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May 2, 1905

THE ENGLISH REPORTS
ROLLS COURT

CONSULTATIVE COMMITTEE

THE RIGHT HONOURABLE THE EARL OF HALSBURY,
LORD HIGH CHANCELLOR OF GREAT BRITAIN

THE RIGHT HONOURABLE LORD ALVERSTONE,
LORD CHIEF JUSTICE OF ENGLAND

THE RIGHT HONOURABLE SIR RICHARD HENN COLLINS,
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BARRISTERS-AT-LAW

THE
ENGLISH REPORTS

VOLUME XLIX

ROLLS COURT

II

CONTAINING
BEAVAN, VOLUMES 3 TO 7

WILLIAM GREEN & SONS, EDINBURGH
STEVENS & SONS, LIMITED, LONDON

AGENTS FOR THE UNITED STATES OF AMERICA
THE BOSTON BOOK COMPANY

AGENTS FOR CANADA
THE CANADA LAW BOOK COMPANY

1905

Printed by WILLIAM GREEN & SONS, Edinburgh

February 1905

**LIST OF LORD CHANCELLORS, MASTERS OF THE ROLLS,
VICE-CHANCELLORS, AND LAW OFFICERS, DURING
THE PERIOD COVERED BY THE PRESENT VOLUME**

LORD CHANCELLORS.

1836. LORD COTTENHAM.
1841. LORD LYNDEHURST.

MASTER OF THE ROLLS.

1836. LORD LANGDALE.

VICE-CHANCELLORS.

1827. SIR LANCELOT SHADWELL.
1841. SIR JAMES KNIGHT BRUCE.
SIR JAMES WIGRAM.

ATTORNEYS-GENERAL.

1835. SIR JOHN CAMPBELL.
1841. SIR THOMAS WILDE.
SIR FREDERICK POLLOCK.
1844. SIR WILLIAM WEBB FOLLETT.
1845. SIR FREDERICK THESIGER.

SOLICITORS-GENERAL.

1835. SIR ROBERT MONSEY ROLFE.
1839. SIR THOMAS WILDE.
1841. SIR WILLIAM WEBB FOLLETT.
1844. SIR FREDERICK THESIGER.
1845. SIR FITZROY KELLY.

**Reports of CASES in CHANCERY ARGUED and
DETERMINED in the ROLLS COURT during
the time of LORD LANGDALE, Master of the
Rolls. 1840, 1841. By CHARLES BEAVAN,
Esqr., M.A., Barrister-at-Law. Vol. III. 1842.**

[1] *CRALLAN v. OULTON. June 25, 26, 29, 1840.*

[S. C. 9 L. J. Ch. 319.]

A testator directed his debts to be paid out of his real and personal estate; and he afterwards provided that if his personal estate should fall short in paying his debts, then he empowered his executors to enter into the receipt of the rents of his freeholds, until the same should be wholly paid off. The personal estate was sufficient for payment of the debts. Held, nevertheless, that a trust had been created for payment of the debts out of the realty, so as to prevent the operation of the Statute of Limitations, and that the real estate remained liable to pay a simple contract debt which had been left unpaid after distribution of the residuary personal estate.

The testator, James Newton, together with the Defendants John Oulton and James Newton Garside, became jointly and severally indebted to the Plaintiff in the sum of £1000 upon a promissory note, payable on demand, and dated the 21st of May 1825. This note was given for the same amount, then due from James Newton to the Plaintiff upon his sole promissory note.

On the 8th of September 1825 James Newton the testator made his will, duly attested as follows:—"I will, order, and direct that all my just debts, funeral expenses, and the charge of the probate and execution of this my last will and testament, be fully paid and discharged by my executors and executrix hereinafter named, out of my real personal estate and effects, [2] as soon as conveniently may be after my decease;" and after making certain devises, he proceeded as follows:—"Provided always nevertheless, and it is my will and mind, that if my said personal estate and effects shall happen to fall short of paying and discharging all my just and lawful debts, funeral, and testamentary expenses; then and in such case, I will, order, and direct, and hereby authorise and empower my said executors and executrix to enter into the receipt of the rents and profits of all my before-mentioned freehold and leasehold messuages, cottages, buildings, lands, tenements, hereditaments, and premises, until thereby and therewith the same shall be wholly paid off and discharged according to the intent and meaning of this my will."

The testator died in January 1826, and his will was proved by James Oulton, Henry Wright, James Garside, and Sally Garside, his executors, and executrix, who paid all his debts, except that claimed by the Plaintiff, and divided the residue of the personal estate, which was stated to amount to £3849, amongst the residuary legatees.

After the testator's death, Oulton paid the interest on the note down to 1835, the particulars of which he entered in his account book, in the manner stated in the judgment of the Master of the Rolls.

R. II.—1

In October 1835 the Plaintiff filed this bill, on behalf of himself and all the other creditors of James Newton, against the executors and the persons interested in the testator's real estate, for payment of the debts out of the real and personal estate. Oulton and Garside had both become bankrupts.

The defences set up were, first, that at the time of giving the joint promissory note in 1825, the Plaintiff, by arrangement, agreed to accept the Defendants Oulton [3] and Garside as his principal debtors; that time had afterwards been given to the principal, and that thereby the estate of the surety had been released.

Secondly, the Statute of Limitations.

And, thirdly, that the personal estate having been found sufficient, the residue had been divided after advertisements for creditors; that, consequently, there was no liability as regarded the real estate, and no trust so as to take the case out of the statute.

Mr. Pemberton and Mr. S. Sharpe, for the Plaintiff, contended, first, that the note being payable on demand, time did not run until payment had been demanded; secondly, that the payment of interest by Oulton took the case out of the Statute of Limitations, he being one of the co-makers of the promissory note and jointly bound thereby, and being also executor of the testator; and thirdly, they argued that the Statute of Limitations did not operate, as the will of the testator contained a trust for payment of his debts.

Sir C. Wetherell, Mr. H. Parker, Mr. Teed, Mr. Moore, Mr. Bird, Mr. Kindersley, Mr. Milne, and Mr. Rogers, for several Defendants, argued, that by the will of the testator his real estate had only been charged in the event "of his personal estate and effects happening to fall short." That this event had not occurred; and that, therefore, the real estate was not liable. That in *Dike v. Ricks* (Cro. Car. 335), where a power of sale was given in case of the insufficiency of the goods, &c., of the testator to satisfy his debts, a plea of purchase from the executrix was held bad, because it did not state the value of the assets and of the testator's debts, so as to shew that the executrix had cause of sale. [4] That the personal estate being once sufficient, the real estate was not rendered liable by any subsequent deficiency; *Culpepper v. Austin* (2 Ch. Ca. 221), *Oldfield v. Oldfield* (1 Vernon, 336). That the Plaintiff having permitted the estate to be distributed without making any claim, and it having been done without precipitation, the executors were not now liable to the Plaintiff; *Higgins v. Crawford* (2 Ves. jun. 572), *The Governor and Company of Chelsea Waterworks v. Cooper* (1 Esp. 275).

They further argued, that the claim against the testator's estate had been barred by the Statute of Limitations, for the joint liability being severed by his death, no subsequent payment of interest by the co-makers of the note could prevent the operation of that statute; *Atkins v. Tredgold* (2 Barn. & C. 23), *Slater v. Lawson* (1 Barn. & Adol. 396; and 9 G. 4, c. 14). That as to the personal estate, no trust for payment of debts could be created, *Jones v. Scott* (1 Russ. & M. 255; reversed, 4 Cl. & Fin. 382); and that as the personal estate had been originally sufficient, no trust had attached on the realty. It was also argued, that the specific devised estates were not liable, *Spong v. Spong* (3 Bli. (N. S.) 84); and that there could be no sale of the real estate, but that payment, if at all, must be made by means of the rents and profits, *Lingard v. The Earl of Derby* (1 B. C. C. 310).

Mr. Pemberton, in reply, admitted that, on a note payable on demand, the Statute of Limitations runs from the date of the note. (See *Norton v. Ellam*, 2 Mee & W. 461).

He cited *Brailhwaite v. Britain* (1 Keen, 206), *Winter v. Innes* (4 Myl. & Cr. 101), *Thorpe v. Jackson* (2 Y. & Col. 553), to shew the continuance of the [5] liability of the estate of the deceased partner, so long as the survivor continued liable; and *Hughes v. Wynne* (Turn. & R. 307), to shew that where real estates are devised in trust for the payments of debts in aid of the personal estate, the Statute of Limitations does not run in equity after the death of the testator. Sir Thomas Plumer there observing, "it is not to be inferred that a man has no debt, because he does not go to law to enforce payment when he has a trustee to pay him."

June 29. THE MASTER OF THE ROLLS [Lord Langdale]. Having read the pleadings and considering the evidence in this case, I am of opinion that at the time of the testator's death, the Defendants, John Oulton and James Newton

Garside, together with the testator, were jointly and severally indebted to the Plaintiff in the sum of £1000, which was due from them upon a promissory note dated the 21st of May 1825, and that the testator having died in the month of January 1826, the interest of the sum of £1000 was from time to time from and after the testator's death paid to the Plaintiff by the Defendant, John Oulton.

It is admitted that previously to the time when the promissory note of 1825 was made, the testator was separately indebted to the Plaintiff in the sum of £1000, the payment of which, with interest, was secured by a former promissory note, which was given for valuable consideration, and which was cancelled on the delivery of the note of May 1825.

It is alleged on the part of the Defendants that at the time when the promissory note of 1825 was given, the Plaintiff agreed to accept the Defendants Oulton and James Newton Garside as his principal debtors, and to [6] consider Newton, the testator, who up to that time had been the sole debtor, as only a surety for Oulton and Garside, and that after the death of Newton, the Plaintiff dealt with Oulton and Garside as the only parties who were indebted to him on the note, and received the interest from Oulton on the behalf of himself and Garside, and that by this course of dealing, the Plaintiff must be considered either to have voluntarily abandoned all claim against the testator's estate, or to be barred by the Statute of Limitations.

It seems that Oulton, making the payment, took credit for the amount in account between himself and the firm of Oulton & Garside, but there is no evidence to shew, as for or against the Plaintiff, whether the money was received by him from Oulton as one of the executors, or as a partner of the firm of Oulton & Garside, or otherwise. The only facts which I conceive to be proved are, that the testator, at the time of his death, was one of the three persons indebted on the note, and that the interest which accrued due on the note was from time to time paid on the note by Oulton, who was one of the parties liable to pay the note, and one of the executors of a deceased party, who was also liable to pay the note.

The answers admit, or do not deny, the payment of the interest by Oulton, but as the answers were not read in evidence, and the proof from the indorsement cannot be brought within six years from the filing of the bill, the only evidence as to the more recent payments is found in Oulton's book, in which an account is kept as between him and the firm of Oulton & Garside. This book, though at first objected to as no evidence, was ultimately relied on by the Defendants, as shewing that the payments were made by Oulton on behalf of the firm of Oulton & Garside, but this variation, supposing it [7] to be made out, does not appear to me to be important; whether the interest was paid by Oulton, one of the executors and one of the parties liable on the note, or by Oulton & Garside, two of the executors and two of the parties liable on the note, does not seem to be material. The fact which, in one view taken of this case, is considered to be important is, that there is nothing to shew that the Plaintiff received the interest from either Oulton or Oulton & Garside, in any way either to prejudice or keep alive his claim against the testator's estate; and laying aside the book of account, the question raised is, whether, under these circumstances, there being no proof that the Plaintiff received the interest from Oulton or from Oulton & Garside, in his or their characters as representing Newton, the Statute of Limitations operates to bar the claim against the estate of Newton.

In the cases of *Atkins v. Tredgold* (2 B. & Cr. 23), and *Slater v. Lawson* (1 B. & Adol. 396), it was determined that at law, when the joint contract was severed by the death of one party, nothing can be done by the personal representative of the deceased party to take the debt out of the statute as against the survivor. How far the principle on which those cases were decided can be applied to the right which a creditor has in equity against the estate of a deceased party, and how far the equitable right which a creditor of joint and several debtors, may have to avail himself of the equities subsisting between the debtors, may be affected by agreements amongst the debtors themselves, may on a proper occasion have to be considered; but on the present occasion, the question does not arise if there be a trust for the payment of the testator's debts; and on considering the will of Newton, I [8] am of opinion that his debts are charged on the real estates, and consequently that there is a trust for the

payment of his debts. It was argued that because the testator, after making the charge or creating the trust, has in a subsequent part of his will directed that if the personal estate should fall short of paying his debts, the executors should enter into the receipt of the rents of his real estate, and therewith pay the debts, he has shewn an intention to charge the real estate only in the event of the personal estate proving deficient; but the first general charge does not appear to me to be varied by the subsequent direction to apply the personal and real estate for the same purpose in a particular order; and I do not think that, according to this will, there is no trust, because the personal estate was sufficient; a trust was created, it became the duty of the trustees to pay the debts, and if it were correct to say, as was said in *Hughes v. Wynne*, "it is not to be inferred that a man has no debt because he does not go to law to enforce payment when he has trustees to pay him;" it may be said with more force in this case, that there can be no such inference when a creditor receives payment of interest from the same person who is trustee, because that person is himself a debtor, and the creditor does not insist upon his calling himself a trustee at the times when the interest is paid.

The debt being proved, and there being a trust for payment of it, and no proof whatever that the Plaintiff ever accepted Oulton and Garside, as his sole debtors, or waived his claim against the testator's estate, I am of opinion that the Plaintiff is entitled to be paid out of the testator's estate.

[9] SUTTON v. DOGGETT. July 21, 1840.

[S. C. 9 L. J. Ch. 335; 4 Jur. 959. Referred to *In re M'Rae*, 1886, 32 Ch. D. 614. Principle applied to debenture-holder's action, *In re New Zealand Midland Railway Company* [1901], 2 Ch. 357.]

In a creditor's suit, the assets being sufficient to pay the debts, but insufficient to pay the debts and the costs of suit taxed as between party and party: the Court ordered the Plaintiff's extra costs as between solicitor and client to be paid out of the fund.

This was a creditor's suit instituted by a party on behalf of himself and all the other creditors of the testator.

Upon a former hearing of the cause, the costs of all parties were ordered to be taxed in the ordinary way as between party and party, and the assets, when realised, were ordered to be applied in payment of the debts reported due, and the costs of suit.

The cause coming on for further directions, it was stated that the estate, though sufficient to pay the debts, was insufficient to pay the debts and the former and subsequent costs of suit taxed as between party and party.

Mr. Blunt now asked that the subsequent costs might be taxed as between party and party, and if it should be found that the fund would be insufficient for the payment of the debts, and such costs, then that the Plaintiff might have his extra costs as between solicitor and client paid out of the assets.

Mr. Girdlestone, *contra*.

THE MASTER OF THE ROLLS [Lord Langdale] thought the order asked reasonable, as it would be merely paying the extra costs out of the creditors' own fund.

Tootal v. Spicer (4 Sim. 510), *Rowlands v. Tucker* (1 Russ. & M. 635), *Hood v. Wilson* (2 Russ. & M. 687), *Barker v. Wardle* (2 My. & K. 818), *Brodie v. Bolton* (3 My. & K. 168), *Stanton v. Hatfield* (1 Keen, 358).

[10] SMITH v. PALMER. July 18, 1840.

Guardian *ad litem* to an infant Defendant resident out of the jurisdiction, appointed on motion upon proof of respectability, and that she had no interest adverse to that of the infant.

Mr. Pemberton moved that M. P. might be appointed guardian *ad litem* to some infants resident in Scotland; the application was made by motion in order to save the

expence of a commission. He stated that such orders had been made by the Vice-Chancellor in unreported cases of *Cropper v. Crosby*, and *Dawson v. Barnes*.

There was an affidavit that M. P. was a fit and proper person.

THE MASTER OF THE ROLLS [Lord Langdale] said he would make the order upon being satisfied by affidavit of the respectability of the proposed guardian, and that she had no interest adverse to that of the infant Defendants.

[10] SMITH v. BIRCH. March 31, April 3, July 3, 1840.

[S. C. 9 L. J. Ch. 349; 4 Jur. 670. See *Tomlin v. Tomlin*, 1841, 1 Hare, 248.]

A bill was filed by a creditor, claiming in respect of an admitted breach of trust, against B. and the representatives of S., deceased; and it prayed that the accounts might be taken, and the real estate of S. sold and applied in paying the amount due to the Plaintiff, and the other debts. A sum of money was paid into Court in this suit, and a decree was made against the assets of S. only, and accounts and enquiries were directed. A creditor's suit was subsequently instituted against the representatives of S., and the common decree made. The Plaintiffs in the first suit claimed the fund in Court, in priority of the creditors in the second. Held, however, that after payment of the costs of the first suit, it ought to be applied in a due course of administration towards payment of all the creditors of S.

In this cause the question was, whether the Plaintiffs in this case of *Smith v. Birch* were entitled to have the fund in Court applied in satisfaction of their demand, [11] in exclusion of the other creditors of the testator claiming in another and subsequent suit of *Keene v. Birch*, under the following circumstances.

John Pegg, by his will, dated the 10th of July 1804, gave the interest of one-fifth part of his residuary personal estate to the Plaintiff Elizabeth Smith for her life, and after her decease gave the same fifth part of his estate to her three children, Saville Smith, Honora Smith, and Charlotte White, in equal shares.

Edmund John Birch and Edward Smith, two of the executors named in the will, possessed themselves of the personal estate, and having neglected fully to account for the same, a bill to compel them to account was filed in the year 1826, and sometime afterwards Edmund John Birch and Edward Smith having admitted assets, it was agreed between the Plaintiff Elizabeth Smith and her children, and the executors, that the sum of £4600 should be fixed as the full amount of the share of the testator's estate to which the Plaintiff Elizabeth Smith and her children were entitled, and that the said Edmund John Birch and Edward Smith should account for the same, and should pay £1533, 6s. 8d., being one-third part thereof, to Mary White, the legal personal representative of Charlotte White (Elizabeth Smith having relinquished her life interest), and should appropriate, set apart, and pay £3066, 13s. 4d., the remaining two-third parts of the said sum of £4600, and invest the same on mortgage or other security for the benefit of Elizabeth Smith for her life, and of her son, and daughter Honora, or those claiming under them after her death, and that the bill then pending should be dismissed.

The £1533, 6s. 8d. was paid to Mary White, and the bill was dismissed; the £3066, 13s. 4d., however, was [12] not invested, but remained due from Edmund John Birch and Edward Smith; and on the 5th of November 1829 Edmund John Birch died, having first made a will, whereby he gave the residue of his real and personal estate to William Moore and Edmund John Birch the son, on trust to sell the same and to pay his debts, and subject thereto on trust for his children. The will was proved by Edmund John Birch the son alone, and the bill of *Smith v. Birch*, was filed, in 1830, for the purpose of compelling payment of the sum of £3066, 13s. 4d. by the legal personal representative of Edmund John Birch, the father, and by Edward Smith; and the bill prayed that an account might, if necessary, be taken of the assets, of Edmund John Birch the father, possessed by Edmund John Birch the son, and, if necessary, that the real estates of Edmund John Birch the father, and the proceeds and rents and profits thereof, might be duly applied in payment of the amount due to the Plaintiffs, and his other debts.

The Defendant Edmund John Birch the son, stated by his answer that a sum of £5000 was due on bond from the estate of Edmund John Birch the father, and in the progress of the cause, before it was brought on to be heard, two sums, one of £650 and the other of £1500, being parts of the personal estate of Edmund John Birch the father, were brought into Court under orders for that purpose made on the 20th of July 1831, and the 7th of July 1832.

By the decree, which was made on the 10th of November 1832, after directing an inquiry whether the *cestui que trust* assented to or acquiesced in the trust funds remaining in the hands of Edmund John Birch the son, it was declared that the estate of the said Edmund John Birch the father was liable to make good the sum [13] of £3066, 13s. 4d., together with the interest due in respect thereof, and it was referred to the Master to compute the interest: and if the Defendant Edmund John Birch should not admit assets sufficient to answer the £3066, 13s. 4d. and interest, it was ordered that an account should be taken of the personal estate of the father come to the hands of the son; and in case the personal estate should not be sufficient, it was ordered that the real estate should be sold, and that the money arising from the sale should be paid into the bank, and all further directions were reserved.

Whilst the proceedings under this decree were pending in the Master's office, the bill in a cause entitled *Keene v. Birch* was filed (in March 1833) by simple contract creditors of Edmund John Birch the father, for the recovery of what was due to them out of his assets, and on the 14th of June 1833 the usual decree for an account and due application of the assets in a creditors' suit was pronounced, and under that decree various proceedings took place, and a debt was proved by a bond creditor.

Edmund John Birch the son having died, a bill of revivor and supplement was filed, and on the 14th of June 1836 a decree was made in the supplemental suit; the accounts were directed to be carried on against the legal personal representatives of Edmund John Birch the son, and the Master was to be at liberty to adopt any of the proceedings in the cause of *Keene v. Birch*, and an account was also to be taken of the estate of Edmund John Birch the son, possessed by his representative.

The Master's report was dated the 8th of January 1839, and thereby it appeared that the balance due [14] from the estate of Edmund John Birch, on account of his father's personal estate, was £183, 12s. 9½d. but that a claim (not allowed), was made for £203, 9s. 6d. for sums paid in satisfaction of simple contract debts; that a balance of £205 was due from the estate of Edmund John Birch the son, in respect of his receipts and payments on account of the real estate of his father; that a balance of £1493, 4s. was due from the legal personal representative of Edmund John Birch the son, on account of his personal estate; and a balance of £34, 19s. 9d. from Thomas Birch on account of the real estate of Edmund John Birch the son; and the Master stated that, in pursuance of the decrees in this cause and in *Keene v. Birch*, the real estates of Edmund John Birch the father had been sold for the several sums stated in his report.

In this state of things, it was claimed by the Plaintiffs in this cause that the two sums of £650 and £1500, which had been paid into Court, in this cause, ought to be applied exclusively towards satisfaction of their demand; whilst the Plaintiffs in *Keene v. Birch*, who attended by their counsel in the cause of *Smith v. Birch*, and argued the point, contended that these sums were general assets to be applied towards satisfaction of all the debts of Edmund John Birch the father, in a due course of administration.

Mr. Bethell and Mr. Goodeve, for the Plaintiffs in *Smith v. Birch*, contended that the sums of £650 and £1500, being personal estate and legal assets, and having been taken out of the hands of the executor and brought into Court at the instance of creditors claiming payment, and who ultimately established their right, were subject only to claims of a superior degree; and further, that as the decree in this cause had declared the [15] liability of the estate of Edmund John Birch the father to pay a fixed sum, it ought to be considered as a final decree, giving to the Plaintiffs in this cause a priority over the Plaintiffs in the creditors' suit, who took only under a decree for accounts.

Mr. Pemberton and Mr. L. Wigram, in the same interest.

Mr. James Russell, for the Plaintiff in *Keene v. Birch*.

Mr. Kindersley and Mr. Prior, for the executor.

Mr. Bethell, in reply.

The following authorities were cited or referred to :—*Seton's Decrees*, 52 ; *Johnson v. Compton* (4 Sim. 47), *Bedford v. Leigh* (2 Dick. 707), *Attorney-General v. Cornthwaite* (2 Cox, 44), *Hamilton v. Houghton* (2 Bli. 169), *Morrice v. Bank of England* (3 Swan. 573 ; *Forest*, 217 ; 3 P. W. 402, n. ; 4 B. P. C. 287), *Perry v. Phelps* (10 Ves. 34), *Abbis v. Winter* (3 Swan. 578), *Drewry v. Thacker* (3 Swan. 529), *Wilson v. Fielding* (10 Mod. 426), *Earl Kildare v. Kent* (2 Free. 253), *Sawyer v. Mercer* (1 T. R. 690), *Jones v. Bradshaw* (2 Freem. 153), *Lee v. Park* (1 Keen, 714), *Largan v. Bowen* (1 Sch. & L. 296), *Clarke v. Lord Ormonde* (Jacob. 124), *Rodenhurst v. Tudman* (Turner, 305), *Freeman v. Fairlie* (3 Mer. 29), and on costs *Costerton v. Costerton* (2 Keen, 774).

[16] July 3. THE MASTER OF THE ROLLS [Lord Langdale]. From the course of proceeding and from the bill and decree it appears that the object of the Plaintiffs in this cause was to establish their demand against, and obtain, payment from Edward Smith and the assets of Edmund John Birch the father.

At the time of the hearing, the demand against Edward Smith was not established ; but the Plaintiffs succeeded in obtaining a declaration that the estate of Edmund John Birch the father was liable to the payment of the sum of £3066, 13s. 4d., which he had agreed to pay, and they had agreed to accept, as their share of the estate of Pegg. The sum had been agreed upon, and the computation of interest was all that was wanted to ascertain the exact amount for which the estate of Birch was liable, and this was directed by the decree ; but the decree was so far from being final, that inquiries were thereby directed for the purpose of enabling the Court to determine whether Edward Smith was not liable with the estate of Edmund John Birch the father, to pay the claim ; and in the event of the Defendant not admitting assets, an account was directed of the personal estate ; and if that should prove deficient, an account and sale of the real estate was directed.

No doubt the accounts and sale were obtained by the Plaintiffs, and were directed for the purpose of ascertaining and realising assets wherewith to pay the Plaintiffs' demand ; and they contend that the object was to obtain payment of their demand in preference to all others ; but on this subject the decree is silent—nothing is said of the application of the assets, except that the money arising from the sale of the real estate is to be brought into Court, and to be subject to the fur-[17]-ther order of the Court. I am of opinion that this decree is not to be considered as a final decree, giving to the Plaintiffs in this cause an exclusive right to any part of the assets. The Court must, no doubt, have contemplated an application of the assets in a due and legal course of administration, and no directions being contained in the decree, it is necessary to recur to the nature of the suit, and the rights of the parties independently of the decree ; and it appears that the prayer of the bill does not seek for any priority over other claimants in the distribution of assets ; it asks for payment of the demand, and, if necessary, for an account of the personal estate ; and, if necessary, that the real estates, and the proceeds and rents and profits thereof, might be duly applied in payment of the amount due to the Plaintiffs, and the other debts of the testator ; so that the form of the suit is such, that the Court is asked to apply the assets in payment of what is due to others as well as to the Plaintiffs ; and then comes the question, whether the Plaintiffs, having in this suit and with notice of a bond debt obtained payment into Court of parts of the personal estate, are entitled to have those parts applied exclusively for their benefit ; and as to this, there may be cases in which the Plaintiff suing for himself alone, and getting into Court sums of money upon which no other person can have any claim, may be entitled to consider what is so brought as applicable exclusively to the satisfaction of his claim ; but I think that payment into Court of assets, which, in the result of the proceedings, may be applicable to the payment of the Plaintiff and other persons, cannot be considered as an appropriation, or as giving an exclusive right to the Plaintiff in priority to claims of higher or even of equal rank ; I am, therefore, of opinion that in this case the Plaintiffs are not entitled to have the sum in Court applied exclusively to their own benefit.

[18] I think, however, that the costs of this cause may properly be paid out of the fund brought into Court ; and it appears to me that the remainder of the fund ought to be subject to the decree which may be made in *Keene v. Birch*, in which suit

the Plaintiffs in this cause ought to apply for such benefit as they may be entitled to in competition with other creditors.

Order the taxation and payment of the costs, and declare that the residue of the fund is to be considered as assets to be applied, in a due course of administration, for payment of the debts of Edmund John Birch.

[18] WORMALD v. DE LISLE. July 20, 1840.

General demurrer allowed to a bill on the ground of the vagueness and uncertainty of its statements.

This bill, which was filed by the assignees of a bankrupt, alleged that, previous to the bankruptcy, "*certain dealings* and transactions took place between the bankrupt and Defendant," and that, by virtue of "*certain agreements*" for leases, the bankrupt was possessed of leasehold houses which the bill specified; that in the course of such transactions, the Defendant from time to time made "*certain loans*" to the bankrupt; and the bankrupt, "as it was alleged by the Defendant," made "*some lease*" or assignment of the property to the Defendant of the leasehold premises, but that the Plaintiffs were unable to discover, save as thereafter mentioned, on what terms, and that the Defendant had entered into the receipt of the rents; that the Plaintiffs were unable to discover with sufficient certainty the amount of the loans made, but the Defendant pretended he had bought the premises under an agreement, to grant the [19] bankrupt an under-lease at such a rent as should pay the Defendant 8 per cent. on the amount paid by him, but at other times the Defendant disputed the agreement; that the amount received by the Defendant for rent greatly exceeded 8 per cent.; the bill prayed a discovery, and that the rights of the Plaintiffs might be ascertained and declared:—for an account of the dealings and transactions between the Plaintiffs and the Defendant: for a declaration that any assignment of the premises might stand as a security for legal advances, and that the Plaintiffs might be let in to redeem, with an alternative prayer, that if it should appear that the premises were demised to the Defendant on the terms of his granting an under-lease, then that it might be decreed.

To this bill the Defendant filed a general demurrer for want of equity, on the ground that the Plaintiffs had not by the bill stated any *certain case* upon which a Court of Equity would grant any relief.

Mr. Hallett, in the absence of Mr. Pemberton, in support of the demurrer.

Mr. Kindersley and Mr. Rogers, *contra*.

THE MASTER OF THE ROLLS [Lord Langdale] intimated, that he did not see how a bill, the statements of which were so vague and uncertain, could be supported. The demurrer was allowed.

See 1 Beavan, 296, note; *Edwards v. Edwards*, Jac. 335; and *Flint v. Field*, 2 Anst. 543.

[20] PAGE v. WAY. July 3, 1840.

[S. C. 4 Jur. 600.]

Settlement of husband's estate on his marriage, interest to pay the rents, &c., "unto or for the maintenance and support of the husband, wife, and children, or otherwise, if the trustees should think proper to permit the same to be received by the husband during his life, without power to charge, &c.," on the bankruptcy of the husband. Held, that a trust had been created for the maintenance and support of the wife and children out of the property during the husband's life.

By the settlement made on the marriage of Mr. Jones with his wife, a part of his freehold and personal property was conveyed to trustees upon trust to receive the rents and profits, "and pay and apply the same when received, unto or for the maintenance and support of the said F. Jones, his wife and children (if any); or otherwise,

if they should so think proper, permit the same rents, &c., to be received by the said F. Jones during the term of his natural life; but so nevertheless, that he should not have any power to assign, mortgage, or charge the same, or to anticipate the growing payments thereof;" and after his decease to apply the rents, &c., towards the maintenance of the wife and children (if any), or, if the trustees thought proper, to pay them to the wife for life without power of anticipation, with remainder to the children, and in default to the husband absolutely.

Mr. Jones became a bankrupt in 1837, and his assignees by this suit claimed the whole income of the trust property. There was no issue of the marriage.

Mr. G. Richards and Mr. Moultrie, for the Plaintiffs, contended that, in effect, a life interest had been given to the husband, which passed to his assignees.

Robinson v. Tickell (8 Ves. 142), *Hammond v. Neame* (1 Swan. 35), *Berkeley v. Swinburn* (6 Sim. 613), *Robinson v. Waddelov* (8 Sim. 184), and see *Rippon v. Norton* (2 Beavan, 63).

[21] Mr. Kindersley and Mr. Keene, for the wife; and Mr. Piggott, for the trustees, were not heard by

THE MASTER OF THE ROLLS [Lord Langdale], who said: there can be no doubt of the intention of this settlement, that the wife should be supported out of the property. The words themselves admit of no reasonable doubt, for the trustees are to receive and apply the income "unto and for the maintenance and support of Jones, his wife and children (if any), or otherwise, if they think proper, permit the same rents, &c., to be received by Jones during the term of his natural life."

I am of opinion, that so long as the wife and children were maintained by Jones, the trustees had a discretion to give him the whole income, but that it was their duty to see that the wife and children were maintained. The assignees take everything subject to what is proper to be allowed for the maintenance of the wife and children, and it must be referred to the Master to settle a proper allowance.

[22] MELLISH v. BROOKS. Feb. 17, 20, July 8, 1840.

[S. C. 9 L. J. Ch. 362; 4 Jur. 739.]

Turnpike tolls are not within the Statute of Limitations of the 3 & 4 W. 4, c. 27, and consequently more than six years' arrears of interest may be recovered on a mortgage of turnpike tolls, notwithstanding the forty-second section of that Act.

The trustees of a turnpike road borrowed a sum of money from A. B. on the security of the tolls, and they assigned to him such proportion of the tolls as the sum advanced bore to the whole principal money advanced on the credit of the tolls. Held, that the other mortgagees of the tolls were necessary parties to a suit, by A. B. against the trustees, to obtain payment of arrears of interest out of the tolls to be received.

By the Great Grimsby Road Act, passed in fifth year of King George the Third, the trustees were empowered to borrow money at legal interest on the credit of the tolls, and to mortgage or assign over the tolls as security for the sums so borrowed and the interest thereof. On the 28th of June 1782, Joseph Mellish having lent to the trustees £600, they by deed transferred and assigned to him such share and proportion of all and every the tolls granted by the Act, as the sum of £600 did and should bear to the whole principal money advanced, and then remaining due on the credit of the tolls by virtue of the Act, to hold to Mellish for the remainder of the twenty-one years granted by the Act, and all such other time as the tolls could be collected, with a proviso for making the appointment void on payment of the £600 and interest.

The provisions of the Act were continued or enlarged by subsequent Acts, and by an Act passed in the ninth year of King George the Fourth (c. 68), the new term and the tolls thereby granted were made liable to the payment of all monies theretofore borrowed, and then due and owing on the credit, or on account of the former Acts, and all interest due and to grow due thereon.

For many years after the date of the security, sums of money, occasionally less

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than the amount of the legal interest, were paid to Joseph Mellish in his lifetime, and after his death to his representatives, the last of which payments took place in October 1801. The [23] trustees, however, had subsequent, and down to the year 1834, continued to make general orders on the treasurer for payment of the interest due to the several mortgagees of the tolls in the list, of whom the Plaintiff who represented the original mortgagee Mr. Mellish, was included; the portion belonging to the Plaintiff had never been received by him, but had remained in the hands of the treasurer and had been misapplied by him.

In April 1832, the clerk to the commissioners wrote to the Plaintiff stating, that much uncertainty having crept into their affairs, as to the persons legally entitled to the mortgage securities, and the Plaintiff appearing in the books to be a claimant, he was directed to request him to produce the securities, as the trustees hoped to make a further reduction of the principal monies.

This letter gave rise to a discussion between the Plaintiff and the commissioners, as to the amount legally due to the Plaintiff, the former contending that he was entitled to the whole arrears of interest, and the latter insisting that the Plaintiff was entitled to the principal and to interest from 1834 only, which amounted to £210. This latter sum they tendered previous to the institution of the suit.

The Plaintiff filed this bill in 1836, against the trustee of the Act alone for payment of the whole arrears of interest out of the monies received, or to be received under the Acts of Parliament, and for a receiver.

The Defendant did not object to pay the £210 already tendered for interest, which they alleged would place the Plaintiff in the same situation, and on the same terms and footing as the other mortgagees of the tolls, but insisted that the other monies, having been [24] left in the hands of the treasurer, and appropriated to the payment of the Plaintiff, the Defendants were not now bound again to pay the same; they objected that the Plaintiff, by his *laches*, had deprived himself of his remedy, and insisted on the benefit of the Statute of Limitations. The first objection was, however, abandoned at the hearing.

Mr. Pemberton and Mr. Loftus Lowndes, for the Plaintiff, contended that the Statute of Limitations, 3 & 4 W. 4, c. 27, did not apply to turnpike tolls; that although the forty-second section enacted that no arrears of interest in respect of any sum charged upon any *land* or *rent* should be recovered by suit, but within six years after the same should become due, yet by the first section of the Act, the meaning of the word *land* was limited "to all manors, messuages, and all other corporeal hereditaments whatsoever, and also to tithes (other than tithes belonging to a spiritual or eleemosynary corporation sole), and also to any share, estate, or interest in them;" that consequently tolls which were incorporeal hereditaments were not included in the Act, and that the security being by deed was not barred by this or any other statute. The only other way of barring the demand would be by presumption, but here the amount was admitted to be due; they cited *Doe v. Booth* (2 Bos. & P. 219), *Fairtitle v. Gilbert* (2 Term Rep. 169), *Dumville v. Ashbrooke* (3 Russ. 98, n.), *Knapp v. Williams* (4 Ves. 430, n.).

Mr. C. P. Cooper and Mr. Dixon, *contra*, contended that the Plaintiff ought to have proceeded at law under the General Turnpike Act, 3 G. 4, c. 126, ss. 47, 48, 49. That the recent Statute of Limitations included interest due on land; that turnpike roads were in-[25]cluded in that term, and turnpike tolls had always been held to be an interest in land under the Mortmain Act. That the claim, therefore, was barred, or at least payment ought to be now presumed. *Bridges v. Mitchell* (Bunb. 217), *Foster v. Hodgson* (19 Ves. 180), *Christophers v. Sparks* (2 Jac. & W. 223).

That as the Plaintiff was only to take the tolls *pari passu* with the other mortgagees of the tolls, they were necessary parties, and not being before the Court, the suit was defective and could not proceed.

Mr. L. Lowndes, in reply.

July 8. THE MASTER OF THE ROLLS [Lord Langdale]. This bill is filed by the legal personal representatives of Joseph Mellish deceased, to recover what is alleged to be due for principal and interest on a turnpike road security for the sum of £600 which was lent in the year 1782. The trustees of the road, admitting the principal and some interest to be due, in the month of November 1834, paid off the sum of £150 part of the principal, and tendered payment of £210 in satisfaction of the arrears

of interest then due; the Plaintiff, alleging that more than that sum was due for interest, refused to accept it in satisfaction, and in February 1836 filed the present bill.

The Defendant does not by his answer deny the Plaintiff's right to receive the remainder of his principal money, and he again offers to pay the sum of £210 before tendered, for interest, but he insists that the Plaintiff is entitled to no more, on the ground as stated in the answer, that on payment of that sum the Plaintiff would be placed on the same terms and footing [26] as the other persons who have advanced money on the security of the same tolls; and he also insists on the benefit of the Statute of Limitations, and that thereby, and by his own *laches*, the Plaintiff is barred from prosecuting any claim for a greater amount of interest than has been tendered to him.

These being the defences in the answer, the Defendant has by his counsel at the Bar insisted, that having regard to the nature of the security, the Plaintiff is not entitled to any relief in equity, or at least to any such relief as is sought by this bill, in the absence of all other parties having claims upon the tolls.

It would seem, that for many years after the date of the security, sums of money, occasionally less than the amount of legal interest, were paid to Joseph Mellish in his lifetime, and after his death to his representatives, but for a considerable time before the month of April 1832 no payment had been made; and there being, as was alleged, much uncertainty in the affairs of the trust, the trustees called on the Plaintiff to produce the securities he held. This communication gave occasion to the discussion which ultimately led to this suit, the Plaintiff insisting that he is entitled to all the arrears of interest which have accrued due and remain unpaid for any time, however remote, and the trustees insisting that the Plaintiff was not entitled to ask for more than the other mortgagees had received, or for a greater arrear than was tendered to him.

In the correspondence between the parties, it seems, to have been considered by the trustees, that their orders upon their treasurer to pay what was due to the mortgagees ought to be deemed an appropriation binding upon the mortgagees, but in the argument it was properly admitted that this could not be sustained, and [27] that in fact the interest had not been fully paid, and the defence was rested upon the form of the suit and upon the Statute of Limitations (3 & 4 W. 4, c. 27).

As to the form of the suit, it is to be observed, that the tolls which are collected under the Acts, are the security to which the Plaintiff and all other persons who have lent money on the credit of the Acts are entitled; that the Plaintiff is one of several, and is entitled to the benefit of only a share of the tolls, namely, a share bearing such proportion to the whole as the amount due to him bears to the aggregate amount of all the other sums borrowed on the credit of the tolls, and the question is, whether the Plaintiff, in the absence of the other mortgagees, can sue alone for his share. He asks to be paid what is due to him out of the monies received or to be received under the Acts of Parliament, and that a receiver of the same may be appointed; but the other mortgagees are interested in those monies, and the Plaintiff cannot be paid in full without diminishing the fund out of which they are entitled to be paid, and under these circumstances, I am of opinion, that in this form of suit the Plaintiff is not entitled to the general relief which he prays, or to more than the Defendants have by their answer offered to give him; the objection, however, is such that it might have been taken by demurrer, and it does in fact amount to little more than an objection for want of parties; and under the circumstances I have thought it right to consider whether the Plaintiff's claim to more than six years' arrear of interest is barred by the Statute of Limitations.

The Plaintiff holds as a security for the sum due to him a share of the tolls of a turnpike road, and the [28] question is, whether such tolls can come within the meaning of the word *land* as defined by the Act of 3 & 4 W. 4, c. 27; if they do, then the security of the Plaintiff, and the money due thereon, are within the provisions of the fortieth and forty-second clauses of the Act, and the Plaintiff is only entitled to recover arrears of interest for six years; but if such tolls do not fall within the meaning of the word *land* as defined in the statute, the Plaintiff may recover what is due, notwithstanding the length of time which has elapsed.

Now by the first section of the Act, it is directed that the word *land* shall extend

to manors, messuages, and all other corporeal hereditaments whatsoever, and also to tithes (other than tithes belonging to a spiritual or eleemosynary corporation sole); and also to any share, estate, or interest in them or any of them; and it does not appear to me that the word *land*, either in its usual and proper meaning independently of the Act, or according to the extended meaning directed by the Act, can be held to mean the tolls payable for the use made of a turnpike road; and I therefore conceive that the Plaintiff's demand is not barred by the statute.

The case, therefore, appears to me to be 'in this situation, that the Plaintiff has asked and may be entitled to more than can be given to him in the present state of the record; but the Defendant in his answer states that the Plaintiff has been tendered the whole amount of interest now due to him as mortgagee; and that the Defendant is willing, and offers to pay him the sum so tendered. The sum thus referred to is £210, being much less than the Plaintiff claims.

Under these circumstances and upon this admission, I think that the Plaintiff is entitled to a decree for pay-[29]-ment of the £210, as for the arrears of interest due on the 24th of November 1834, but on the present state of the record nothing more can be done.

The Plaintiff may take a decree for £210 without costs, or have his bill dismissed with costs, without prejudice to his filing a new bill. (NOTE.—The Plaintiff elected to take the limited decree.)

[29] THE ATTORNEY-GENERAL v. THE COOPERS' COMPANY. May 7, June 18, 1840.

[S. C. 4 Jur. 572. See *Commissioners of Donations v. De Clifford*, 1841, 1 Dr. & War. 255; *Attorney-General v. Merchants Venturers' Society*, 1842, 5 Beav. 356; *Mayor of Beverley v. Attorney-General*, 1857, 6 H. L. C. 324; 10 E. R. 1321; *Attorney-General v. Wax Chandlers' Company*, 1870-73, L. R. 5 Ch. 511; L. R. 6 H. L. 12.]

Where a testator clearly declares an intention of devoting the whole income of a property to charitable purposes, then, although he does not, in specifically directing the application of portions of it, exhaust the whole income, still the general intention that the whole shall be applied to charitable purposes will prevail; and on the other hand, although he does not make any such general declaration of devoting the whole to charity, but gives each and every portion of the whole income at the time to some charitable purpose, and by that means exhausts the whole, then if the income should afterwards increase, the increase will also be applicable to the charitable purposes.

A testator devised a house to the Coopers' Company, upon condition, and to the use, intent, and purposes of maintaining, augmenting, and supporting a school at R., lately erected, and the same rent which he represented to be £11, should be bestowed in manner following. He then gave different sums to different objects, amounting in the whole to £8, and amongst them 5s. to the Coopers' Company, and then gave £3, which he represented as that which remained ungiven, to the Coopers' Company, to put in their common box, towards the repair of the house when need be; and if the house should fall into decay by sudden misfortune, whereby no rent should be made, then the legacies to stay until it should be made tenantable, which he trusted the company would do within two years, and when tenantable, the company to go on with his will, "to avoid the penalty and danger which followeth." He then gave the house over beneficially to the Grocers' Company if the Coopers' did not bestow the £8 as he willed them to do. The rents increased to £75.

Held, that all the objects of the testator's bounty were entitled to participate in the increased rents, and that the Coopers' Company took the three-elevenths beneficially, subject to the repairs.

This was an information filed by the Attorney-General upon the certificate of the Charity Commissioners, and it prayed a declaration that the property [30] mentioned in the information was held by the Coopers' Company for charitable purposes only, and not for their own use and benefit, and that the whole of the rents ought to be applied to the several charitable purposes in the will of the testator directed, and to

the repair of the said premises, and for an account of the rents and a scheme for the future regulation of the charity.

The testator Henry Coker by his will, dated in 1573, gave the whole rents of his house called the Ship to his wife for life, and proceeded in these terms; and "after her decease, then I will the said houses unto the master wardens of the Company of the Coopers, and they to put it to the same use as hereafter followeth; that is, I will the said houses called the Ship, wherein now dwelleth Robert Wythens and Godfrey Wilson unto the master wardens of the Company of Coopers, after the decease of my wife, upon this condition, and to this use, intent, and purpose, that is to the maintenance, augmentation, and upholding of the schoolhouse of Ratcliff, late erected by Nicholas Gibson, grocer, and the same rent of the aforesaid houses called the Ship, which is now rented at £11 by the year, the which money and rent my mind and will is, now as then and then as now, shall be bestowed in manner and form following;" he then proceeded to give £8 out of the £11 in small sums and in different ways, and amongst them 5s. yearly out of the rents to the master wardens of the Coopers' Company, to be equally divided among them; he afterwards recapitulated the preceding gifts in the following terms: "The sum of all the money which I do will yearly to be given by the master wardens of the Company of Coopers out of the rent that cometh out of the houses called the Ship aforesaid, that is to the schoolmaster of Ratcliff £3, 6s. 8d. To the usher £1, 13s. 4d., to the master wardens of the Company of Grocers 40s., for a sermon 6s., [31] to the parson at St. Michael's 12d., to the churchwardens 2s., to the clerk and beadle of the Grocers 2s., to the clerk and beadle of the Coopers 2s.; to a carpenter appointed by the master wardens of the Grocers 2s., and to the master wardens of the Coopers 5s. The sum of all is £8, so that there remain ungiven of the whole rent of the same houses £3. The which £3 I give unto the master wardens of the Company of Coopers to put into their common box of the said company towards the reparations of the aforesaid houses when need shall be, and further my very mind and will is, as now as then and then as now, that if the said houses given to the master wardens of the Company of Coopers shall so far fall into decay by sudden misfortune (as God defend), whereby no rent may be made of them to perform my legacies by them to be done, then my very will and mind is, now as then and then as now, that the legacies when such chance shall fall (as God defend), shall stay until such time as they may be made tenantable, which I trust they will do with speed at the furthest within two years and no further prolonged, then the said housing being made tenantable, my very will and mind is, that the master wardens of the Company of Coopers shall go forward with this my will as I first made and set order in the same as my sure trust is in them, as they will avoid the *danger and penalty* that followeth; that is my mind and will is, as now as then and then as now, that if the master wardens of the Company of Coopers do not bestow the £8 in manner and form, in part or in all, as I willed them to do in this my will, and suffereth and neglecteth my *legacies* to be done in part, or in all by the space of one whole year after the first view and warning given unto them to be done, and leaveth it undone and no reasonable cause to the contrary, that then my very will and mind is, as now as [32] then and then as now, that the master wardens of the Company of Grocers shall enter upon said houses and ground called the Ship; and they to repulse and put out forth the master wardens of the Company of Coopers for ever; and the master wardens of the Company of Grocers to enjoy them, and have them for ever, and do with it as shall seem good to them, and to do and use them as they do with any lands belonging unto them."

The rents of the property had increased and now amounted to £75 a year, and the questions were first, whether after paying the specific sums given to the other charitable objects to the extent of £8 a year, the company were or not entitled to the surplus beneficially; and secondly, whether after providing for the repairs, the company were entitled beneficially to the surplus or took it subject to the charitable trusts.

Mr. Pemberton and Mr. Blunt, in support of the information, contended that the intention of the testator was to devote the whole income to charity, and consequently that the whole increased rents were applicable to that purpose; that the Coopers' Company took nothing beneficially; and that, at all events, each charity was entitled to a proportionate increase of the sums named in the will; *The Attorney-General v. The Mercers' Company* (2 Bli. N. S. 178).

Mr. C. P. Cooper, Mr. Hubback, and Mr. Norie, *contra*, contended that the several payments comprising the £8 annually were fixed payments, which were not to receive any increase on an improvement taking place in the rental; and that the company, upon keeping the [33] property in repair, were entitled beneficially to the whole surplus. That the use of the word *legacies*, the direction to put into the common box, and the clause of forfeiture all shewed that the company took beneficially; in *The Attorney-General v. The Cordwainers' Company* (3 Myl. & K. 534) a similar condition of forfeiture was held to entitle the company beneficially.

The following cases were cited or referred to in argument:—*Thetford School case* (Coke Rep. 8, 130 b.), *Danvers v. Manning* (2 B. C. C. 18), *The Attorney-General v. Corporation of Bristol* (3 Mad. 319; and 2 Jac. & W. 294), *The Attorney-General v. Brazen Nose College* (2 Cl. & F. 295), *The Attorney-General v. Catherine Hall* (Jacob, 381), *Attorney-General v. Smythies* (2 Russ. & My. 717), *The Attorney-General v. The Skinners' Company* (5 Sim. 596), *Shepherd v. The Mayor of Bristol* (3 Mad. 320), *Jordon's Charity* (5 Sim. 571; and 1 Myl. & K. 416), *Attorney-General v. Johnson* (Ambler, 190), and as to the effect of long usage, *Attorney-General v. Caius College* (2 Keen, 150).

Mr. Bacon, for the Grocers' Company, submitted to the decree of the Court.

Mr. Pemberton, in reply.

THE MASTER OF THE ROLLS [Lord Langdale] (at the conclusion of the argument observed), there is no dispute as to the principles on which the Court acts in cases of this kind, and which have, I conceive, been very properly and [34] accurately stated at the Bar; that if the testator clearly declares an intention of devoting the whole income of a property to charitable purposes, then, although he does not, in specifically directing the application of portions of it, exhaust the whole income, still the general intention that the whole shall be applied to charitable purposes will prevail; and on the other hand, although he does not make any such general declaration of devoting the whole to charity, but gives each and every portion of the whole income at the time, to some charitable purposes, and by that means exhausts the whole, then, if the income should afterwards increase, the increase will also be applicable to charitable purposes. Those are general rules which have been adopted.

With respect to the clause, which has been very much relied on in this case, as to the pain, danger, and penalty which was to follow, if the Coopers' Company neglected to do the repairs, or to make the payments, namely that then the master wardens of the Company of Grocers were to enter and expel them, it must be observed, that although a pain and penalty, by the terms of it, certainly implies some loss to the party who suffers it, and may be the loss of a beneficial interest as seems to have been decided by Sir John Leach in the case of the Cordwainers' Company, yet this testator might very probably have considered it a pain and penalty to take from the company the management of this property; whether I ought so to consider it, must, I think, depend on a very careful examination of the case of Cordwainers' Company.

I confess the case is very far from being free from doubt: and I shall give my opinion upon it in a day or two.

[35] June 18. THE MASTER OF THE ROLLS. This information prays a declaration that the property in question is vested in the company, and held by them for charitable purposes only.

Upon a consideration of the will of the testator, Henry Cloker, it appears to me that a declaration to that effect cannot be made, and that the Defendants are entitled to a beneficial interest in the property; for, although the testator has said that he devised the property to the Coopers' Company, "upon this condition, and to this use, intent, and purpose, that is, the maintenance, augmentation, and upholding of the school at Ratcliff;" yet he has afterwards directed the temporary application of a portion of the rent to a different purpose, and has shewn an intention to connect the performance of the trust with the pecuniary interest of the persons who were to perform them; and having given £3, which he describes as what remains ungiven of the whole rent of the property, to the Coopers' Company, to put into the common box of the company, towards the reparations of the property when need should be, he has imposed a penalty or forfeiture on the company in default of their applying the other parts of the rent as he had willed. Under these circumstances I think that the company took a beneficial interest in the property; and considering that at the date of the will the whole rent was £11, and observing the mode in which the testator has

divided the whole sum, and given specific sums for specific purposes, which, together, constitute the whole sum, I think that he must be considered to have meant an apportionment of the whole; and it therefore appears to me that the Defendants, although entitled to a beneficial interest, are not entitled to an indefinite or unascertained residue, but only to three-[36]-elevenths of the whole residue subject to the repairs, and that they are trustees of the remaining eight-elevenths for the charity.

Affirmed, August 4th, 1841.

[36] PAGE v. BROOM. *March 21, July 3, 1840.*

[Distinguished, *Worley v. Frampton*, 1846, 5 Hare, 566.]

Parties having an equitable estate only, agreed to grant a lease to A. B., which was to contain special covenants both on the part of the lessors and lessee. The intended lessors died before the lease had been granted, and their interest became vested in bankrupt assignees and an heir at law, against whom a decree for specific performance was made. Held, that receiving the benefit of the lessee's special covenants the assignees and heir were themselves bound, to the extent of their interest in the property, to enter into the special covenants which the original intended lessors had contracted to enter into.

In this case, the Plaintiff had been declared entitled to the specific performance of an agreement for a lease against parties claiming under the intended lessors, and who respectively filled the characters of heir and bankrupt assignees, and the question was, whether such assignees and heir were bound to enter into any other covenants with the lessee, than the usual trustee covenant that they had not incumbered.

The circumstances under which the question arose were as follows. (See the case as reported in 4 Russ. 6; 2 Russ. & M. 214; and 4 Clark & Fin. 399.)

In June 1806, Thomas Willows was entitled in fee to Saville House and its appurtenants, in Leicester Square, subject to a conveyance thereof previously made to Robinson and Townes for securing the repayment of £6000 to Thomas Wright, and subject to such payment [37] on trust to convey the same to Thomas Willows and his heirs.

In the month of June 1806, the mortgage was paid off as to £3000, one moiety thereof by Miss Linwood, and as to the other moiety by John Broom and Herbert Broom; and by deeds dated the 26th and 27th days of June 1806, the legal estate was conveyed by Robinson and Townes to Richard Samuel White and Richard Rosser, who became the trustees thereof to secure the payment of £3000 and interest to Miss Linwood, the sum of £1500 to John Broom, and the further sum of £1500 to Herbert Broom; the equity of redemption remained vested in Thomas Willows in fee.

At this time an agreement was made between Thomas Willows, the mortgagor, and Miss Linwood and the two Brooms, his mortgagees, that Miss Linwood should occupy a portion of the property as an exhibition room, and that another portion of the property should be demised to and occupied by the Brooms as carpet dealers; and many alterations of the premises being required, the Plaintiff was requested and he agreed to perform the various works, on terms which were expressed in certain articles of agreement, dated the 27th of June 1806; and by these articles, and in consideration of Page's covenants and agreements, Willows, Miss Linwood, and the Brooms, with the approbation of White and Rosser the trustees, agreed with Page that they would, as soon as the buildings therein mentioned should be erected, execute to Page a lease of a part of the property, subject to the reservations therein mentioned, to hold for forty-nine years from the 29th of September then next at a rent of 40s. payable to White and Rosser; and it was agreed that the lease should contain covenants on the part of Willows for quiet en-[38]-joyment and insurance; and that the top of the roof of any buildings, to be built opposite to the lights of the building to be erected as therein mentioned, should not be raised higher than ten feet below the top of the ceiling of such last-mentioned buildings; and that no erection or roof should, during the term, be erected that should approach nearer than twenty feet to the

building thereby agreed to be erected. The agreement provided several other special covenants to be entered into by Willows for the purpose of securing to the other parties the accommodation and advantages which they required, and Page agreed to execute the works therein mentioned on the terms set forth; and by the same agreement, Page agreed that when the lease to him should be executed, he would grant to Miss Linwood a lease of the rooms and apartment which she was to have, for forty-eight years and three-quarters, wanting ten days, from the 25th of December then next, at the yearly rent of £250, and subject to the stipulations therein mentioned; and that he would grant to Willows a lease of the other part of the premises at the rent of £200.

A lease of a part of the premises was afterwards granted to the two Brooms for forty-nine years and a half, from the 27th of June 1806, at a rent of £375, payable to White and Rosser till the mortgage of £6000 should be paid off, and afterwards to Willows. By another deed of the 20th of September 1806, White and Rosser were appointed receivers of the rents of the premises, on trust to pay taxes, the interest of the mortgage of £6000, and the interest on other incumbrances, and the costs of the trustees, and to apply any surplus in reduction of the mortgages.

[39] Mr. Page executed the works which he agreed to execute, with variations required by the parties and by the agreement of the 27th of June 1806: and certain indentures dated the 30th of September 1806 and 26th of November 1807 were executed, whereby the premises were charged with an annuity of £400 by means of directions given by Willows to White and Rosser to pay the same to the Plaintiff, and in the year 1808 Mr. Page became entitled to a still further security.

One part of the premises being under lease to the two Brooms, was in their possession till they took one Harris into partnership with them, and from that time the two Brooms and Harris were in possession. Another part of the premises was intended to be leased by the Plaintiff to Miss Linwood, at a rent of £250 for the same, and after the month of November 1808 a further part of the premises was occupied by her. The remainder of the premises was intended to be leased by the Plaintiff to Willows, at the rent of £200 per annum. Willows was in possession till June 1808, when he delivered possession to the two Brooms and Harris.

Mr. Page having completed all the works, in 1809 the drafts of the several leases required for the execution of the subsisting agreements were prepared and agreed to.

By the draft of the intended lease to Page, Richard Samuel White and Richard Rosser, Thomas Willows, Mary Linwood, John Broom and Herbert Broom were made parties of the one part, and Page, the intended lessee, was the only party of the other part; and it was proposed to be witnessed that a lease of the premises other than those demised by the Brooms, was granted to the Plaintiff for forty-eight years, from the 29th of Sep-[40]-tember 1807, at the rent of 40s., and subject to the several covenants therein mentioned to be on his part performed, and covenants were inserted by White and Rosser that they had done no act to incumber, and by Willows that he and White and Rosser, or one of them, would pay all rates and taxes, except as therein mentioned; and also that he and White and Rosser would repair the main walls and roofs, and also that he would insure the buildings, and rebuild the same if burnt; and further, that the top or highest line of the roof of any buildings which might thereafter be built opposite to the lights of the buildings thereby demised should not be raised higher than to a line of ten feet below the top of the ceiling of the demised buildings and rooms, and that no wall or building should be made by Willows on the ground so as to rise or approach nearer to the walls of the demised buildings than at the distance of twenty feet from the same, without the special licence of Page, and Willows was to enter into other covenants respecting the occupation of the premises and the right of way. The draft also provided covenants by Willows, Miss Linwood, and the Brooms for quiet enjoyment, further assurance and the production of deeds.

Though the draft of the lease was approved, the lease was not executed.

Thomas Willows died intestate in the year 1813, leaving John Willows his heir; and in 1814 John Willows sold the equity of redemption to John Broom, Herbert Broom, and John Harris, and by indentures, dated the 30th and 31st days of December 1814, for the considerations therein mentioned, the equity of redemption was conveyed to Davy, in trust for John Broom, Herbert Broom, and John Harris, as tenants in

common, [41] subject to all mortgages, and to all leases and agreements for leases made by Thomas Willows, and then subsisting.

In April 1815 Herbert Broom died intestate, leaving his son Herbert his heir, and his widow Rebecca Broom became his legal personal representative.

In May 1817 the trustee White died, leaving Rosser his co-trustee him surviving; and in 1818 the Plaintiff filed his bill for a specific performance of the agreements which he had entered into.

In October 1820 Harris conveyed his one-third part of the equity of redemption to John Broom.

By the decree, which was pronounced on the 26th of November 1827, it was declared that the Plaintiff was entitled to have the lease to him, the two several leases from him, and the under-lease from Mary Linwood to him executed by all proper parties, according to the drafts prepared by White, Mr. Willows's solicitor, in 1809, with this difference, that the lease thereby proposed to have been made by the Plaintiff to Thomas Willows was to be made to John Broom, Herbert Broom, and John Harris, or those who represented them, and with this difference also, that if the mortgage to the Brooms should appear to be satisfied, the Plaintiff was entitled to have the lease granted to him for the additional term of fifty years, at the rent of 40s. per annum.

On the 30th of June 1830 John Broom became bankrupt, and the Defendants Ganderton, Pittman, and Slatter were the assignees of his estate and effects; and by the various events which had occurred, the equity of redemption and the right to an under-lease which [42] when the draft of the lease was prepared were vested in Thomas Willows, had now become vested, as to two-thirds parts thereof, in the assignees of John Broom, and as to the other one-third part thereof, in the representatives of Herbert Broom.

By a decretal order, dated the 25th of July 1833, it was referred back to the Master to settle and approve of the lease to the Plaintiff, which by the decree he was declared entitled to have executed to him; and in settling the lease the Master was to have regard to the circumstances and events which had taken place since the time when the drafts were prepared by Mr. White, and the relations in which the parties stood.

In pursuance of this order the Master by his report, dated the 23d of April 1839, approved the draft of a lease which did not contain any of the special covenants which the draft of 1809 proposed that Thomas Willows should enter into. The parties were Richard Rosser, the survivor of the trustees named in the indenture of the 27th of June 1806 of the first part; Thomas Davy, the trustee named in the indenture of the 31st of December 1814 of the second part; Thomas Ganderton, Joseph Pittman, and Thomas Slatter, the assignees of John Broom, of the third part; Herbert Broom, the heir at law of Herbert Broom deceased, of the fourth part; Rebecca Broom, the administratrix of Herbert Broom deceased, of the fifth part; Mary Linwood of the sixth part; and the Plaintiff Samuel Page of the seventh part; and in this draft lease Page the Plaintiff had entered into all the requisite covenants in conformity with the agreement; but the only covenant on the part of the assignees of John Broom and the heir and administratrix of Herbert Broom was the usual trustee covenant that they had not incumbered.

[43] The Plaintiff took exceptions to the Master's report, approving of this draft lease, insisted in effect that it ought to contain covenants on the part of the assignees and heir, to the extent of the interest in the premises, to the same effect as if the lease had been executed by Willows; namely, that they should enter into covenants, limited as above stated, for payment of taxes, to repair main walls, to insure the premises, to rebuild in case of fire, not to build higher than the limited line, for quiet enjoyment, and further assurance, &c.

The exceptions now came on for argument.

Mr. Pemberton and Mr. S. Sharpe, in support of the exceptions, contended that the assignees and heir, who were to have the benefit of Page's covenants, were bound on their parts to enter into the limited covenants proposed, otherwise Page would receive as a security for his advances, which exceeded £13,000 in 1809, not a lease in the terms of the agreement, but one discharged of rates, taxes, insurance, and those protections for the beneficial enjoyment of the property which he had stipulated for.

That the parties claiming the benefit of the agreement entered into by Willows must bear the burthen, and that this was not the ordinary case of trustees, whose covenants were limited to their own defaults, but a case where parties were seeking the benefit of an agreement, and attempting, at the same time, to avoid incurring the obligation. That though the estate of Willows was equitable, yet the parties in possession, with notice of the covenants, would in equity be bound by them: *The Duke of Bedford v. The British Museum* (2 Sug. Vend. 361 (9th ed.), and 2 Myl. & K. 552).

[44] Mr. Teed and Mr. Glasse, for the assignees, and Mr. Kindersley, for Herbert Broom, the heir at law, admitted that the covenants now proposed were similar to those inserted in the draft lease of 1809, but limited to the estate and interest of the assignees and heir; they however argued that the Plaintiff was not now entitled to be placed in a better situation than he would have been if the lease had been actually executed in 1809. That in such case the covenants would have been in gross, and would not have run with the land, so as to bind the assignees, Willows the lessor not having the legal estate, which at that time was vested in White and Rosser, *Webb v. Russell* (3 Term Rep. 393), *Whitton v. Peacock* (2 Bing. N. C. 411); they argued that equity would not extend the legal liability on a covenant, *Goddard v. Keate* (1 Vern. 87); that assignees stood in a different position from ordinary persons, being trustees only for others, *White v. Foljambe* (11 Ves. 337), and that their liability ought to cease on their parting with the estate, *Wilkins v. Fry* (1 Mer. 265), or be limited to their continuance as assignees; *Ex parte Stuart* (2 Rose, 215). That if the bankrupt had incurred any liability the Plaintiff ought to come in, *pari passu*, with the other creditors, and had no equity to a preference over them; that the Court had in view this very point when it directed the Master to have regard to the change of circumstances, &c., and that the effect of making the assignees enter into such covenants as those proposed, would be to postpone the distribution of the bankrupt's estate until the expiration of the lease.

Mr. Pemberton, in reply.

[45] July 3. THE MASTER OF THE ROLLS [Lord Langdale]. This case comes on upon exceptions to the Master's report, approving the draft of a lease to be granted to the Plaintiff by the Defendants, claiming under Thomas Willows deceased, by whom the lease was agreed to be granted; and the question is, what covenants the Plaintiff is entitled to have inserted in the lease, the Plaintiff contending that he is entitled to covenants more numerous and important than those which have been inserted in the draft of the lease approved by the Master.

The facts of this case are very long and complicated, and the time necessarily employed in obtaining a correct knowledge of them, tends, on every occasion, to increase the delays which have unfortunately occurred in this suit. (His Lordship recapitulated the facts, and proceeded.)

The Plaintiff makes no complaint of the covenants which, according to this draft, are proposed to be entered into by himself, or by the trustees Rosser and Davy, or by Miss Linwood; but the draft proposes that Herbert Broom, the heir of Herbert Broom deceased, and Ganderton, Pittman, and Slatter, the assignees of John Broom, should only covenant that they respectively have done no act to incumber, and it is therefore proposed, that the Plaintiff, who has done all in his power to perform the agreement on his part, and who is bound in further performance thereof to execute leases to Miss Linwood, and to those who claim under Thomas Willows, should under the circumstances which have taken place, altogether lose the benefit of the several special covenants which, by the draft of 1809, it was proposed and agreed that Thomas Willows should enter into.

[46] The Plaintiff insists that this is not the common case of heir or assignees being called upon formally to give effect to the agreements or covenants of persons under whom they claim, but the case of mortgagors and landlords, or lessors, seeking for themselves or the estates they respectively represent, the benefit of the agreements entered into by the mortgagees and lessees, in consideration of which the persons under whom they claim entered into the agreement on their parts. Those claiming under Willows ask for the benefit for which he stipulated, and it is argued that they must, to the extent of the estate they have received, sustain the burden. They claim the reversion of the lease which Page is to receive, and the rent which Page is to pay, and Page thereupon insists that, to the extent of that reversionary interest

which they derive from Willows, they must secure to him, the Plaintiff, those benefits which were intended to be secured to him by the covenants of Willows.

The equity of redemption and the reversionary interest in the property to be comprised in the lease, as to two-third parts, is vested in the assignees of John Broom, and as to the remaining third, in the representatives of Herbert Broom.

The bill is filed by the mortgagee and proposed lessee against the mortgagor and proposed lessor.

Pending the suit, certain alienations and transmutations of interest have taken place, but the persons now claiming the interest of Willows have vested in them the right to all the beneficial interest which Willows was to receive, and claim the performance of all the duties which the Plaintiff Page was to perform towards Willows, and they cannot be allowed to exact from Page all [47] the benefit which Page was to secure to Willows, without giving to him (to the extent of the property they have derived from Willows), the benefit which Willows stipulated to give.

The principal argument urged by the Defendants is that they are not liable to more than they would have been liable to if Willows had actually executed a lease according to the draft of 1809, and that such covenants as are now required would not have run with the land; but I am of opinion that this argument cannot prevail; the Plaintiff has never been in the situation in which he would have been if the lease of 1809 had been executed at the proper time.

The Plaintiff executed the works, and entered into the agreement on his part, in consideration of the annuity and of the covenants which he was to receive from Mr. Willows. The benefits for which he stipulated have been suspended for a long series of years, and in the meantime the interest of Willows has become vested in persons who claim in a representative character, and claim for the estates they represent all the benefits which Willows stipulated to receive, and some of which are to be secured by the acts of Page; and it seems unreasonable to allow this claim, to which they are entitled, without imposing upon them, to the extent of the beneficial interest they receive, the same obligation to secure Page to which Willows himself was liable.

The several instruments executed by Willows were agreements to be performed: the benefit of those agreements is now sought, in the right of Willows, by those who are now entitled to the beneficial interest which belonged to Willows, and I conceive that the Court, in [48] directing that the Master, in settling the lease, should have regard to the circumstances and events which had taken place, and the relation in which the several parties stood, did not intend to deprive the Plaintiff of all the securities which he might have had from the covenants of Willows, but to give him the same advantages, so far as they could justly be had, against the persons to whom the beneficial interest of Willows had passed. I think, therefore, that the report is erroneous, and that it must be referred back to the Master to alter the draft of the lease by inserting proper covenants from the assignees of John Broom and the heir and personal representative of Herbert Broom, for the several purposes intended to be secured by the covenants of Thomas Willows; such covenants, however, to be limited to the beneficial interest to which the assignees and heir respectively are entitled in the premises.

[49] GREENLAW v. KING. July 4, 6, 1840.

[S. C. affirmed, 10 L. J. Ch. (N. S.), 129; 5 Jur. 18. Distinguished, *Beaden v. King*, 1852, 9 Hare, 521. See *Guest v. Smythe*, 1870, L. R. 5 Ch. 554 (n).]

An Act of Parliament empowered a rector, with the consent of the bishop who was patron of the living, to raise money by annuity for building a new rectory house, the plan and the accounts of which were to be approved of by the bishop. The bishop advanced the necessary money, and obtained a grant of an annuity, charged on the living. Held, though there was no unfairness, that the transaction, on principle, could not stand.

A rector was empowered, by Act of Parliament, with the consent of the bishop, to raise money by way of annuity on lives, for the purpose of building a new rectory

house, and to charge the same on the rectory. The bishop himself advanced the money: the annuity was granted, and was paid by the rector until his death; the sums thus paid amounted to the sum advanced with lawful interest. At the suit of the succeeding rector, the transaction was set aside on the ground of the equitable incapacity of the bishop to become the purchaser of the annuity. Held, that the Plaintiff had a right to avoid the annuity altogether, and that the Defendant was not entitled to have it ascertained, what was a proper annuity to have been granted, and to charge the succeeding rector with his proportion thereof.

The object of this bill was to set aside an annuity granted to a trustee for a former Bishop of Rochester, and secured, under the powers contained in a Private Act of Parliament, on the rectory of St. Mary, Woolwich; the ground on which it was impeached was, that the bishop filled a fiduciary character under the Act, and that it was, therefore, incompetent for him to contract for a charge upon the living.

In 1819 Hugh Frazer was the rector, and the bishop, in right of his See, was the patron of the rectory of St. Mary, Woolwich, and by an Act passed in the forty-ninth year of King George the Third (local and personal, c. 88), intituled "An Act to enable the rector of the parish and parish church of St. Mary, Woolwich, in the county of Kent, for the time being, to grant building leases of the glebe lands belonging to the said rectory, and to sell the present rectory house and garden, and to build a new rectory house," after reciting that great benefit would accrue to the said rectory, and great convenience to the inhabitants of the said town, if power was given to the rector for the time being, to grant a lease or leases of the said glebe lands for a term of years, sufficient to encourage [50] persons to build upon and improve the same, and that it would be beneficial if permission were given to sell the then rectory house and garden, and to build a new rectory house; it was enacted, that the rector for the time being, should have power, "by and with the consent of the Bishop of Rochester for the time being," to lease the glebe lands for any term not exceeding ninety-nine years, at the best improved rent; and the rectory house and garden were thereby vested in the Rev. G. A. Hatch and Alexander Fraser, discharged of all estates, &c., of the bishop and his successors, and of the rector and his successors; upon trust to sell and apply the produce towards building a new rectory house, of such dimensions and extent, and with such conveniences thereto as should be approved of by a plan, &c., under the hand and seal of the said Bishop of Rochester for the time being; and it was provided that such new rectory house should be built and finished to the satisfaction of the Bishop of Rochester for the time being, at a price not exceeding £3000; and if the monies arising from the sale should be insufficient for the purpose, the rector was authorized to take fines on granting leases, but so as such fines should not in the whole exceed £3000, and that the amount of every such fine should be approved of by the Bishop of Rochester for the time being.

The powers of the above Act were enlarged by a subsequent Act of the 52 G. 3, whereby, after reciting the sale of the rectory, the granting of building leases, and of the application of the produce (about £2100) in building the new rectory house, &c., and that there would still be wanting £2000 or thereabouts to carry the Act into execution, and that it would be advantageous to the present and future rectors if power was given to Hugh Fraser to borrow a sum of money by way of [51] annuity upon two lives, towards finishing the rectory, &c.; it was enacted, that it should be lawful for the rector for the time being by deed, &c., "by and with the consent of the Bishop of Rochester for the time being, to be signified by any writing under his hand and seal," to borrow any sum, not exceeding £2000, as might be necessary for completing the rectory house, &c., by the sale of one or more annuity or annuities, upon one or more life or lives, and to secure the payment of such annuity or annuities by a grant or charge upon the ground rents reserved under the leases already granted under the said Act of the 49 G. 3, or in case of the ground rents being insufficient, upon the rents and profits of the rectory.

The produce so to be raised was directed to be invested in Exchequer bills, in the names of the trustees, and by them to be from time to time applied in finishing the rectory, &c.

And it was thereby further enacted, that when and so soon as the new rectory house, garden and offices should have been finished and completed to the satisfaction of

the Bishop of Rochester for the time being, a declaration or writing to that effect, under the hand and seal of the bishop should be a sufficient release and discharge to the trustees for all the monies which might have been applied by them, or by Hugh Fraser under their authority, for and towards finishing, &c., the new rectory house, &c., pursuant to an account thereof to be by them rendered and approved of under the hand and seal of the Bishop of Rochester for the time being; and that in case there should be any balance remaining, it should be lawful for the rector for the time being to lay out and expend the same, *by and with the approbation of the Bishop of Rochester* for the [52] time being, in permanent improvements upon the rectory. There was a general saving clause of the right of all persons, except the bishop and rectors.

On the passing of the last-mentioned Act, measures were adopted for raising £2000 thereunder. Advertisements were inserted in the London and local papers, for persons willing to contract for an annuity on one or two lives secured on the rectory. Many applications were made, but there were no offers at a less rate than about 10 per cent. A Mr. Hill afterwards offered to advance £2000 on annuity for two lives, and the life of the survivor at 9 per cent., and a deed being prepared for securing it, and sent to the bishop for his execution, he objected that the rate was too high, and declined executing the deed. What was thereupon done did not appear in evidence, but a letter from the bishop to the agent who was negotiating the loan was proved, which was as follows:—"As Mr. Broderip, the gentleman I spoke to here, will not take the annuity at less than 8½ per cent., I have come to the determination of taking it myself at that rate, provided that in the meantime you have not been able to procure the £2000 on lower terms. The two lives I propose to insert are those of my two sons, Walker King aged fourteen, and Edward Dawson King aged thirteen years. I conceive that being a party in the deed, I cannot hold the annuity in my own right, and therefore, I propose, that my eldest son Walker should be the third party in the deed, and hold the annuity for his sole benefit. I take it for granted, that his being a minor is not an obstacle to his thus holding it, but if it should, I propose my brother, John King, Esq., of Grosvenor Place, should hold the same for me; and give me a declaration of trust to that effect. I suppose there can be no objection to having an indorsement [53] made on the back of the deed, to the purport of the memorandum which I herein inclose."

The proposed indorsement stated the advertisements, and "that no offers were made for purchasing any annuity for the longest liver of two lives upon lower terms than nearly 10 per cent., except one at 9 per cent."

It was afterwards determined that a Mr. Venables should be the trustee for the bishop; and by an indenture of the 10th of January 1813, and made between the bishop of the first part; Mr. Fraser, the rector, of the second part; the two trustees under the Act of the third part; and Thomas Venables, the brother-in-law of the bishop, of the fourth part; it was witnessed, that pursuant to and in exercise of the power and authority to the said Lord Bishop of Rochester given by the said stated Act, he, the said Lord Bishop of Rochester, did thereby consent that the said Hugh Fraser should borrow the said sum of £2000 from the said Thomas Venables, for the purpose of the said Act, by the sale to him of an annuity of £170 for the lives of the said Walker King and Edward Dawson King, and the life of the survivor of them; and it was thereby also witnessed, that in consideration of £2000 paid to George Avery Hatch and Alexander Fraser, and in consideration of 10s. to him Hugh Fraser also paid by T. Venables, the said Hugh Fraser did grant, bargain, sell, and confirm unto T. Venables, his executors, administrators, and assigns, one annuity of £170, to be paid and payable for and during the lives of the said Walker King and Edward Dawson King, and the life of the survivor of them, and to be charged upon, and issuing and payable out of all and singular the rents reserved by the several building leases then already granted in pursuance of the said Act; and Hugh Fraser, [54] thereby also charged the ground rents, and also the rents and profits of the said rectory of the parish and parish church of Saint Mary, Woolwich, with the payment of the same annuity.

The £2000 was admitted to have been the money of the bishop; and by an indenture of the 28th of January 1813, made between Mr. Venables, of the one part, and the bishop of the other part, after reciting that the £2000 was the proper money

of the bishop, and that the annuity of £170 had been granted to Mr. Venables in trust for the bishop, Mr. Venables declared that he would hold the annuity in trust for the bishop, his executors, administrators, and assigns.

By letters written to the bishop by his confidential solicitors in 1820, the invalidity of the transaction had been called to the attention of the former, and counsels' opinion had been taken thereon.

In 1823 the bishop, for natural love and affection, transferred the annuity to his son, the Defendant, the Rev. Walker King.

The bishop died in 1827; and the rector having died in 1837, the Plaintiff, who then became rector, filed this bill against the Rev. W. King and the representatives of Venables, insisting on the invalidity of the transaction, and praying that it might be set aside; and for a declaration "that all sums already paid on account of the annuity of £170 ought to be considered as applied in or towards satisfaction and discharge of the interest, and then of the principal of the said sum of £2000; and if it should appear on taking the accounts that the principal and interest had been discharged, then that the Plaintiff might be relieved from further paying the annuity."

[55] The principal Defendant, by his answer, admitted, "that the several payments made in respect of the said annuity would together amount to more than a sum of £2000, with lawful interest for the same, from the date of the grant of the said annuity."

There was conflicting evidence as to the rate at which an irredeemable annuity for two lives might have been procured at the time, but as the decision proceeded on other grounds, it is immaterial to state the evidence on this point.

Mr. Pemberton, Mr. Kindersley, and Mr. R. W. E. Forster, for the Plaintiff, contended that, under these Acts of Parliament, the Bishop of Rochester was placed in the position of a trustee to defend the rectory and the future incumbents from any improper or prejudicial dealing by the trustees or the then rector. That it had been clearly settled that a trustee, or any other person holding a fiduciary character, was incapacitated from purchasing the trust property, or dealing therewith for his own benefit: thus, the commissioners and assignees of a bankrupt, the solicitor to the commission, a confidential agent, the committee of a lunatic, the trustees of a charity and a guardian, had been held incapacitated from purchasing the property as to which they had an inconsistent duty. That this case was like *Grover v. Hugell* (3 Russ. 428), where a part of a glebe had been sold for the redemption of the land tax, and the rector had become the purchaser, it was held that the transaction was such as to prevent a good title being made. They contended also, that as the rectory had repaid the £2000 and interest, the annuity deed ought to be delivered up to be cancelled. They cited *Ex parte* [56] *Bennett* (10 Ves. 380), *Attorney-General v. Dudley* (G. Cooper, 146), *Scott v. Davis* (4 Mylne & Craig, 87).

Mr. G. Richards and Mr. Heberden, *contra*, argued, *first*, that the bishop was not a trustee under the Acts; that his assent, which was required, was for the protection of the See of Rochester and the patronage of the rectory alone, the protection of the future rectors being sufficiently provided for by the trustees and by the superintendence of the rector for the time being, who was the party most interested in obtaining money for the purposes of the Act on the best possible terms.

Secondly, that the bishop, though a trustee, might still deal in the manner he had done; for this was not a sale by a trustee to himself, but by a *cestui que trust* to his trustee; that the case was like that of *Howard v. Duane* (Turner & Russ. 81), where it was held, that trustees, having a power of sale with the consent of a tenant for life, might sell to the tenant for life. That here no fraud or concealment had been charged, and that the attempt to prove an undervalue had altogether failed.

Thirdly, they contended that the Plaintiff was barred by lapse of time.

And, *fourthly*, as to the extent of relief, they argued, that the Plaintiff was only entitled to a reference to the Master, to inquire what amount of annuity ought properly to have been granted, and that the payment of such annuity ought to be decreed for the future. That if Mr. Fraser had, by overpayments, discharged the £2000 and interest, still the present Plaintiff, who had the benefit of [57] the rectory house, was not entitled to take credit for the overpayments of Mr. Fraser, whose family, if any one, were entitled thereto. That the Act contemplated the successor of Mr. Fraser bearing his portion of the burthen for the benefit he received, and that

it would be most unjust if he were allowed to get rid of the whole burthen, on the plea that his predecessor had paid too much. That as regarded Mr. Fraser, the grant of annuity was valid; he had concurred in it in every way; and that if it was to be avoided as against his successor, the relief must be limited to the extent to which the arrangement was prejudicial to such successor. That the principle of repaying the £2000 and interest was not equitable: for the Defendant had run all the risk of the lives falling in, and if the two lives had ceased, the annuity would also have ceased; that a party could not be allowed to stand by and take all the advantage which might accrue from the early ceasing of the annuity by the falling in of the lives, and after the peril was over, get rid of the annuity on payment of the principal and interest. That the risk had been run by the Defendant; and although he had not insured the lives, he had himself been the insurer. As to the rectory having repaid the advance, it was a mere fallacy, the amount having been paid by Mr. Fraser himself out of his own monies. They cited, as to the purchases by trustees (2 Sugden's Vendors, 119), *Ayliffe v. Murray* (2 Atk. 58), *Ex parte Lacey* (6 Ves. 625), *Coles v. Trecothick* (9 Ves. 247), *Downes v. Grasebrook* (3 Mer. 200), *Hunter v. Atkins* (3 Myl. & Keen, 113), *Campbell v. Walker* (5 Ves. 677); as to the effect of time, *Morse v. Royal* (12 Ves. 355), *Hosenden v. Annesley* (2 S. & Lef. 637), [58] *Chalmer v. Bradley* (1 Jac. & W. 51), *Parkes v. White* (11 Ves. 226), *Gregory v. Gregory* (G. Cooper, 201; Jacob, 631), and *Champion v. Bigby* (1 R. & Myl. 539, affirmed by Lord Cottenham in 1840).

THE MASTER OF THE ROLLS [Lord Langdale]. It appears that, in 1809, it was thought desirable to build a new rectory house at Woolwich, and for that purpose it was proposed to sell the old house and, part of the glebe lands, to obtain a power of granting leases on fines, and to employ the amount thereby raised in building the new house. To effect this purpose an Act of Parliament was obtained in 1809, authorising certain things to be done, with the consent of the bishop of the diocese.

The monies raised under this Act being found insufficient for the purpose, a second Act was obtained in 1812, whereby authority was given to raise a further sum of £2000, by granting annuities on one or more life or lives. In this Act of Parliament again, several things were required to be done with the consent of the bishop, who, being the patron of the rectory, was a most important party to any proceedings affecting the living. The several offices which seem to have been imposed upon him by these Acts of Parliament, as far as they relate to the present question, were these:—It being highly necessary and important that a house should be erected suited to the rectory or to the value of the rectory, the plan of the house was to be approved of by him: in the next place the borrowing of the money by sale of annuities was also to be assented to by him: the money to be raised was to be placed in the hands of trustees appointed by the Act; but prior to their dis-charge there was to be a declaration of the bishop, that the house had been finished and completed to his satisfaction. The accounts were to be rendered by the trustees, and to be approved of by the bishop; and, moreover, any surplus raised by these means was to be applied, with the approbation of the bishop, in planting and in other purposes for the permanent improvement of the rectory. In all these several particulars, therefore, it is perfectly manifest that the bishop had a very important duty to perform. He was intrusted not only with the protection of the interest of the See in regard to its patronage, but also with the protection of the rectory and the interest of all future rectors. The annuity was to be granted by the then rector; but as the produce was to be applied for purposes which were to be useful to all succeeding rectors, a duty was imposed on the bishop, to see that the rector for the time being did not abuse the power which was thus vested in him.

In December 1812 the rector proposed to raise £2000 by the grant of an annuity of £180 for two lives. This proposal was communicated to the bishop, who, conceiving, as I think most properly, that it was his duty not to give a blind consent, but to exercise his judgment having regard to those interests which he was bound to protect, observed, that he thought 9 per cent. was too high a rate, and in consequence of his interference the negotiation then pending was broken off.

It is to be inferred from the correspondence, that the bishop thought he could probably be able to find some person who would require a less price, and I cannot help thinking that the necessary inference to be derived from his own letter is this—that by his own proper inquiries, and acting in a manner in the highest degree meritorious

for the benefit of the rectory, he [60] had found a person who was willing to advance the £2000 for a less annuity than that which had been previously proposed by Mr. Fraser, the rector, under the advice of Mr. Hogg, the surveyor. I cannot imagine that the bishop, either at this time or ever throughout this transaction, had the least sinister object in view; so far from it, I believe he was then acting with a desire to promote the interest of the rectory, and if he had never interfered further, the transaction would no doubt have stood entirely clear; instead of any contrivance or fraud, or anything of that sort on his part, I think we have indications of his having been actuated by a very contrary spirit. Finding that Mr. Broderip, to whom he referred, did not think fit to advance the £2000 at a less rate than 8½ per cent., the bishop unfortunately imagined it would not be a bad thing for him to obtain the annuity at that price. But even then, so far from being actuated by any sordid or fraudulent motive, he openly and fairly states in his letter, that he had come to the determination of taking it at that rate himself, "*provided that in the meantime the agent had not been able to procure the £2000 at a lower rate*;" so that if it had been in the power of the rector or his agent, in the meantime, to procure the £2000 on lower terms, I have no doubt the bishop would immediately have given up the project he at that time entertained, and personally, would have had no more to do with this transaction. How a communication of that kind from the bishop might have affected Mr. Fraser, or those who were advising him, is a matter of very different consideration; for if they found that this was a thing agreeable to the bishop, they might certainly have discontinued all exertions for procuring another person to accept the annuity at a lower price, and would, perhaps, have felt very much inclined to gratify the bishop on whom Mr. Fraser so much depended.

[61] The bishop seems to have been perfectly aware that there was a difficulty in the transaction—he was conscious, that being "a party to the deed" in another character, there existed a difficulty in making himself the grantee of the annuity, and he therefore proposed to have a trustee appointed. Mr. Venables was ultimately fixed upon for that purpose, and the transaction was then completed. Thus the bishop, in whom all these powers were vested, in whom this trust was reposed by the Act of Parliament, made himself, in the course of the transaction, an interested party.

Now I apprehend that the question here, is not whether there was fraud or no fraud, nor whether there was a contrivance to get an undue advantage or not; but the question is, whether this Court will permit a person standing in the fiduciary and confidential situation in which the bishop then was, to make himself an interested party in the very transaction which he was bound as trustee most vigilantly to superintend. What Lord Eldon said on this subject is calculated to make an impression on every mind; he says (speaking quite generally of trustees and persons in fiduciary situations), "If a trustee can buy in an honest case, he may in a case having that appearance, but which, from the infirmity of human testimony, may be grossly otherwise." (*Ex parte Bennett*, 10 Ves. 385.) The impossibility of detecting the conduct of parties placed in such situations, is the reason which imposes upon the Court a necessity, which I believe has always been acted on, of saying that such transactions shall not stand at all. You have not the means of finding out all the modes in which advantage can be taken; and, therefore, it is safer, and the interests of society require, that you should forbid such transactions altogether.

[62] It is undoubtedly a great satisfaction to observe, that in the course of these proceedings the bishop intended to do what was right; he however violated the rule of law, and at no very long period afterwards he was apprised of the difficulty in which he had placed himself—he was at that early period placed on his guard, and had then the opportunity of making provisions for the chance of the transaction being afterwards set aside.

It appears to me the bishop was making what he thought a proper and an advantageous arrangement for himself; but he had not the slightest idea of defrauding the rectory. I think it is but due to those who are now claiming under him to say, that such is the strong impression which I have on my mind, and that I do not think there is the smallest imputation which can rest on his memory;—no such charge is made by the bill, and the counsel for the Plaintiff have most carefully abstained from making any such imputation. The simple question, however, to which we are brought in this case is, whether such a transaction as this is, can, consistently with the rules of law,

be allowed to stand. I am of opinion it cannot, because it is a clear violation of those rules which have been established for the defence of those whose interests and property have been committed to the protection of persons placed in a fiduciary situation; on that ground alone I think this case is to be determined.

It is said, that length of time is to operate as a bar; but I apprehend that time runs in this case only from the period when the present rector was appointed; the bishop was, in one sense, a trustee for the several rectors, he was to protect the interest of the rectory, not only for Mr. Fraser the incumbent at that particular time, but all future rectors; and if Mr. Fraser had either so [63] involved himself in the transaction that he could not set it aside, or if he was so interested or so well satisfied that he did not choose to set it aside, surely that is no reason whatever why the person who succeeded him should not be allowed to complain. The question is, what is now to be done. The bishop and those who claim under him have been repaid the £2000 and interest; that is admitted in the answer. Then who is injured? The bishop and those who claim under him have been repaid the money advanced, with interest, and although the annuity will now be determined to the disappointment of parties claiming under the bishop, yet this is the consequence of the transaction into which he entered, and those who claim under him must be bound by it. What the Plaintiff says is this—the rectory was benefited to the amount of £2000, and that has been repaid out of the income of the rectory—repaid it is true, out of the income of the rectory while in the enjoyment of Mr. Fraser; but what has the Defendant to do with that? The bishop and those claiming under him have been repaid, and the debt incurred by the rectory having been satisfied, the annuity ought to cease.

It being admitted in the answer that the £2000 and the interest have been repaid, I am of opinion, that the annuity deed ought to be delivered up to be cancelled.

Affirmed by the Lord Chancellor, 15th January 1841. [10 L. J. Ch. (N.S.), 129; 5 Jur. 18.]

[64] BARKER v. SMARK. July 18, 1840.

[See *Walsh v. Bishop of Lincoln*, 1874, L. R. 4 Ad. & E. 253.]

A vendor conveyed his estate to a purchaser, and took a bond for the purchase-money. He afterwards sued at law on the bond, and in equity insisting on his equitable lien. He was put to his election in which Court he would proceed.

The Defendant Smark purchased a moiety of certain property for the sum of £3000, which was conveyed to him in September 1829, in consideration of £3000 in the deed expressed to be paid.

The purchase-money was not however paid at the time, but a bond dated the 30th of June 1829 was given by Smark for the payment of the £3000 and interest.

On the 30th of May 1840, the Plaintiffs, who represented the vendor, filed their bill against Smark and others to have it declared that they had an equitable lien on the property for the payment of the £3000 and interest, and for an account and payment by means of a sale of the estate, or that a legal mortgage might be made to them by the Defendants.

On the 10th of June 1840, the Plaintiffs also commenced an action at law on the bond, for the recovery of the £3000 and interest.

On the 9th of July, the Defendant Smark, after putting in his answer, obtained *ex parte*, an order that the Plaintiffs should elect within eight days in which Court they would proceed. It was now moved on the part of the Plaintiffs, that this order might be discharged with costs.

Mr. Chandless, in support of the motion contended, that the order had been obtained on a false suggestion, namely, that the Plaintiff was prosecuting the Defendant [65] both at law and in equity for one and the same matter: whereas the Plaintiff was proceeding against the Defendant personally at law and against the estate in equity; on that ground, he contended, that the order for election ought to be discharged; *Mills v. Fry* (3 Ves. & B. 9). He argued that a mortgagee was entitled to avail himself of all his remedies at one and the same time: and that the

decision of *Greenwood v. Taylor* (1 R. & Myl. 185) had been disapproved of in the recent case of *Mason v. Bogg* (2 Myl. & Craig, 443).

Mr. Pemberton and Mr. Teed, *contra*, insisted on the regularity of the order to elect and distinguished this from the case of a legal mortgage.

Mr. Chandless, in reply.

THE MASTER OF THE ROLLS said, that although a mortgagee was entitled to pursue all his remedies concurrently, yet in this case where the vendor had taken a bond to secure the purchase-money, he could not be permitted to sue at law and in equity at the same time: that this order to elect would not prejudice the Plaintiff, for if he failed in one remedy he might resort to the other.

[66] LANE v. PAUL. June 17, July 21, 1840.

The Plaintiff's right to except to the Defendant's answer for insufficiency, is not waived by a motion for production of papers, founded on admissions in the answer. It is unnecessary in such a case to move "without prejudice to the Plaintiff's right to except."

It is not true as a general proposition that an insufficient answer is no answer.

On the 9th of May the Plaintiff gave notice of a motion for the production of documents admitted by the answer of the Defendants to be in their possession, but the notice contained no reservation of its being made "without prejudice to the Plaintiff's right of excepting to the answer."

On the 29th of May the motion was brought on, when an order made against one Defendant; exceptions to the answer for insufficiency were delivered on the same day.

On the 11th of June the same motion was made and discussed as to another Defendant, and on the same day the exceptions for insufficiency were referred to the Master.

A motion was now made on the part of the Defendant to discharge the order referring the exceptions on the ground of irregularity, it having been made after the motion to produce the documents, and after an order had been made on admissions contained in the answer.

Mr. Pemberton and Mr. Kinglake, in support of the motion, contended, that by moving on admissions in the answer without any reservation of the right to except, the Plaintiff had affirmed the sufficiency of the answer; for an insufficient answer being considered no answer, the Plaintiff by adopting it for the purposes of the motion had assumed its sufficiency.

[67] That the practice was thus stated in Maddock's Chancery Practice (vol. ii. 3d ed. p. 422). "After an application to pay money into Court founded on an admission in the answer, the Plaintiff, it has been held, cannot except to the answer; a special motion in such cases should be made for payment of money into Court without prejudice to a reference for insufficiency; no direct authority was cited, but that was the opinion of the registrar which the Vice-Chancellor confirmed;" *Rowe v. Anderson* (May 15, 1819, MSS.).

Mr. Loftus Lowndes, *contra*, contended that the practice was otherwise. That if such a motion had the effect of preventing exceptions being afterwards taken, the Plaintiff could not prevent that result by stating in his own notice of motion that it was to be made "without prejudice," or in such a mode as not to produce the effect which, it was assumed, the Court attributed to it; in *Phillips v. Stephenson* (11 Price, 733), the Court refused to insert this qualification in the order; he referred also to a case of *Davis v. Franklyn* lately before the Lord Chancellor.

Mr. Pemberton, in reply.

THE MASTER OF THE ROLLS said he would take an opportunity of inquiring into the practice.

July 21. THE MASTER OF THE ROLLS [Lord Langdale]. In this case the Plaintiff, having given notice of a motion for the production of documents, stated in the schedules to the answer, took exceptions to the answer, and caused the same to be delivered on the same day on which an order was made upon the motion; and he

[68] afterwards obtained an order to refer the exceptions to the Master in the usual manner.

The notice of motion did not express, as is often done, that the motion was intended to be made without prejudice to the Plaintiff's right to except to the answer; and the Defendant, alleging that the motion was an acceptance of the answer or a waiver of the exceptions, now moves that the order referring the exceptions may be discharged for irregularity. *Rowe v. Anderson*, which was cited at the Bar, is the only decided case which has been found on the subject, and it is in favour of the motion; but it appears from a note of the late Mr. Walker that that case was decided upon a motion that a like order had been made by Lord Eldon in the case of *Rowe v. Gudgeon*, which seems to have been a mistake, the order in *Rowe v. Gudgeon* having been made by Sir Thomas Plumer, and being made in the common form for the production of papers without prejudice to the Plaintiff's right to except.

Under these circumstances *Rowe v. Anderson* cannot be considered as a conclusive authority; and it appears to me that the words "without prejudice" so frequently introduced into notices of motion made upon the answer before the time for excepting has expired, can only be considered as made from abundant caution, and cannot in the absence of direct decision be taken as conclusive evidence, that if the words were not introduced, the motion would be a waiver of the exceptions.

Though an answer which is found insufficient may be treated as no answer, as to the points on which it is so found, yet it is not true, as a general proposition, that an insufficient answer is no answer: an answer, insufficient in many points, may yet in other points be most [69] important to the Plaintiff, and sufficient to bind the most important interests of the Defendant.

I recollect no instance in which an order for production of papers or payment of money into Court has not been made without prejudice to the right of excepting when so asked, nor any instance in which it has been suggested, that the words "without prejudice," &c., when asked for, ought not to be inserted; and it appears to me, that if the Defendant by the answer admits sufficient to entitle the Plaintiff to a production of papers, it would be unjust to say, that the Plaintiff shall not have the production, without depriving himself of the time to except to other parts of the answer, which the general rules of the Court permit.

The answer, though sufficient for the motion, may be very insufficient in other respects; and supposing that upon the answer filed, there is a clear right to have money or papers brought into Court, and yet that it is not clear whether it would be for the Plaintiff's benefit to except to any other part of the answer, there seems no reason why during the time which the general rules of the Court allow for that purpose, he should be obliged either to delay his motion to obtain the order to which he is entitled, or to lose the time for further consideration upon the other parts of the answer; and it being understood that by the general rules the Plaintiff has a certain limited time to except to the answer, it does not appear that the Defendant can be injured by the omission of the words "without prejudice," &c., in the notice of motion for production of papers.

I am therefore of opinion that this motion must be refused, but considering the doubts which have existed on the practice, and the case of *Rowe v. Anderson*, it is refused without costs.

[70] FINCH v. BROWN. July 20, 1840.

The ordinary rule between mortgagor and mortgagee in possession is, that the Court will not direct an account with annual rests, if there was an arrear of interest due on the mortgage at the time of the mortgagee's taking possession.

A property was subject to a mortgage for £1000; A. B. agreed with the mortgagor for the purchase of a portion of this property, and entered into possession without paying his purchase-money. In 1813 A. B. bought up the whole mortgage for £1000, on which an arrear of interest of £101 was due. There was at the same time due from A. B., in respect of his purchase £365. Nothing further being paid by the mortgagor, A. B. in 1816 recovered possession of the property. The rents exceeded the amount of interest, and in 1823 the whole arrear of interest had been paid off. The Court refused to direct annual rests.

Mr. Finch being entitled to an estate in the county of Berks, the whole of which was subject to a mortgage for £1000, agreed to sell a portion of it, called the Short-Grove Close, to a Mr. Brown.

In September 1811 possession was taken by Mr. Brown of the part he had purchased, without however paying the purchase-money for it.

In January 1813 Mr. Brown obtained a transfer of the mortgage, which, as before observed, extended over the whole estate. At that time there was due on the mortgage for principal the sum of £1000, and for interest £101. On the other hand, there was due from Brown to Finch, for the amount of purchase-money of the Short-Grove Close, and for interest from the time he took possession, the sum of £365. On the balance, therefore, of accounts there was due from Finch to Brown in January 1813 the sum of £736.

No further interest appeared to have been paid on the mortgage, and Brown, in August 1816, recovered and retained possession of the mortgaged property. By means of the rents received by him, the whole arrear of interest was paid off by November 1823. After this time the annual interest amounted to about £30, while the average rental amounted to nearly £70 a year. [71] The sum of £518 was still due to 1835 on the balance of accounts, about £300 having been paid for repairs, &c., by the mortgagee.

The cause coming on for further directions on the Master's report, who had ascertained the particulars of the account,

Mr. Pemberton and Mr. Coleridge contended, that under the circumstances, and the rents exceeding the interest from 1823, the accounts ought to be now taken with annual rests.

Mr. Tinney and Mr. E. Montagu, *contra*, cited *Wilson v. Metcalfe* (1 Russ. 530), *Davis v. May* (19 Ves. 383), and *Latter v. Dashwood* (6 Simons, 462).

THE MASTER OF THE ROLLS [Lord Langdale] said he must consider that there was an arrear of interest due when the mortgagee took possession, and that the ordinary rule therefore applied, which was not to direct annual rests in such a case.

[72] MEHRTENS v. ANDREWS. July 15, 1839.

A testator, who died in 1767, directed his estate to be converted and invested, and he gave the same to his wife for life, remainder to his daughter, with remainder to the Plaintiffs. The executors neglected to convert some leaseholds, and permitted the successive tenants for life to enjoy the same until their expiration. After their deaths the Plaintiffs filed their bill against the representatives of the executors for a general account. The executors, who had no personal knowledge of the matter, represented the residue to consist of a sum in the funds; and they, by their answer, amongst other papers, admitted the leases to be in their possession. At the hearing the Plaintiffs waived the accounts, and took the money in the funds. They afterwards discovered the breach of trust in respect of the leaseholds, and filed a supplemental bill to obtain relief in respect thereof. The Court, notwithstanding the former decree, decided in their favour, but without costs.

Executors who, contrary to the trusts of the will, had permitted the tenant for life to enjoy leasehold property in specie, the title to which was bad, but of which no advantage was taken by the owners of the property, being responsible for the value of the lease at the testator's death: Held, that such value should be ascertained, *having regard to the enjoyment actually had thereunder*.

The testator J. G. Bass, being possessed, amongst other property, of two leaseholds, the first being held for a term of sixty-one years from Michaelmas 1753, at a rent of £20, and the second for a term of twenty-one years from Midsummer 1753, at a rent of £20, made his will, dated in 1761, whereby he gave to John Savage and James Savage all the residue of his estate and effects, upon the special trust that they should, as soon as might be after his decease, convert the same into money, and invest the same at interest on Government or other securities, and pay the interest to his wife for life, with remainder to his daughter Sarah Duppa for life, with remainder to her children, and in default, to his next of kin living at the death of Sarah Duppa.

(who, in the events which happened, proved to be the Plaintiffs in this cause), and he appointed John Savage and James Savage his executors.

In 1767 the testator died, and his will was proved by his executors. They realised the other residuary estate, and invested it in £7000 consols, but they did not sell the leasehold property; in the same year [73] (1767), the widow and the two executors demised the first-mentioned leasehold property for twenty-one years, determinable at the end of seven or fourteen years, at a rent of £135, 16s.; and in the same year the executors, for a nominal consideration, assigned the second-mentioned property for the residue of the term unexpired therein.

The first-mentioned property was afterwards let on lease by the widow and Sarah Duppa, and the whole rents were received by them during the continuance of the lease.

The widow died in 1789; the first-mentioned lease expired in 1814, and Mrs. Sarah Duppa having died in 1831 without issue, the ultimate limitation thereupon took effect in favour of the Plaintiffs, who were foreigners.

The Defendant Gibbs was the executor of Sarah Duppa, who was the surviving executrix of the surviving executor of the testator; and he thus represented both the original testator and Sarah Duppa. In 1832, and after the death of Sarah Duppa, the Plaintiffs filed their bill against Gibbs and others for a general account of the estate of the testator. Gibbs, who was a mere representative, and was very imperfectly acquainted with the affairs of the testator, stated by his answer, that the whole residue consisted of the money in the funds, but he admitted the leases, &c., relating to the leaseholds to be in his possession. The cause came on for hearing, when the Plaintiffs waived taking the accounts of the estate, and having on a reference been found to be the next of kin entitled under the testator's will, they, on the cause coming on for further directions obtained an order for dividing the funds amongst them.

[74] Having afterwards, as they stated, discovered the facts relating to the leaseholds, and alleging that they had been misled by the erroneous statement in the answer of Gibbs, they filed the second bill to recover the amount of the value of the leaseholds at the testator's death.

The leases were alleged by the Defendants to have been granted by a tenant in tail, who had power to lease for twenty-one years only, and who died without issue, and without having suffered a recovery.

The cause now came on for hearing, when

Mr. Pemberton and Mr. Wright contended, that by the non-conversion of the property according to the specific directions in the will, a breach of trust had been committed, for which the Defendants were responsible; that the Plaintiffs had not been guilty of any *laches*; that time did not run until the death of the tenant for life, when the class to take became for the first time ascertained. That the waiver of accounts had been made by the Plaintiffs in ignorance of their rights, and ought not therefore to deprive them of the relief now sought by their supplemental bill.

Mr. Kindersley and Mr. Shadwell, for the Defendants, submitted, that the present suit ought not to be entertained after the Plaintiff's waiver of the accounts in the former suit. They also insisted, that the lease of 1753, having been granted by a tenant in tail who had the power to lease for twenty-one years only, and who died without having suffered a recovery, was therefore void as against those in remainder, and had expired in 1774, after which the parties had become mere tenants at will. They argued also that at this distance of time it ought [75] to be assumed that the tenants for life had become the purchasers of the leaseholds; that the Defendants were, at the utmost, liable only for the value of the leaseholds at the testator's death, having regard to the bad title; and that the Plaintiffs were barred by the lapse of time.

Mr. Pemberton, in reply. No length of time will bar a trust, and parties whose interests are contingent are not bound to assert their rights until such interests come into possession. The value of the leases must be ascertained with reference to the enjoyment had thereunder.

THE MASTER OF THE ROLLS [Lord Langdale]. This is one of those cases which one cannot contemplate without very great regret, for whatever may have been the conduct of the parties at the time when this transaction took place, still this suit, if

successful, will have the effect of depriving innocent parties of that to which they had every reason to think themselves entitled, and who have had no reason to believe that their interests would be contested.

The direction in the will of the testator was distinct, it was therefore the duty of the executors and trustees to have obeyed that direction, and to have converted the leaseholds into money. That course, however, was not pursued, they permitted the successive tenants for life to enjoy the whole income, so that on their death the whole interest was gone, and nothing was reserved for those who became entitled in remainder.

It is attempted to answer this by saying that although the lease had been granted for sixty-one years, yet it was granted upon a bad title: that the lessor was [76] only tenant in tail, and had no right to grant a longer lease than that which a tenant in tail has the power to grant. It is not very material how that may be, for if the parties who became successively entitled to this property after the death of the tenant in tail did not think fit to dispute the lease, but allowed it to continue as if it were a legal and valid lease, and thereby permitted the persons who were to enjoy the benefit of it under the will to receive the whole profit, such persons were not entitled to retain the whole profit for their own benefit, but ought to have secured it for all the persons entitled under the testator's will, and amongst them for the contingent legatees. It is said, and perhaps truly, that if this property had been sold at the time, a very small sum would have been produced for the tenants for life and those in remainder, but, however that might have been, the property ought to have been secured for the persons in remainder; and if by the forbearance of those who were entitled to dispute the validity of the lease, profit was made by it, the whole of it ought not to have been received by the tenants for life alone, but all the persons entitled under the will were entitled to their proportion of the benefit of it.

It is then said, that the Plaintiffs are precluded by the length of time which has occurred since these transactions took place. The tenant for life died in 1831, upon which event the Plaintiffs' interest first vested absolutely, and this bill was filed in 1836. It is true that the Plaintiffs might immediately on the death of the testator have filed a bill to have their interests secured, but they were under no obligation to do so, and their neglect so to do did not authorise the trustees and executors to deal with their property in the way they have done; persons entitled in remainder or contingency only, are not to be precluded from relief be-[77]-cause they do not file their bill until after their interests have become vested in possession. I am therefore of opinion, that no such time elapsed between the death of the tenant for life in 1831 and the filing of this bill as to deprive these parties of relief.

With respect to the former suit, if there were anything whatever to shew, that the Plaintiffs at the time when they prosecuted that suit were in any degree aware of any right they might have with respect to the matter now complained of, I should certainly have thought their conduct such as would have prevented their commencing a fresh suit for the relief they now ask; but this does appear to me to be a discovery made since that time. It is clear that the decree in that cause is not so framed as to give to the parties the relief which they seek for in this cause; and I think, after some hesitation, and having had some doubt about the matter in the course of this proceeding, that I ought not to consider that decree as one which deprived the Plaintiffs of the relief they now ask, and which, independently of that decree, they would be most clearly entitled to. Though there has been some neglect, I think I am bound to give the Plaintiffs relief, but I ought not to give them the costs, on the contrary, having regard to the other suit, the costs of this suit, though for redress against a breach of trust, must come out of the sum recovered.

It remains to be considered to what extent the Defendants are liable. If the matter had been rightly conducted, the leases would have been sold on the testator's death: the produce would have been invested: the income would have been paid to the tenants for life, and the capital preserved for those entitled in remainder. What is to be ascertained is the value of the leases at the time [78] when they ought to have been sold. I should scarcely think it worth while to take any enquiry as to the one which was assigned for a nominal consideration; with respect to the other the real object is to ascertain what was its value to be sold at the time when it ought to have been sold, which I apprehend to be a year after the death of the testator. Now

if I were to direct it simply in that way, the Defendant would of course say it was worth nothing to be sold, because there was a bad title. I cannot think that that would be right; what is to be ascertained is the value of the lease, having regard to the enjoyment which was actually had under it; it must then be ascertained how much stock could have been purchased with that amount, and that, I think, is what the Plaintiffs are entitled to.

[78] GILLETT v. PEPPERCORNE. July 25, 27, 1840.

[Cf. *Robinson v. Mollett*, 1874, L. R. 7 H. L. 802.]

A. employed B, a stockbroker, to purchase some Canal shares. B. apparently bought them from C, the ostensible owner, but who afterwards turned out to be a mere trustee for B. The Court, after a lapse of several years, and without entering into the question of the fairness of the price, Held that the transaction was void on grounds of public policy, and set it aside with costs.

The Defendant, a stockbroker, was largely interested in the South Lambeth Water works Company, of which he was also an active director. Having recommended the Plaintiff to make investments therein, the Plaintiff, in May 1826, December 1830, and January 1831 respectively, purchased through the Defendant twenty-five shares in the undertaking, and which shares were transferred to the Plaintiff by persons named Ewart, Cole, and Manning respectively, and from whom, apparently, the Defendant purchased such shares for the Plaintiff. It subsequently turned out that at the times of the sales these shares actually belonged to the [79] Defendant, and that they had shortly previous been transferred into the names of the apparent vendors, as trustees for him. Some of these shares had, after their purchase, been transferred by the Plaintiff to his sons by way of advancement; but they were retransferred the day previous to the institution of this suit. The Plaintiff, as he alleged, made this discovery in 1837, and in 1838 he filed this bill to set aside the transaction, on the ground that it was not competent to a stockbroker or agent employed to purchase, to sell his own shares to his principal in the name of another party; that the prices given were extravagant; that the Defendant had been guilty of fraudulent concealment of the real fact: and the bill prayed that the Defendant might return to him the purchase-money given for the shares, with interest at 5 per cent., the Plaintiff offering the retransfer the shares, and all the profits received by him.

The Defendant, by his answer, insisted that he had not acted as the broker of the Defendant, but merely as a friend; that the prices given were the fair market prices; that no fraud had been intended; and that the transfer had been made through the medium of a third party, in order to prevent the depression in the price of shares, which would have been created by a transfer by one so intimately connected with the company; he also relied on the Statute of Limitations.

There was no evidence of the prices charged being extravagant, or of any fraud having been intended, and it appeared also, that the Plaintiff was a large proprietor of shares purchased from other persons.

Mr. Pemberton and Mr. Loftus Wigram, for the Plaintiff, argued that shares of this description, the number of which were limited, had no market price like the [80] public funds, and that therefore it was not possible accurately to ascertain their real value. That a party employed as agent to purchase on behalf of his principal was not permitted, by the rules of equity, to sell to his principal, unless he clearly informed his employer of the fact. That sales so made were altogether void in equity, and the transaction was liable to be set aside. That the principle had been settled by this Court and the House of Lords in the case of *Brookman v. Rothschild* (3 Simons, 153, 2 Dow & CL 188, 5 Bligh, 165, N. R.). That here there had been an improper concealment of the facts, which could only be accounted for by the party intending to do what was wrong; and that the Defendant was liable to refund the purchase-money, with interest, at 5 per cent.; *Bick v. Motley* (2 Myl. & K. 312), *Bate v. Scales* (12 Vesey, 402), and *Munch v. Cockerell* (9 Simons, 339).

Mr. C. P. Cooper, Mr. Bethell, and Mr. E. Montague, *contra*, contended that the

Defendant had not acted as the Plaintiff's broker, but gratuitously as his friend; and that the advice he had given was *bona fide*, and had turned out to be sound. That the prices given for the shares did not exceed their market value, or what would have been given to a third party; that no loss had been sustained, and consequently that the allegations in the Plaintiff's bill failed. That the Plaintiff and his son, who had access to the company's books, must be taken to be cognizant of the facts; that the delay in commencing proceedings was a bar to relief; and that the retransfer by the son to enable the father to commence this suit was contrary to the Statutes of Champerty and Maintenance, *Prosser v. Edmonds* (1 Y. & Col. 481), and had this effect, that the Plaintiff now claimed not in his own right, but as representing his son, who had no right of suit. They argued also [81] that no fraud or intention to deceive existed; that the only reason for transferring through a third party was to prevent the injurious effect which would result in the price of shares in the market, if an active director were known to be parting with his interest in the concern; that the proceeding was common on the Stock Exchange, and was known by the name of an assignment by double transfer; they insisted also that the case differed from *Brookman v. Rothschild*, where there were a series of fictitious transactions, terminating in a loss.

Mr. Pemberton, in reply, contended that no time would bar relief in respect of a fraud; that where a fraud had been committed and concealed, the onus rested on the person committing it, of shewing when the veil had first been removed, and the party defrauded first made aware of his rights.

THE MASTER OF THE ROLLS [Lord Langdale]. Though this case has necessarily occupied considerable time, and has been argued with great ability, yet the question, as it seems to me, is a very simple and short one. I have not now to consider what was the value of the shares when bought by the Plaintiff, but I have simply to determine on the validity of the different transactions at the time when they took place. If they are to be established, both parties will remain in their present situation; but if otherwise, it must be the endeavour of the Court to restore them to the situation in which they would have been, if these transactions had never taken place.

It appears from the facts admitted, that the Plaintiff and Defendant in this case had been on terms of intimacy for a great length of time, and that the Plaintiff [82] had very frequently employed the Defendant as his stockbroker and agent. The Defendant was a director and the principal manager of the Vauxhall Waterworks Company. The Plaintiff began to have an interest in that company about April 1826; and about the same time, or in the beginning of the following month of May, the Plaintiff was desirous of increasing his interest in the company. The first transaction, which is impeached, was completed through the medium of the Defendant on the 8th of May; and it appears to me from the documents, that in that transaction, the Defendant did act as the agent of the Plaintiff; that transaction, on the face of it, was a purchase by the Defendant of ten shares, from a Mr. Ewart, the apparent owner, who conveyed those shares to the Plaintiff at a price amounting altogether, with the stamp, to the sum of £931; and it seems that on the 29th of April, a few days before, the Defendant had, for a nominal consideration, transferred to Mr. Ewart the same number of shares; and on the whole, it appears beyond doubt, that at the time when the Defendant was apparently acting as the agent of the Plaintiff in purchasing the shares for him from Mr. Ewart, he was, in fact, selling and causing to be transferred shares which were his own property.

The second transaction which is impeached took place in December 1830; upon that occasion it appears to me from the documents, without going further, that the Defendant was acting as the gratuitous agent of the Plaintiff; but the acting gratuitously makes no difference in my mind as to the result of this transaction. Mr. Benjamin Cole then transferred ten shares in this company to the Plaintiff. Now, so far as the Plaintiff could judge from the transaction, Mr. Cole appeared to transfer ten shares to him, or according to his nomination; and [83] Mr. Peppercorne appeared to be acting as the agent of the Plaintiff, procuring that transfer and affecting that purchase; while the fact was, that on that very day Mr. Cole had received ten shares from a person of the name of Davies, and on the same day Mr. Davies, for a nominal consideration, had received from the Defendant six shares in that company. It is further alleged by the bill, that at some considerable time previous, Mr. Davies had

also received from the Defendant the other four shares for a nominal consideration ; but I do not consider that to be proved.

The third transaction which is impeached took place on the 20th of January 1831. Upon that occasion, also, it appears to me, that the Defendant was acting as the agent of the Plaintiff. The transaction, on the face of it, was a purchase from, and a transfer by Mr. Manning of five shares. The costs of those shares was £454, 17s. 6d. ; and in this case, as in the former, it seems that the Defendant had previously transferred those five shares to Mr. Manning for a nominal consideration. To the extent, therefore, of the twenty-one shares, it appears to me that the Defendant sold the shares which were belonging to himself to the Plaintiff, when, at the time, he was appearing to the Plaintiff to act as his agent, and to be purchasing them from somebody else. The single question in this case, I apprehend is, whether such a transaction can be supported.

It is said that this is every day's practice in the city. I certainly should be very sorry to have it proved to me that such a sort of dealing is usual ; for nothing can be more open to the commission of fraud than transactions of this nature. Where a man employs another as his agent, it is on the faith that such agent will act [84] in the matter purely and disinterestedly for the benefit of his employer, and assuredly not with the notion that the person whose assistance is required as agent, has himself in the very transaction, an interest directly opposed to that of his principal. It frequently, I believe, happens that the same person is agent for both parties, in which case he holds an even hand, and acts, in one sense, as arbitrator between them ; but if a person employed as agent on account of his skill and knowledge is to have, in the very same transaction, an interest directly opposite to that of his employer, it is evident that the relation between the parties then becomes of such a nature, as must inevitably lead to continued disappointment, if not to the continued practice of fraud.

I am of opinion that these transactions cannot be supported ; not only are they in themselves so extremely likely to lead to the commission of fraud, as to make them directly against the policy of the law ; but in those cases which have occasionally come to the knowledge of the Court, and which fortunately have not been frequent, it has invariably been found that fraud has been the result of such transactions. It is not necessary to shew that fraud was intended, or that loss afterwards took place in consequence of these transactions, because the Defendant, though he might have entertained no intention whatever of fraud, was placed in such a situation of trust with regard to the Plaintiff that the transaction cannot, in the contemplation of this Court, be considered valid.

Being for these reasons of opinion, that these transactions cannot stand, the next question is, whether anything has taken place to deprive the Plaintiff of the right of saying to Mr. Peppercorne, "Put me in the situation in which I was before ; whether these shares [85] were of greater value or not, I do not choose to be at the risk of selling the shares which now stand in my name : they have been transferred to me in a manner which the law does not warrant, and I desire to be placed in the situation in which I should have been, if the transaction had never taken place." First, with regard to the length of time ; there is nothing to shew that this was discovered before the year 1837 ; it is not sufficient to say that the Plaintiff, being a proprietor, might have gone to the books and made a search and found out all these matters, or that the son, being a director and having the books before him, might have made this search ; the knowledge, in my opinion, ought to have been brought home to the Plaintiff, and this has not been done.

With respect to the other point as to the transfer made previously to the institution of the suit, I do not think it makes any difference. The prayer of the bill, to the extent of the twenty-one shares, must, therefore, be granted : the Defendant ought to take back those shares, with all the dividends which have been paid upon them, and he ought to pay to the Plaintiff the purchase-money, with interest at the rate of 5 per cent., and the costs of this suit.

[86] HODGES v. THE CROYDON CANAL COMPANY. July 8, 1840.

[See *Kinnaird v. Trollope*, 1889, 42 Ch. D. 617.]

A canal company conveyed, under their common seal, the canal, works and rates to a mortgagee, to hold, &c., until repayment of certain money borrowed and interest. There was no covenant to repay. Held, under the modern Statutes of Limitations, that although the mortgagee could recover the principal within twenty years, yet his remedy for arrears of interest was limited to six years.

The point in dispute was, whether a mortgagee was entitled to six years' or twenty years' arrears of interest. The Defendant, the mortgagee, was willing before suit to pay the principal and six years' interest, but made no tender. At the hearing the mortgagee succeeded on the point of interest. Held, that as there had been no tender, the mortgagee must pay the costs.

By the Act incorporating the Croydon Canal Company (41 G. 3), they were empowered to borrow money by mortgage according to a particular form.

In 1810 they borrowed £300 from L. Brickwood, which was secured by mortgage under their common seal, whereby the company bargained, &c., to Brickwood the canal and all the works, and all the rates payable by virtue of the Act, to hold, &c., until the said sum of £300, with interest at £5 per cent., should be repaid. There was no covenant to pay.

No interest had been paid subsequent to October 1819, and under an Act of the 5th W. 4, the Croydon Canal was sold to the Croydon Railway Company for £40,250, and it was enacted that the purchase-money and all other the monies belonging to the Croydon Canal Company, should, from time to time, be paid and applied, under the orders and directions of the committee for the time being of such company, in or towards the performing, observing, paying, answering and satisfying all the mortgage and other debts, contracts, engagements, damages and expenses, and all other claims, demands and liabilities whatsoever, to which the said canal company were or might be subject or liable, and which were or ought to be performed, observed, paid, answered, or satisfied by the same canal company, or [87] so far as the same monies would extend; and the surplus (if any) of the said purchase, compensation, and other monies, which might ultimately remain after answering the purposes aforesaid, should be paid and distributed, under the like orders and directions, to and amongst the proprietors, for the time being, of the shares in the said Croydon Canal Company.

This bill was filed in June 1839 by Hodges, the assignee of the estate of Brickwood, on behalf, &c., against the canal company, for an account of what was due on the mortgage, and for payment. The Defendants stated they were ready and willing, prior to the institution of the suit, to pay the Plaintiff his principal and six years' interest; and the question was, whether the Plaintiff was entitled, consistently with the recent Statutes of Limitations, to recover more than six years' arrear of interest.

By the 3 & 4 W. 4, c. 27, entitled "An Act for the Limitation of Actions and Suits relating to Real Property," &c., it is enacted by the fortieth section, that no suit shall be brought to recover any sum of money secured by any mortgage, &c., or otherwise charged upon any land, but within twenty years after the right shall have accrued, unless some part payment or acknowledgment shall have been made in the meantime. The forty-second section provides that no arrears of rent, or of interest in respect of any money charged upon or payable out of any land, &c., shall be recovered by action or suit but within six years after the same shall have become due; provided that where a prior mortgagee has been in possession within one year next before an action or suit brought by any subsequent mortgagee, the latter may recover interest for the whole time the former was in possession.

[88] By a subsequent Act of the 3 & 4 W. 4, c. 42, entitled "An Act for the further Amendment of the Law, and the Better Advancement of Justice," it is enacted by the third section, that all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, shall be brought within twenty years after the cause of such action or suit but not after.

The cause now came on for hearing.

Mr. Piggott (in the absence of Mr. Pemberton), for the Plaintiff, contended that the 3 & 4 W. 4, c. 27, s. 42 was not applicable to this case, and that the Plaintiff was entitled to recover twenty years' arrear of interest under the 3 & 4 W. 4, c. 42, s. 3. That it would be absurd to allow a party to recover the principal after twenty years, and yet limit the remedy for interest to six years. That the point had been raised in *Paget v. Foley* (2 Bing. N. C. 679), where it was insisted that an action of covenant for rent in arrear could not be brought after six years; but the Court of Common Pleas held otherwise, and that the statute of the 3 & 4 W. 4, c. 42 governed the case.

That the mortgagee, but for the Railway Act, might have entered at any time within twenty years after the last payment (1 Vict. c. 28), and he would not have been dispossessed until full payment of all the arrears of interest. That the Railway Act was not intended to defeat the rights of the mortgagees, and although no entry could now be made, yet the Plaintiff's rights must be considered as extensive as if that Act had never passed.

[89] He also argued that the Railway Act created a trust for payment of the creditors of the canal company.

As to costs, that there having been no actual tender, the Plaintiff was entitled to his costs of suit; *Gammon v. Stone* (1 Ves. sen. 339), and that in *Garforth v. Bradley* (2 Ves. sen. 678), where there had been several tenders, yet the mortgagee was considered entitled to costs, except for his having been vexatious.

Mr. Kindersley and Mr. Chandlee, *contra*, contended that the terms of the 3 & 4 W. 4, c. 27 were express, and that the Plaintiff could not recover more than six years' arrear of interest. That there was no covenant or security on which to sue according to the second cited Act, but the security was on the land alone. That the second Act had reference only to actions on specialties where there was a personal liability. That the Railway Act did not alter or extend the rights of the creditors. As to the costs, they insisted that the Plaintiff had claimed too much, and the Defendants having always been ready to pay the principal and six years' interest, it must follow, that if the Plaintiff should fail as to the interest, which was the only point in difference, he ought to be ordered to pay the costs of the suit which had been occasioned by his insisting on more than he was entitled to.

THE MASTER OF THE ROLLS [Lord Langdale]. This bill is filed for the recovery of a mortgage secured on land, and not on rates alone; and the only question is, what arrears of interest can be recovered on the principal sum of £300. This must depend on the [90] different Statutes of Limitation. The 3 & 4 W. 4, c. 27, s. 42 enacts "That after the said 31st of December 1833," &c. Now I cannot doubt that this money is "charged upon or payable out of land or rent," and according to this clause, interest cannot be recovered for more than six years. I am then referred to another Act, the 3 & 4 W. 4, c. 42, the third section of which enacts "That all actions of debt," &c. In this case, there is no covenant or engagement to pay, there is simply a conveyance of the canal, &c. Is this then the species of action of covenant or of debt upon bond or other specialty referred to in the second Act? I think not, and that this case depends on the first Act; consequently no more than six years of interest can be recovered.

As to the costs, there was no tender or offer to pay until the bill was filed; the Defendants must, therefore, pay the costs. If there had been a tender of the principal and six years' interest, then the Plaintiff would have had to pay them. The result of this litigation is, that the Plaintiff loses his fourteen years' interest, and the Defendants the whole costs of the suit.

[91] ATTORNEY-GENERAL v. BRETTINGHAM. July 11, 13, 1840.

Ten acres of charity land were alienated by the trustees in consideration of £55, and a fixed rent charge of £6: Held, that it was incumbent on those claiming the benefit of the alienation to shew that the transaction was beneficial for the charity, and not having done so it was held invalid.

The Court does not consider it the duty of the Attorney-General to contend for his

strict rights in charity informations; in cases of hardship it sanctions his acting with forbearance towards the parties; and will postpone its decision, to give the parties an opportunity of entering into an arrangement with the Attorney-General.

A piece of copyhold land of ten acres, without the walls of the City of Norwich, was held by trustees for the poor of the parish of St. Mary, under a will dated in 1561, which described it as ten acres of arable land. In April 1725 the trustees, in consideration of a yearly rent charge of £6 and £55 in money, agreed to surrender the property to Matthew Brettingham and his heirs, and out of the £6 he was to be at liberty to deduct 9s. 7d., which was a yearly rent due to the lord of the manor.

The property was conveyed, and the £55 was paid and invested, and now consisted of £100 consols standing in the names of the trustees.

This information was filed in 1835 by the Attorney-General, on the certificate of the Charity Commissioners, stating the present annual value of the property to be about £100 a year, insisting that the trustees had no powers to alienate, and praying a reconveyance of the property upon the trusts of the charity.

There was no relator named in the information. The bill contained a statement, "that it was generally understood in the parish that the land so devised, before it was sold, was unprofitable, uninclosed, and used for playground." The agreement for sale, dated the 6th of April 1725, stated, "that by this agreement the parish made a considerable improvement of this charity, [92] for Mr. Brettingham was to pay £30 over and above the £6 per annum, and which £30 the trustees agreed to have applied to the use of the poor of St. Mary's, in the same manner as the £6 per annum was to be applied, and to that end land was to be bought and settled accordingly."

The Defendant, who had become entitled to the property (being the fifth owner in succession from the purchaser), stated his belief, that the ground was unprofitable at the time of the sale; that the sale was beneficial to the charity; that large sums had been since expended; and he submitted that the alienation was valid, and in case of being compelled to surrender, he claimed to be allowed the monies laid out in permanent improvements.

The witnesses on the part of the information deposed that the present annual value of the property was about £130.

The Defendant's witnesses proved that the buildings erected about the year 1725 must have cost £1338, and that the money expended in building, &c., since 1820 amounted to £750.

Mr. Kindersley and Mr. Blunt, in support of the information. Trustees of a charity have no power to alienate the charity property, it is of itself a breach of trust. Even in the case of leases, their powers are limited; as where it is shewn that the mode of letting is such, that no person meaning fairly to discharge his trust would have resorted to it, *Attorney-General v. Cross* (3 Mer. 540). Or, [93] where there is a lease for ninety-nine years at a fixed rent, the transaction cannot be supported, *Attorney-General v. Lord Hotham* (Turn. & Russ. 209); so where a lease is made for ninety-nine years, "it is incumbent on the lessee, taking a term of that duration, to shew a consideration making that a proper lease, as in the ordinary course of a provident management of an estate, it is not:" *Attorney-General v. Brooke* (18 Ves. 326; and see *Attorney-General v. Kerr*, 2 Beavan, 420): *à fortiori*, then must a party who takes under an alienation at a fixed rent charge shew its fairness. Here, there is a permanent alienation of charity property for a fixed rent of 12s. an acre, which cannot be supported.

Mr. Pemberton, Mr. George Turner, and Mr. Bird, *contra*, after commenting on the harshness of this proceeding, in which the Attorney-General had filed an information without a relator responsible for costs, to set aside a transaction after 115 years' acquiescence, and suggesting no fraud, but relying simply on the dry principle of law, proceeded to argue, that the trustees of a charity were under no absolute incapacity which prevented them alienating the property, if under the circumstances it was beneficial to the charity. In *The Attorney-General v. Hungerford* (8 Bli. 437; 2 Cl. & Fin. 357), a lease of charity lands renewable for ever at a fixed rent, which amounted to an alienation of the inheritance, was supported by the House of Lords; there, Lord Brougham, in giving judgment, distinctly stated, that an alienation might not

only be harmless as regarded a breach of trust, but be fit for trustees to adopt, and be such as on an information by the Attorney-General they might be compelled to do. The case had been previously decided in the same way by Lord [94] Plunkett, who, in giving judgment, fully considered all the former decisions (8 Bli. 455). In *The Attorney-General v. Warren* (2 Swan. 302), the Court observed, "There is no positive law which says, that in no instance shall there be an absolute alienation;" and again, "alienation not improvident, but beneficial to the charity, and conformable to the rule which ought to guide the trustees, may be good." In *The Attorney-General v. Pembroke Hall* (2 Si. & Stu. 441), where the trustees of a charity conveyed to Pembroke Hall part of their lands in lieu of an annual sum payable thereout, the Court would not disturb the arrangement, and made this observation, which is very applicable to the present case: "I cannot think it the office of a Court of Equity, at the distance of more than two centuries, to undo an arrangement which was perfectly fair at the time, between the contracting parties."

That if this were a case of fraud or undervalue, it ought to be alleged and proved by the Attorney-General; but now, after a lapse of so many years, when the witnesses were dead and the evidence destroyed, every presumption ought to be made in favour of the transaction, especially where no allegation of improvidence was stated on the information.

Mr. Jeremy, for the trustees.

THE MASTER OF THE ROLLS [Lord Langdale], without hearing a reply, observed, I am of opinion that this transaction cannot stand. I think this a hard case, and that a discretion on the part of the public might well have been exercised by abstaining from prosecuting it, but being brought before the Court, it must be dealt with strictly upon the law and the facts as they appear.

[95] This being an absolute alienation of charity property in consideration of a perpetual rent charge and a sum of £30, I think it is incumbent upon those who claim the benefit of that alienation to shew that it was beneficial to the charity. That has not been done on the present occasion, it is difficult even to presume it, yet without that presumption it is impossible to sustain the transaction. Considering, therefore, that it cannot be supported, it is a matter of difficulty to determine what relief is to be given. It would, I think, be better to leave the matter for the present for the consideration of the Attorney-General; the case is a very hard one, and the Attorney-General will exercise a very sound discretion by treating with the parties leniently, or, if I may say so, liberally. If, however, he thinks fit to call upon the Court to act according to the strict rules of law, the Court, whatever regret it may feel, must do so; but I cannot help saying that it is much better in this case, as in a case before Lord Eldon, to leave the consideration of this matter for some time, at least, in the hands of the Attorney-General. I ought to state, in consequence of something that has passed during the argument, that I do not think it is the duty of the Attorney-General in all cases to contend strictly for the rights which the law may give him; I found my opinion, on reasons which appear to me to be quite consistent with general policy; and, if example were wanting, I have that of Lord Eldon, in *The Attorney-General v. The Corporation of Exeter* (2 Russ. 370), who referred it to the Attorney-General of the day to consider whether it would be proper for the charity to accept a less sum than was found to be due to it. Lord Eldon, in that case, did not receive from the Attorney-General an answer that it was no part of his business to relieve the Court from its perplexity, [96] but the Attorney-General took the matter into his consideration, and made his report, which was afterwards confirmed and acted on by the Lord Chancellor.

I should state, that I have never received an answer of that description from any Attorney-General; and I hope that every Attorney-General whilst he acts in the vigorous discharge of his duty to redress breaches of charitable trusts will consider it to be his duty to act considerately and with forbearance in all proper cases. The law arms him with great power, and enables him to bring parties before the Court without the peril of costs. That power is intended for the benefit of the public, and ought to be used, as it generally is, with forbearance, and without oppression to individuals.

The cause was ordered to stand over to enable the Attorney-General to take the case into his favourable consideration.

[97] BASTIN v. WATTS. July 24, 1840.

[S. C. 4 Jur. 791.]

A testator devised a copyhold estate to trustees, in trust to pay the rents to his wife until his youngest child attained twenty-one, she maintaining his children until that event; and when and as soon as that event should happen, upon trust to pay one-fifth of the rents to his wife for life. He then gave the remaining four-fifths separately to his four daughters, *nominatim*, for life, with remainder to their respective children; and it was his will that if any of his children should die without issue *that the share of her so dying* should go to the children of such of his daughters as should leave issue; but in case all his daughters should die without leaving lawful issue, then he devised all his said real and personal estate unto his brothers and sisters; he subsequently devised the one-fifth given to the wife for life in a similar manner. A., one of the daughters, died without issue before the youngest attained twenty-one. Held, that the shares vested on the youngest attaining twenty-one; that the gift over was only of *vested* shares, and therefore that there was an intestacy as to the one-fifth intended for A.

William Bastin, the testator, by his will, dated in 1818, devised and bequeathed to trustees his five copyhold messuages, &c., in Cheltenham, and all other his real and personal estate, upon trust to pay the rents and profits unto his wife, Sarah Bastin, until his youngest child should attain the age of twenty-one years (provided she continued his widow), she maintaining, &c., his four children; but in case his wife should die or marry again before his youngest child attained twenty-one, then he directed his trustees to apply such rents and profits towards the support, &c., of his children "until his youngest child should attain the age of twenty-one years; and *when and as soon as that event should happen*," the testator directed that his trustees, &c., "should divide his said real and personal estate into five equal shares and proportions, and that his said trustees should stand possessed thereof, upon trust to pay the rents, issues, and profits of one-fifth part thereof unto his said wife, Sarah Bastin, and her assigns for her life, or so long thereof as she should continue his widow," which he directed should be made up £100 a year. And if she married again he revoked the devise in her favour, and in lieu gave her an annuity of £80. And he "further directed that as to one other equal [98] fifth part of all his said real and personal estate, his said trustees should pay the rents, issues, and profits thereof unto his daughter, Mary Ann Bastin, and her assigns for life, and after her decease upon trust to convey such share unto all and every the child or children of Mary Ann Bastin; to hold to her, him, or them, their heirs, executors, administrators, and assigns as tenants in common;" and he gave in similar terms another one-fifth to his daughter Emily for life, with remainder to her children; and a third one-fifth to his daughter Charlotte for life, with remainder to her children; and the remaining one-fifth the said testator directed should be paid to his daughter Juliana Bastin, under the same provisions, limitations, and restrictions; and the testator directed the shares to his daughters should be for their separate use.

"Provided, and the testator's will was, that in case any or either of his said children should die without issue, *that the share or shares of her or them so dying* should go and belong to all and every the child and children of such of his said daughters as should happen to leave issue, his, her, and their heirs and assigns as tenants in common; but in case all his said children should die without leaving lawful issue, then the said testator devised and bequeathed *his said real and personal estate unto his brother and two sisters*, to hold to them, their heirs, executors, administrators, and assigns as tenants in common.

"And from and after the decease of Sarah Bastin, the testator directed that his trustees should stand possessed of the said fifth part, or share of his said real and personal estate, the rents, issues, and profits whereof were thereinbefore given to Sarah Bastin for her life, upon trust to pay and apply the rents, issues, and [99] profits thereof between his said daughters in equal shares in manner aforesaid, and to convey and assure the same unto and between all the children of the said testator's

said daughters, their heirs or assigns as tenants in common, or in default of issue to the said testator's brother and sisters in such and the same manner, and to the same uses, intents, and purposes as were thereinbefore expressed with regard to the said four shares thereinbefore devised."

The testator died shortly after, leaving his widow and four daughters surviving him.

In 1829 the testator's daughter Juliana died an infant without issue, and on the 24th of May 1837 Emily the youngest surviving daughter attained twenty-one. Neither of the surviving daughters had any issue.

The only remaining property of the testator consisted of the copyhold houses in Cheltenham, the rents of the one-fifth part wherof, originally intended for the testator's daughter Juliana, had been carried to a separate account until the determination of the rights of the parties thereto under the above circumstances. A supplemental bill was filed for determining that point, and it now came on for hearing.

Mr. Pemberton and Mr. Koe, for the surviving daughters contended, that the gift to Juliana did not vest until the youngest attained twenty-one, and that having died before that period, she had acquired no vested interest; so that even her children (if she had had any) could not have taken. That the gift over, being of the vested share only to which the daughter Juliana at her [100] death might be entitled, had failed by the death of Juliana during the minority of Emily; that there was consequently an intestacy as to the one-fifth intended for Juliana.

Mr. Kindersley and Mr. Blower, for the heir of one of the deceased sisters of the testator; and

Mr. G. Turner and Mr. James Campbell, for a surviving brother and sister of the testator, admitted that nothing vested in Juliana; but they contended, that the gift over was of the share intended for her; that the ultimate gift to the brothers and sisters was expressed to be "of my said real and personal estate," which was a residuary gift, and not a gift of the particular contingent shares previously given to the daughters, and that this shewed clearly the meaning of the testator in the previous gifts over.

That the gift over to the brothers and sisters was not too remote, and that they would be entitled in the event of the other daughters dying without children. They insisted, that until the one-fifth vested, the rents of that share of the estate ought to be accumulated so long as the law allowed, and that the accumulated fund arising from the mesne profits would belong to those ultimately found entitled to Juliana's share; they cited *Fearne Cont. Rem.* (page 543), *Genery v. Fitzgerald* (Jacob, 468), *Gibson v. Lord Montfort* (1 Ves. sen. 485), *Chapman v. Blissett* (Ca. tem. Talbot, 145); and see *Stephens v. Stephens* (Ca. tem. Talbot, 228).

Mr. Pemberton, in reply. The subsequent gift over of the wife's one-fifth, shews that the prior gift over to [101] the brothers and sisters was not of a residue, but of the particular vested shares.

THE MASTER OF THE ROLLS [Lord Langdale]. It appears to me, that upon the true construction of this will, the brothers and sisters are entitled only to such shares as had become previously vested in the wife and children. I apprehend that this testator never contemplated the event of any child dying before the youngest attained twenty-one; and in that respect he seems to have made a very absurd disposition of his property. He gave the whole of his property to trustees upon trust, to pay the income to the wife until the majority of his youngest child, for the support of herself and her children. When the youngest attained twenty-one, then there is a distinct gift in five equal parts, one to the wife, and the other to each of the four children; and there are remainders over as to the shares which were given to the children, and which were to vest in the children when the youngest attained twenty-one. He proceeds then to consider certain events which might happen: that some of his children might die without leaving issue, in which case he gives *their shares*, that is the shares previously vested, to the *children* of the other daughters. This, which is certainly a very singular provision, was a gift over of those shares only which had vested in his daughter. It was admitted in the argument, that no share vested in his daughter Juliana, and without relying upon that admission, it appears to me that this is the true construction of this will; and then comes the gift over to the brothers and

sisters, in the very same clause, and in the very same sentence, in which he has been giving over those shares only which had become vested in the children. That this is not a general residuary clause applied to the [102] whole estate, is perfectly manifest; because it applies only to the shares of the children, and not to that of the wife, and the testator seems so conscious of it, that he proceeds immediately to dispose, separately from the others, of that share which he had previously given to the wife. This, therefore, is not that general and universal gift which is required for the purposes of the argument. I think the real effect of the will is, to give over to these parties those shares which were previously vested, and no other; there is, therefore, an intestacy as to the share in question.

[102] ROBERTSON v. CRAWFORD. June 6, 10, 1840.

A. B., a widow entitled to a pension *durante viduitate*, cohabited with C. D. in Scotland. In regard to society, they held themselves out as man and wife; but with respect to the pension, they acted as if they were unmarried, and A. B. half-yearly made solemn declarations of widowhood for the purpose of obtaining the pension. Held, on exceptions to the Master's report, that on the whole, he was right in finding that no valid marriage had taken place.

In this case it had been referred to the Master to enquire whether the Plaintiffs Mr. and Mrs. Robertson had contracted a valid marriage previously to the 5th of June 1828. The Master found in the negative, and the Defendants took an exception to his report, thereby questioning the accuracy of the finding.

The circumstances which gave rise to the question in the suit are fully stated in his Lordship's judgment.

Mr. Tinney and Mr. K. Parker, in support of the exception.

Mr. Pemberton, Mr. Kindersley, and Mr. Schomberg, *contra*.

[103] June 10. THE MASTER OF THE ROLLS [Lord Langdale]. In the year 1815 the Plaintiff Harriet Robertson, then Harriet Bouchier, as the widow of a civil servant of the East India Company belonging to the Presidency of Bombay, became entitled to a pension payable to her during her widowhood, out of the Bombay Civil Fund.

On the 5th of June 1828 it was resolved by the subscribers to the fund, that the pension from the fund then enjoyed by the widow of any member should not be discontinued on her marriage.

On this resolution being communicated to Mrs. Robertson, she stated it to be her intention to avail herself of it, and she afterwards sent to the Defendants, who are the agents of the trustees of the fund, a paper writing purporting to be a copy of a certificate of a marriage between the Plaintiffs on the 5th of March 1830; and in the same paper writing the parties were stated to have been re-married "having been previous irregularly wed."

This reference to a previous marriage which, though stated to be irregular, might have been perfectly valid, induced the trustees of the fund to enquire when such previous marriage took place. If it took place before the 5th day of June 1828, the pension payable to Mrs. Bouchier during her widowhood then ceased. No satisfactory answer having been given to the enquiries which were made, the trustees refused to continue the payment; Mr. and Mrs. Robertson therefore filed this bill against the agents of the trustees, and at the hearing it was referred to the Master to enquire whether the Plaintiffs had contracted a valid marriage previous to the 5th of June 1828. The Master has found that they [104] did not contract a valid marriage before that time, and the question comes before me upon an exception to his report.

Upon the evidence produced before the Master, it appears that if any marriage took place between Mr. and Mrs. Robertson on the 5th of March 1830, the circumstances under which the marriage took place were greatly misrepresented by Mr. and Mrs. Robertson, and the certificate, of which a paper writing purporting to be a copy was produced, appears to have been a mere invention. The sanction upon oath of so gross a fiction as this appears to me to have been, necessarily takes from the credit of the guilty parties; but innocent persons involved in the appearance of guilt or dishonour, and not knowing how to extricate themselves by direct means, have

often been found to resort to improper and guilty means to defend themselves against a charge really unfounded; and it is necessary to be very cautious not to convert the disapprobation of the improper means employed for defence, into a belief of the truth of the charge which those improper means of defence were intended to meet: the credit of the party is most materially affected, but proof of the charge is not the less required.

I have read the evidence with the impression that no fact, depending solely on the oaths of Mr. and Mrs. Robertson, ought to be relied upon; but the case is to be made out against them: they cannot prove a negative; and where their statement is corroborated by other witnesses it must be attended to; and it is, I think, not to be rejected in cases where it is consistent with all the facts otherwise proved, and where, if false, it might have been easily contradicted; and so considering the evidence, it appears to me that Mr. and Mrs. Robertson [105] formed an illicit connection, and went to Scotland in the year 1818 or 1819, that they cohabited there, and permitted themselves to be called Mr. and Mrs. Robertson, and were by several persons considered to be married; but that Mrs. Robertson half-yearly made a solemn declaration that she was not married, and that their conduct was so equivocal, that although some persons considered them to be married, there were several others who considered them not to be married.

From the beginning of this connection Mr. and Mrs. Robertson were desirous to preserve her pension, which was only payable during her widowhood, and also to preserve some reputation in society, which could only be had by marriage or supposed marriage. Widowhood was the title to the pension, marriage was the title to respect in society; there could be a real title only to one; but the parties desired to have both, and consequently whatever the real fact was, there was constant practice of misrepresentation—to the Defendants there was a periodical declaration of widowhood, to the society where they lived there was a course of conduct from which marriage was to be, and perhaps was intended to be, inferred.

It is from the midst of this miserable equivocation, this habitual and degrading deception, that it has been necessary to collect the evidence by means of which it is to be ascertained, if possible, what was the real fact.

Bearing in mind that marriage is everywhere a contract, and requires the consent of parties, and that whatever may be the circumstances from which, by the law of some countries, consent may be presumed, it is plain that in this case, as in other cases of presumption, all the circumstances must be considered, as well those which re-[106]-pel, as those which support the presumption alleged. On the whole, I think, that the evidence preponderates in favour of the Master's finding. It appears to me, that the parties when they first went to Scotland were not married—the first connection between them was illicit—their conduct when they first went to Scotland gave rise to a belief, that the connection was illicit, in the minds of other persons, and the question seems to be, whether their equivocal conduct is to be accounted for, by supposing that they were not married, and desired to keep up appearances, or by supposing that they were really married, and yet acted in a way to excite suspicion at least, for the purpose of disguising the marriage and defrauding the trustees of the pension fund; and it seems to me greatly more probable, that persons who were under a strong desire to preserve the pension, and whose notions of virtue and morality did not preserve them from the illicit connection they formed, should rather determine to maintain a valid title to the pension, and trust to such contrivances as chance offered for acquiring and maintaining without just title some respect in society, than that they should act virtuously and morally in their personal connection, whilst they were defrauding the trustees of the fund, by actual declarations on oath before a magistrate, and by equivocal conduct destroying the title to consideration, to which their lawful connection entitled them; and I think that on the whole, the evidence supports this view of the case, and shews, that so far as these parties cohabited in such a manner as to create a habit and repute from which marriage might be inferred, they did so for the sake of appearances only, and without any notion or consent by either party that a marriage would thereby be constituted or evidenced. The opinions which I have read by the consent of the parties inform me, that the mere appearance to the world, and the habit and repute will not necessarily make a mar-[107]-riage by the law of Scotland, if it can be sufficiently inferred that

the contract of marriage had never truly been formed by the consent of parties : that is to say, that the circumstances on which the belief of others might be founded or leading to [the inference, were permitted or arranged for the purpose of disguise and appearance only, and that the parties privately knew that no tie actually existed between them ; and considering the mode in which the connection between these parties was formed, their loose morality, their interest to preserve the pension, the equivocal circumstances in which they appeared in Scotland to several persons who have made affidavits, and the periodical declarations made on oath by Mrs. Robertson, and exposing her to the risk of punishment if shewn to be false, I think I must conclude that the title to the money is that which they preserved valid, and that they were content to rest on appearances only for any claim which they made for admission into virtuous and respectable society.

Their whole life seems to have been passed in attempts to maintain appearances, without losing their title to the pension. Isabella Guthrie had heard Mr. Robertson speak of his wife Mrs. Robertson, and other witnesses depose nearly to the same effect, but only one direct admission or declaration is proved. Mrs. Robertson, then Mrs. Bouchier, had placed three of her sons by Mr. Bouchier under the care of Mr. Graham the rector of a school at Haddington. In March or April 1819 she went to see them, accompanied by Mr. Robertson ; she was pregnant, and Mrs. Graham supposed that a private marriage had taken place. In the summer of the same year she again visited her sons, and placed another with Mr. Graham, and then told Mrs. Graham that she was married to Mr. Robertson, and had borne him a son, who was nursing at Thorningside. [108] Considering the circumstances, the communication with Mrs. Graham, with whose husband her sons were boarded, that when she visited her sons her state of pregnancy was apparent, and that she repeated her visit after that pregnancy had ceased ; the occasion seems to have been one in which, for the sake of appearances for herself, and to avoid serious inconveniences to her sons, she might be most desirous to represent herself as married, though the fact were otherwise.

Taking this declaration or admission in connection with all the other facts of the case, I do not think that it can be held to constitute a marriage, or to be any evidence of a consent to marry.

It appears from the evidence, and particularly from the affidavits of Dr. Struthers and Mr. Glen, that whatever doubts might have arisen in the minds of some persons, Mr. and Mrs. Robertson had so far succeeded in keeping up appearances, as to sustain a respectable character, and to be deemed married persons to a considerable extent ; how important this was to their reception into society, and to the welfare of the daughters of Mrs. Robertson by Mr. Bouchier, may well be conceived, yet she half-yearly made her declaration on oath that she was not married.

It can hardly be doubted, that when the certificate of the 5th of March 1830 was fabricated, the expressions which gave rise to this litigation, were inserted with a view to persuade some persons that there had been a marriage during the whole time of cohabitation, without suggesting to the other persons who had received the periodical declarations, that any marriage had taken place during the time that such declarations had continued.

[109] Nothing is to be said in any way to excuse or palliate the conduct which Mr. and Mrs. Robertson have pursued, but it is my duty to adjudicate on their civil rights, and with a view to that object, to determine upon the evidence before me, whether the Master has rightly found that these parties were not married before the 5th of June 1828, and I think that he has ; and, therefore, that the exception must be overruled.

[109] BUNNY v. BUNNY. July 27, 1840.

[S. C. 9 L. J. Ch. (N. S.), 335 ; 4 Jur. 716. See *Farrer v. St. Catherine's College, Cambridge*, 1873, L. R. 16 Eq. 23.]

By her will a testatrix gave legacies of £200 each to the seven children of J. B. B., and also other interests. By her first codicil she revoked the legacies of £200 to the children of J. B. B., and all other legacies given by the will, and in lieu gave

legacies of £200 each to Samuel and four other children of J. B. B. by name. By her second codicil she cancelled all legacies left in her will to J. B. B.'s children, and by a third codicil she revoked the legacy of £200 by a previous codicil to her will given to Samuel. Held, that the legacies of £200 each, given to the other four children by the first codicil, were not revoked.

The question in this case was, whether certain legacies of £200 each, given by the first codicil to the will of the testatrix, were or were not revoked.

On the 20th of November 1824 the testatrix made her will, which was prepared in a formal manner, commencing, "this is the last will," &c., and she thereby, amongst other legacies, gave as follows:—"I give to the seven children of my said cousin Joseph Blandy Bunny a legacy of £200 each." She also thereby gave to each of such children as should be living at her death, a reversionary interest in a sum of £1750.

On the 15th of August 1835 she made a codicil to her will, which was also prepared in a formal manner, commencing with the words, "This is a codicil [110] to my will" dated the 10th November 1824, and it contained this passage:—"I revoke the legacy of £200 each to the children of my late cousin, Joseph Blandy Bunny, and all and every other legacy, benefit or bequest, given to them or any of them under my said will, and in lieu thereof, I give only the legacy of £200 each to Samuel Bunny, Joseph Bunny, Martha Bunny, Elizabeth Bunny, and Anna Bunny, five of the children of my said cousin Joseph Blandy Bunny."

On the 18th of August 1836 the testatrix wrote on a small piece of paper the following memorandum, which was proved as a testamentary paper:—"I cancel all the legacies I have left on my (1) will to my late cousin Joseph Blandy Bunny's children.—A. BUNNY, August 1836."

On the 21st of December 1836 she made another formal codicil, commencing, "This is a further codicil to the last will and testament of me," &c., which bears date the 20th November 1824, and which contained the following passage:—"I revoke the legacy of £200 by a previous codicil to my said will, given to Samuel Bunny, the eldest son of my late cousin, Joseph Blandy Bunny." She thereby also gave other legacies, and declared it to be a further codicil to her said will, and to be deemed and taken as part thereof.

Joseph, Martha, Elizabeth, and Anna Bunny, by this bill claimed the legacies of £200 each given by the first codicil of the 15th of August 1835, and the question was, whether, on the context of the testamentary papers, these legacies had or had not been revoked.

[111] Mr. Pemberton and Mr. John Baily, for the Plaintiffs. By her first codicil the testatrix revokes the gift of £200 each to a class of seven persons, and in lieu gives like legacies of £200 each to five of those individuals, *nominatim*. The testatrix, who throughout makes a distinction between her will and codicil, by the second codicil cancels the legacies given by the will; she did not refer to the gifts in the first codicil, and therefore leaves the legacies given by the first codicil untouched: this construction is confirmed by the third codicil: for she thereby *revokes* a legacy of £200 "by a previous codicil," given to Samuel, one of the five persons; this shews that she conceived, that the legacy given to him by the previous codicil had not already been revoked: for, if revoked, it would have been perfectly useless to have made another codicil expressly revoking it; and, further, if she had intended the other four persons to take nothing, why not revoke their legacies at the same time with that of Samuel? Even if the second codicil revoked the legacies given by the first, the third codicil would operate as a restitution of them. A construction must be put on these instruments which will make the whole consistent: that can only be done by holding that the Plaintiffs are entitled, which construction is clearly in accordance with the intention of the testatrix.

The principle which ought to guide in the decision of such cases, is thus stated by Tindal, C. J., in giving judgment in *Doe dem. Hearle v. Hicks* (8 Bing. 480): "If the devise in the will is clear, it is incumbent on those who contend it is not to take effect by reason of a revocation in the codicil, to shew that the intention to revoke is

(1) It was argued that this word in the original was "any," and not "my."

equally clear and free from doubt, as the original intention to devise; for if there is only a reasonable doubt, whether the clause of revocation was intended to in-[112]-clude the particular devise, then such devise ought undoubtedly to stand."

A codicil ought not to be presumed a revocation, unless it distinctly appears: *Griffiths v. Grieve* (1 Jac. & W. 31). The case of *Miles v. Clark* (1 Keen, 92), was very similar to the present: there the "testatrix bequeathed a legacy to A. for life, with remainder to his children; by a codicil she revoked all gifts to A. and his children, except Amelia, to whom she gave £400; the testatrix subsequently, in a letter to Amelia, which was proved as testamentary, said, "I cut A. and his children off from every bequest I have formerly given to him or them." It was held, that the gift to Amelia, though one of A.'s children, was not thereby revoked.

Mr. Tinney and Mr. Piggott, *contra*, contended that at the time of making the second codicil, the original will and the first codicil together formed the will of the testatrix, for all codicils form part of a will: *Crosbie v. MacDoual* (4 Ves. 610), so that by the second codicil the testatrix, in cancelling all the legacies she had left in her will to the children of Joseph Blandy Bunny revoked the gifts both in the will and in the first codicil. If she had died immediately after the execution of the second codicil, there could have been no question; and if so the gift by the first codicil could not be revived by implication: *Skerratt v. Oakley* (7 Term Rep. 492); that whatever might be conjectured as to the intention of the testatrix, that intention, if omitted, could not now be supplied: *Holder v. Howell* (8 Ves. 97). That there was no greater inconsistency in the testatrix twice revoking the legacies to Samuel, than there would be in adopting the Plaintiffs' construction, [113] which assumed that she had twice revoked the legacies of £200 given by the will, namely, by the first and third codicils.

Mr. Pemberton, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. It appears to me that the Plaintiffs are entitled. The testatrix commences her will and the first and third codicils with formal words; she terms the first "her will," and the two others "a codicil to her will," and "a further codicil to her will, bearing date the 20th of November 1824;" and the principal question is, what the testatrix means by the word "will," when used in the second codicil. She must mean either her will or her will and codicil taken together; if she meant the former, she was doing what was unnecessary, as the legacies by the will had already been revoked; and if she meant her will and codicil, then it is not easy to account for the subsequent revocation of a supposed existing gift to Samuel. In this state of inconsistency, by far the most reasonable hypothesis is, that she was desirous of having it clearly known that she had revoked the bequests of £200 each given by her will, and that in the absence of advice, she wrote the paper, which was a short repetition of what she had already done; any doubt seems removed by the subsequent codicil, when she appears to have had advice: no longer relying on her recollection, and having the assistance of a professional person, she revokes the legacies of £200 by a previous codicil given to Samuel. It is manifest that she and the person who was advising her then considered that Samuel, and consequently the Plaintiffs also, had at that time legacies left by the previous testamentary papers. I am of opinion, therefore, that the Plaintiffs are entitled, and must decree accordingly.

Decree for the Plaintiffs.

[114] NEWMAN v. HUTTON. July 8, 9, 1840.

The bill alleged that the Plaintiff had paid to the Defendants a sum of £1250 as the balance of accounts between them, the Plaintiff being at that time deranged, and labouring under the erroneous impression that the Defendants could transport him; and it alleged that nothing was due from the Plaintiff, and prayed for an account and repayment. The Defendants, by a plea, stated that the parties had come to a settlement of account, and after giving credit to the Plaintiff for the sum due to him, a sum exceeding £1250 was found due to the Defendants, which by final settlement was paid, and receipts given; there was an averment that the accounts were just, that credit was given to the Plaintiff for all sums due, and that

Defendants were justly entitled to credit for all sums for which credit had been given: that there was no error in the account, and that the Plaintiff was of sound mind. There was, however, no denial, by answer or averment, that the £1250 was not due. The plea was overruled.

The bill, in effect, stated that the Plaintiff had been employed by the Defendants as captain and supercargo of the Defendants' ships trading to Africa, at a fixed salary, and a commission on the goods sold. That he made four voyages without having any settlement of accounts, and that he returned to England in a very bad state of health, and was at times deranged. That he pressed for a settlement of accounts, and that the Defendants, pretending that the Plaintiff had been guilty of embezzlement, which the bill alleged to be untrue, threatened to prosecute him for felony. That a meeting took place for the settlement of the accounts, and that the Defendants made claims on the Plaintiff, amounting to £1650, which were afterwards reduced to £1250, which sum, as the bill alleged, "the Plaintiff, who was at the time in a deranged state of mind, agreed should be paid to the Defendants." The bill alleged "that the Plaintiff was not, in fact, indebted in the sum of £1250, or in any sum of money, but that the Defendants were, in fact, at that time largely indebted to him; and that he consented to pay the said sum of £1250 while labouring under temporary derangement, and under the erroneous impression that the Defendants had it in their power to transport him, and in order to prevent their so doing." The bill alleged that it was [115] then agreed that the £1250 should be paid by the Plaintiff, and that mutual receipts should be given in full of all demands, which was done the next day.

The bill prayed that an account might be taken of what was due to the Plaintiff; that the £1250 might be repaid, and that the agreement and receipt might be delivered up to be cancelled.

The Defendants put in a plea and answer to this bill; the plea stating that disputes having arisen between the Plaintiff and Defendants, they met for the purpose of coming to a final settlement; that the books of account of the Plaintiff and Defendants were produced and examined, and the state of the accounts ascertained (a calculation being made of the commission due to the Plaintiff on certain unsold goods), and after giving credit to Plaintiff for £904, which sum was calculated to be due to him, there was or would, under such computation, be due to the Defendants a sum considerably exceeding £1250; which, by way of final settlement of all accounts between them, it was agreed should be paid by the Plaintiff to the Defendants; and that receipts in full of all demands were to be mutually given. The plea then set out the written agreement, and stated that on the following day the money was paid, and mutual receipts were given; it averred that the books of account were just and true, that credit was justly given to the Plaintiff for all sums due, and that the Defendants were justly entitled to credit for all sums in respect of which credit was taken; that there were no errors in the account, and that the Plaintiff, at the time, was of sound and accounting mind. There was an answer to the part of the bill omitted from the plea, but there was no denial, by answer or averment, of the allegation in the bill that the £1250 was not due.

[116] Mr. Kindersley and Mr. Spurrer, in support of the plea.

Mr. Pemberton and Mr. Elderton, *contra*.

THE MASTER OF THE ROLLS [Lord Langdale]. Considering the nature of this suit, and the extreme improbability that the allegations can be true, I am not surprised at the effort which has been made to shorten the suit and lessen the expences.

This bill states matters of account between the parties, and that it was necessary to settle them; that the Plaintiff was in a deranged state of mind from the time of leaving Africa, and that the Defendants procured a settlement of these accounts when he was in that state of insanity.

The bill also states that the Defendants alleged that they had the grounds for establishing a criminal charge against the Plaintiff, and that, if convicted, he would necessarily have been transported; and alleges that in this state of mind, and to avoid the consequences stated in this threat, he paid the £1250; there is also an allegation that the Plaintiff was not, in fact, at all indebted to the Defendants at the time of the settlement and payment.

The bill prays that an account may be taken of what remains due to the Plaintiff, for the repayment of the sum of £1250, and for the delivery up of the memorandum of agreement and receipt.

I need not state that if these facts were true, the Plaintiff would be entitled to have the transaction reinvestigated, and it would seem a very common equity in [117] this Court to have accounts opened and reinvestigated where, under threats, payment of a sum not due has been obtained.

To this bill the Defendants put in a plea and answer; the plea stating that a sort of agreement or settlement of accounts was made, averring that the accounts in the books were just and true, that there were no errors, and that the Plaintiff was then of sound mind; and they answer that part of the bill which is omitted from the plea; but there is no answer to the statement that nothing was due to the Defendants.

The Defendants say, that the parties met to settle these accounts, that a great part of the Plaintiff's claim related to commission on goods actually sold, another part to commission on goods not sold; and it is stated that they ascertained what was due in respect of the goods sold, and computed what was due in respect of goods unsold, and that, on the balance of accounts, more than £1250 appeared due from the Plaintiff to the Defendants; and they state that the accounts in the books were just and true accounts. But can these statements, taken together, be considered as an answer to the charge in the bill, that the Plaintiff was not indebted to the Defendants in £1250 or any sum of money? I think they cannot. It therefore does appear, from the allegation remaining uncontradicted, that £1250 was not due, and that as the Plaintiff was induced to sign the receipt under threats, he is still entitled to relief, and the plea must be overruled, with costs.

[118] DAVIES v. HARFORD. July 4, 18, 1840.

The Defendants were ordered to deposit certain documents with their clerk in Court for the usual purposes, and to give an inspection of the remainder at their office, and produce them at the examination of witnesses and at the hearing. Held, that the production on the examination of witnesses in town and at the hearing should be at the expense of the Defendants; and for production on the examination of witnesses in the country, at the expence of the Plaintiff.

The point in this case is fully stated in the judgment.

Mr. Pemberton, for the Plaintiff.

Mr. Tinney, for the Defendants.

THE MASTER OF THE ROLLS. In this case the Plaintiff has obtained an order that the Defendants do produce and leave with their clerk in Court certain books and papers, and the Plaintiff is to be at liberty, at all reasonable times and upon giving reasonable notice, to inspect, at the office of the Defendants, three several ledgers, and to take copies thereof, or extracts therefrom at the Plaintiff's expence; and the Defendants and their clerk in Court respectively are to produce the books and papers on the examination of witnesses, and at the hearing of the cause.

The parties differ upon the minutes of the order, only in this respect, that the Defendants say, that as the production of the ledgers on the examination of witnesses and at the hearing is to be for the benefit of the Plaintiff, it ought to be at the Plaintiff's expence, and to be so expressed in the order; whereas the Plaintiff says, that according to the rules of the Court, which are relaxed only for the convenience of the Defendants, the ledgers ought to be deposited in the hands of the clerk in Court, and that if they were so, there would be no expence incurred by the production on the examination of wit-[119]-nesses in town or at the hearing; and that the expence of production on the examination of witnesses in the country would, if required by them, have to be paid by them in the usual course, but that in consequence of the ledgers being left in the hands of the Defendants for their convenience, there will be considerable expence in the production on the examination of witnesses in town, and at the hearing.

No precedent has been found of any provision for costs in such an order as this.

Let the production be ordered on the examination of witnesses in town and at the hearing at the expence of the Defendants, and for production on the examination of witnesses in the country at the expence of the Plaintiff.

[119] THE DURHAM AND SUNDERLAND RAILWAY COMPANY v. WAWN.
July 18, 22, 1840.

[S. C. 4 Jur. 764.]

The Court will restrain one tenant in common from the wilful destruction of the common property; but where a railroad company had obtained a lease from five out of six tenants in common, and had, contrary to the wishes of the remaining tenant in common, constructed a railroad on the property, which, at law, had been held to be an ouster, the Court refused to interfere by injunction to prevent the dissenting tenant in common removing the rails, &c., though the rent agreed to be paid by the company was three times the former rent.

The Defendant Mr. Wawn was tenant by the curtesy with remainder to his infant son of one undivided sixth part of two messuages, and two quays or wharfs adjoining thereto, situate in Sunderland; the remaining five-sixths being vested in other persons. This property was let at an annual rent of £30: The Plaintiffs being, in 1835, desirous of obtaining this property [120] for the purposes of their railway, agreed with the other tenants in common for a lease of it for ninety-nine years at the old rent, until the railway had commenced its operations, and thenceforward at a rent of £90 a year. A lease had been prepared by which the several tenants in common purported to grant the property to the company on the above terms, with liberty to pull down the houses and to erect works and machinery, and the company covenanted at the expiration of the lease to replace the property in its former condition. This lease, dated the 1st of July 1835, was executed by the other tenants in common, but the Defendant refused to execute it, alleging that he had entered into no agreement to grant a lease.

In August 1835 the company nevertheless entered into possession, and pulled down the houses, and erected the railway, works, &c., on the site at some considerable expence. A lengthened correspondence took place between the company and Mr. Wawn as to his concurring in the lease, but which it is unnecessary to set forth. In December 1835 Mr. Wawn gave notice of his intention to bring an action against the company, and he accordingly brought an action of ejectment to recover possession, but was defeated by an outstanding term set up by the company. (See *Doe v. Wawn v. Horn*, 3 Meeson & W. 333.) He afterwards brought a second action and recovered. (3 Meeson & W. 564.) On the 11th of May 1840 the Defendant caused a writ of possession for one-sixth of the property to be issued; and on the 29th of June the company filed this bill against Mr. Wawn and the other tenants in common, stating the above facts, and that from information they had received, they believed that the Defendant Wawn would, on being put into possession of his one-sixth, pull down the buildings, &c., [121] erected by the company, and pull up the railway by violence; and unless prevented by injunction would take such proceedings as would in all probability lead to a breach of the peace; the bill prayed for an injunction.

On the 30th of June the Master of the Rolls, for the purpose of preventing any damage until the question could be discussed, granted an injunction *ex parte*, restraining the Defendant from damaging the buildings and railway.

The Defendant now moved to dissolve the injunction.

Mr. Bethell and Mr. Hare, in support of the motion, contended, that an injunction to stay waste had in no case been granted on the application of one tenant in common against another; that such was the distinct opinion of Lord Eldon in *Hole v. Thomas* (7 Ves. 589), who granted an injunction in that case, on the express ground that the Defendant was there cutting timber of one-third growth at an improper season, his Lordship observing, "for that is destruction." So in *Twort v. Twort* (16 Ves. 128), Lord Eldon expressed the same opinion that there was no instance of an injunction having been granted between tenants in common or coparceners, nay, further, that

such motions had been refused (see *Goodwyn v. Spray*, 2 Dickens, 667); the injunction was granted in that case expressly on the ground that the tenant in common in possession was an occupying tenant to the Plaintiff. That it had been determined in this very case at law, that there had been a legal ouster by laying down the railway, and that there was no equity to prevent the [122] Defendant from removing it if he pleased. That there had been no acquiescence on the part of the Defendant, who had all along repudiated the agreement of the other tenants in common.

Mr. Pemberton and Mr. Elderton, *contra*, contended that, although a tenant in common had an unquestionable right of using property in a beneficial manner for himself, still he had no right so to deal with it as to destroy the profitable enjoyment of it by the other tenants in common; that here it was evidently most beneficial to all parties to lease the property at a triple rent, and that a mere tenant for life of one-sixth could not be allowed to prevent the other parties interested in the property from enjoying that benefit. That to take up the rail would be a mere wilful destruction of the property, and in the cases cited the Court admitted that an injunction would be granted between tenants in common "in a case of malicious destruction." (7 Ves. 590.) So in *Twort v. Twort*, it was said by Lord Eldon, "Where a case of positive and actual destruction appeared, I granted an injunction, as that was not the legitimate exercise of the enjoyment arising out of the nature of the party's title to that which belonged to him and the other party." There, also, the Defendant had, by acquiescence—by standing by and allowing the Defendants to make a great outlay on the property, prevented himself enforcing his strict legal rights to the Plaintiff's prejudice.

Mr. Bethell, in reply. No acquiescence is stated in the bill, nor has any been shewn. The Plaintiffs have put the property in its present state by their own wrong and violence, and [123] in opposition to the wish of the Defendant, who has a strict right to place it in its former position.

July 22. THE MASTER OF THE ROLLS [Lord Langdale]. I have read the papers in this case, and am of opinion that the injunction cannot be sustained. There are two grounds on which it has been put by the Plaintiffs; namely, acquiescence, and secondly, that the circumstances are such as to amount to wilful destruction of the common property. It cannot be sustained on the first ground, for it appears that the Defendant throughout has kept the company at arm's length. On the second point, that it involves the destruction of the property, two cases have been stated which are material as shewing this, that if property be held by tenants in common, and enjoyed in conformity with their common rights, and one makes wilful destruction of the common property, he will be restrained by the Court. This state of things does not exist: the state of things which now exists was brought about by the Plaintiffs, in defiance of the legal rights of the Defendant. This, therefore, does not appear to me to come within the principle of the cases cited, and the injunction must be dissolved with costs.

The Plaintiffs appealed to the Lord Chancellor, but, after the hearing, the case was compromised.

[124] GRAHAM v. OLIVER. July 2, 3, 1840.

A party, acting as the absolute owner, contracted to sell property. He was the absolute owner of part, and as to the other part he was tenant for life, with a power of sale, at his request and by his direction, vested in trustees. Upon a bill by the purchaser for a specific performance, an enquiry was directed "whether the Defendant could make a good title, or could, by application to the trustees, procure a good title to be made."

Difficulty in decreeing a partial performance of a contract, where a vendor has not the power of fully performing it.

Evidence of conversations not put in issue is inadmissible, but where conversations are alleged in the answer, evidence is admissible on the part of the Plaintiff to shew their effect, notwithstanding they are not stated in the bill.

This was a bill for specific perform, filed by William Graham against John Oliver.

In 1838 the Defendant Oliver, acting as the owner, entered into an agreement for the sale to the Plaintiff of about ninety-three acres of freehold land, some leaseholds, and two leasehold cottages for the sum of £5500. The Defendant having refused to perform his contract, the Plaintiff filed this bill, praying a specific performance of the agreement, upon the Defendant making a good title; or if he should not be able to make a good title to the whole, then for a specific performance as to that to which he could make a good title, with a reasonable abatement from the purchase-money.

According to the answer, it appeared that the Defendant was absolutely entitled to the leaseholds; that the cottages belonged to his mother, who had verbally promised to make him a present of them; and as to the freeholds, that on his marriage they had been settled on the Defendant for life, or until bankruptcy, &c., with remainder to his wife for her separate use, with remainder to the children of the marriage (which last limitations had failed by the death of his wife without issue), with remainder over to other persons; and it was declared that it should be lawful for the trustees of the [125] settlement, "at the request and by the direction of the Defendant during his life," to be testified by some writing, to sell the property at such price as to the trustees should seem reasonable.

The Defendant resisted the performance of the agreement on the following grounds: first, he insisted that the memorandum was a proposal only, and not a concluded agreement; secondly, he alleged that the word "cottages" had been struck out of the agreement before he executed it, and that therefore there was no existing contract as to them; thirdly, that the agreement had been unfairly obtained at an undervalue; and, fourthly, he insisted that he could not make a good title to the freehold, having no power to compel the trustees to execute the power of sale, and that he was wholly unable to complete the contract as to the cottages.

Mr. Pemberton, Mr. G. Turner, and Mr. G. Russell, for the Plaintiff, after combating the first three objections to a specific performance, depending on facts which it is not necessary to set out, argued, that the contract being valid, the Plaintiff was entitled to a specific performance, either as to the whole, or as to such part as the Defendant was able to make a good title to, and that this was a case for a partial performance with a compensation: *Thomas v. Dering* (1 Keen, 729), *Mortlock v. Buller* (10 Ves. 316), *Hill v. Buckley* (17 Ves. 394), *Milligan v. Cooke* (16 Ves. 1).

That as yet there was no proof of the Defendant's being unable to make a good title, or that the trustees [126] would not concur, they therefore asked for a reference to the Master, similar to that in *Glyn v. Sawle*.⁽¹⁾

Mr. Kindersley and Mr. S. Sharpe, for the Defendant.

Courts of Equity will not decree the specific performance of every contract to purchase, if any doubt or hardship exists in the case, it will leave the parties to their remedy at law for damages on the contract; here sufficient doubt has been thrown on the transaction to induce the Court to withhold its intervention, especially in a case where the rights of persons not parties to the cause are deeply concerned. If the trustees were parties to the cause, which they are not, they would not be compelled to perform a contract to which they were not parties, or commit a breach of trust; even the tenant for life may, for the benefit of the parties interested under the settlement, insist that he has not exercised a sound discretion. The settled and unsettled property has been sold for one gross sum; this was improvident as regards the settled property, as the respective values cannot be clearly and satisfactorily ascertained, and the prices severed.

(1) *Glyn v. Sawle* was a bill by vendors for specific performance of agreement to purchase lands in Cornwall. One objection raised by the Defendants was that on part of the estate there existed certain rights of tin bounds, which authorized persons, not otherwise interested in the estate, to enter for the purpose of searching for and working tin mines.

By the decree of the Master of the Rolls, dated 25th of July 1838, it was referred to the Master to inquire whether a good title could be made to the estate in question, and at what time it was first shewn, "and in case the Master should be of opinion that a good title could not be made, he was to state the reasons upon which such opinion was founded."

As to a partial performance, the case cited of *Thomas v. Dering* negatives the right of the Plaintiff to have a [127] conveyance of the life-estate, and here there is no alternative prayer, as there was in that case.

Mr. George Turner, in reply, referred to *Clark v. Seymour* (7 Sim. 87).

THE MASTER OF THE ROLLS [Lord Landgate]. This bill, for the specific performance of an agreement or contract, is certainly filed under very unfortunate and very peculiar circumstances.

The Defendant being entitled to part of the property as tenant for life, and as to other part being absolutely entitled, and with regard to the remainder, it being very doubtful whether he had any title at all, enters into a contract to sell the whole property to the Plaintiff, as if it was his own. Being called upon to perform the agreement, he first of all disputes the validity of the contract. I am of opinion, however, upon the evidence, that the contract is binding upon the Defendant, and that there is no reason whatever for saying that it was unfairly obtained. The Plaintiff is, therefore, either entitled in this Court to a specific performance as to the whole or in part, or he is entitled to damages at law for the non-performance of his contract. It does not at present appear whether this contract can be specifically performed and carried into execution or not. It certainly can, provided the trustees, who have a power of sale, at the request, and by the direction, of the Defendant, think it an advantageous and proper transaction to be carried into effect by them. If this appeared to be the case, I should have no difficulty in compelling the Defendant to perform his part of the contract. If the [128] trustees do not so consider it, the Plaintiff then demands to have the contract carried into effect, so far as it can be, by the Defendant; and this case must then be considered with relation both to the freehold or settled property, and the leaseholds. If the Plaintiff demands the conveyance of the mere interest which the Defendant has in the freehold or settled property and in the leaseholds, then the question arises, which was considered by me in the case of *Thomas v. Dering*, whether, having regard to all the circumstances, to the nature of the property, and to the trusts of the settlement, to which part of it is subject, there ought to be that partial performance.

The general rule, subject to some qualification, undoubtedly is, that where a party has entered into a contract for the sale of more than he has, the purchaser, if he thinks fit to accept that which it is in the power of the vendor to give, is entitled to a performance to that extent.

There is, however, a very great difficulty in all these cases, and I scarcely know how it can be overcome; though a partial performance only, it has been somewhat incorrectly called a specific performance; the sentiments of Lord Redesdale on this point, as expressed by him in two cases before him, are strongly impressed on my mind. (*Lawrenson v. Butler*, 1 Sch. & Lef. 13; *Harnett v. Yeilding*, 2 Sch. & Lef. 553.) The Court has thought it right in many cases to get over those difficulties for the purpose of compelling parties to perform the agreements into which they have entered; and it is right they should be compelled to do so where it can be done without any great preponderance of inconvenience.

[129] I think it right to direct an inquiry in the terms asked, making no declaration however at present as to the specific performance of the contract; the inquiry however is directed with a view to a specific performance, if upon the result it should be ascertained, that it can be properly directed in this case.

It is clear as to the leaseholds, that the Defendant has an absolute power of selling them, and I am not prepared to say, if the Plaintiff asked for a specific performance of the agreement so far as it related to those leaseholds, that he would not have a right to insist upon it; whether he would or not does not now appear.

As to the costs, it is not at present clear that a specific performance will be decreed; it may possibly happen, that notwithstanding the situation in which things now appear, this bill may ultimately be dismissed. I think it premature to give the costs in the present state of the cause; they must therefore be reserved.

A point occurred during the progress of this cause in respect to the admissibility of evidence. The Plaintiff proposed to give in evidence certain conversations with the Defendant which were not charged in the bill, but which to some extent were stated in the answer.

THE MASTER OF THE ROLLS said, I do not mean in any way to prejudice the

existing rule, that conversations not put in issue cannot be read in evidence, but in this case I think that to some extent the evidence is admissible. In the answer, communications to a particular effect are stated; these allegations being made by the Defendant, the Plaintiff has a right to meet them by evidence; and to the extent of shewing the real effect of these com-[130]-munications, or that they were not such as are stated in the answer, I am of opinion that these depositions may be read. So far as they tend to shew something quite unconnected with that which is alleged in the bill and answer, I think it would be an infringement of the rule to admit them.

EXTRACT OF DECREE.—Refer it to the Master to enquire whether the Defendant can make a good title, or can by application to the trustees of the indenture of settlement of the 2d and 3d days of November 1837, in the pleadings mentioned, procure a good title to be made to the premises comprised in the contract or agreement in the pleadings mentioned, including the cottage therein mentioned, or to any and what part thereof; and in case the said Master shall find that a good title cannot be made to the said premises or any part thereof, then he is to state to the Court the reason why such good title cannot be made, with liberty to state special circumstances.

[130] ATTORNEY-GENERAL v. THE HABERDASHERS' COMPANY.

A Master in Ordinary having become incapacitated from attending to the business of his office, the matters were transferred to the Master in rotation, with liberty for him to adopt the proceedings already had.

One of the Masters in Ordinary having by illness become permanently incapacitated from attending to the business of his office, frequent applications were made by motion to the Court, to transfer the matter to the office of another Master. In some of these cases the Master's report had been actually prepared, and only required his signature; and the application in such cases was, that the Master in rotation might sign the report.

THE MASTER OF THE ROLLS settled, in all these cases, that the proper order to be made was, "to transfer the matter to the Master in rotation, with liberty for him, if he should think fit, to adopt the proceedings already had in the Master's office."

[131] MATTISON v. TANFIELD. July 23, August 1, 1840.

[S. C. 4 Jur. 933. Cf. *Lewis v. Morris*, 1854, 19 Beav. 34.]

A testator devised real estate in trust, for the persons who at his decease should be the next of kin of R. D. deceased, according to the Statute of Distributions, and their heirs as tenants in common; the next of kin consisted of great-grandchildren's children, and the children of great-grandchildren's children: Held, that they took *per stirpes*, and not *per capita*.

The testator in this cause devised certain real estates to trustees, to hold to them their heirs and assigns, and proceeded to express himself as follows: "but in trust, nevertheless, for the person or persons who at the time of my decease shall be the next of kin of Richard Dixon, late of Thoraby aforesaid, grocer, deceased (the great-grandfather of my late wife Elizabeth Terry deceased), according to the statute made for the distribution of intestates' effects, and his, her, or their heirs and assigns for ever; and if there shall be more than one such person, they shall take as tenants in common, and not as joint-tenants."

At the death of the testator, there were living descendants of Richard Dixon, coming under the description of next of kin according to the Statute of Distribution, seventeen persons, seven of whom descended from Isabella, the only daughter, and ten of whom descended from Thomas Dixon, the only son of the same Richard Dixon, and they stood in different degrees of propinquity. The next of kin of equal degree were great-grandchildren's children; the rest were children of great-grandchildren's

children, who by representation according to the Statute of Distribution are deemed to be next of kin. That these were the persons to take was admitted, and the question was, whether they were to take *per capita* or *per stirpes*. The Plaintiffs, and the others who claimed as children of great-grandchildren's children, insisted that the seventeen next of kin thus ascertained, were to take *per capita*, and that each was [132] entitled to an equal seventeenth share of the whole estate; the others contended, that the division ought to be *per stirpes*, and that the children of each great-grandchild's child ought to take among them no more than the parent would have been entitled to if living at the testator's death.

Mr. Pemberton and Mr. Torriano, for the Plaintiffs.

Mr. Temple, Mr. Stuart, Mr. Atkinson, Mr. Romilly, Mr. Koe, Mr. J. Russell and Mr. Keene for other parties.

August 1. THE MASTER OF THE ROLLS [Lord Langdale]. It appears to me that the next of kin must take *per stirpes*. Those who are not next of kin in fact, but only deemed to be such according to the Statute of Distributions, make out their title by representation as the statute directs, and I think that they can be entitled only to such interest as might have belonged to the person they represent, unless there be words in the will which shew a contrary intention. In the absence of such words, it appears to me, that the testator, by referring to the statute must have referred to the taking by representation, allowed to persons standing in a remoter degree of propinquity than others.

The question is, therefore, reduced to this, whether the words of the will import an intention that the next of kin, though some of them derive their character as such by representation, are nevertheless to take *per capita*. The cases seem to shew that the word "equally" or the words "share and share alike," would here have had that effect. But the gift in this case is to the persons, and their heirs as tenants in common, and these [133] words are not exclusively applicable to equal interests as the words "equally," and "share and share alike" (*Thomas v. Hole*, Forrester, 251); and there being nothing in the will to shew a contrary intention, I think, that the parties who made out their right to be legatees, or devisees as next of kin by representation according to the statute, must under the will take by virtue of that representation, and only take the share of the person they represent. I think, therefore, that the estate belongs to the next of kin in shares to be determined by a distribution *per stirpes*.

[133] LEWIS v. CHAPMAN. Jan. 17, 20, August 8, 1840.

[Cf. *Hogg v. Scott*, 1874, L. R. 18 Eq. 444.]

Injunction to restrain the piracy of a publication, to which the Plaintiffs would have been otherwise entitled, refused on the ground of delay in making the application. Constructive knowledge imputed to the Plaintiffs by the Court, of an infringement of their copyright by the Defendants.

The Plaintiffs, Lewis and Pringle, who were the publishers of a work called "The Topographical Dictionary of England," applied for an injunction to restrain the Defendants, Messrs. Chapman and Hall, from printing, publishing, vending, &c., a work called "Gorton's Topographical Dictionary of England and Wales," portions of which, as they alleged, had been pirated from the Plaintiffs' work in a similar way to that stated in *Lewis v. Fullarton* (2 Beavan, 6).

The principal circumstances are stated in the Master of the Rolls' judgment.

Mr. Pemberton, Mr. Kindersley, and Mr. Hardy, for the Plaintiffs.

[134] Mr. G. Richards and Mr. Miller, *contra*, contended that no injunction ought to be granted until the Plaintiffs had established their title at law; that the two works had been compiled from common authorities, and that the Plaintiffs had deprived themselves of their right to an injunction by acquiescence and delay; they cited *Saunders v. Smith* (3 Mylne & Craig, 711).

THE MASTER OF THE ROLLS reserved his judgment until he had again read the affidavits.

August 8. THE MASTER OF THE ROLLS. In this case it has appeared, and upon

reconsideration now appears to me, that the injunction for which the Plaintiffs have moved ought not to be granted. The work of the Defendant which is sought to be restrained is on the same subject as the work in which the Plaintiffs claim copyright.

The two works were preparing for publication at the same time. The publication of the Defendants began first, and the attention of the Plaintiffs was drawn to it at the commencement, and afterwards during the progress of the Defendants' publication, which was completed six years and a half before the bill was filed; and for more than one year before the bill was filed a complete copy of the Defendants' work was in the possession of the Plaintiffs, and had been obtained by the Plaintiffs for the express and avowed purpose of investigating the contents and comparing them with the contents of the Plaintiffs' work, and the contents of Fullarton's book, which at that time was under consideration here. The delay of the Plaintiffs is accounted for by [135] reasons which affect them and relate to their own convenience only. In the consideration of the case I have seen no reason to doubt the Plaintiffs' copyright; and upon the examination of the exhibits I have found reason to think that in the preparation of Mr. Gorton's third volume, considerable use was made of the Plaintiffs' work: and although the small extent to which the Plaintiffs from time to time made themselves acquainted with the contents of the Defendants' work, may in point of fact be entirely true; yet it appears to me, that the Plaintiffs having so strong an interest in the subject, having such powerful motives for vigilant attention, and having such means of information, cannot be allowed in a Court of Justice to state that they remained ignorant of that which they had the perfect means of knowing, and which it was their avowed purpose as well as their strong interest to learn; and under these circumstances I think it my duty to impute to them such a knowledge of the contents of the Defendant's work as made it their duty to apply for an injunction, if at all, at a much earlier period.

And on the ground of delay, and not for any other reason, I think that the injunction moved for must be refused.

[136] WILSON v. CLUER. *July 17, August 1, 1840.*

[S. C. 9 L. J. Ch. 333; 4 Jur. 883. For subsequent proceedings, see 4 Beav. 214.]

Generally, annual rests are not directed against a mortgagee in possession, when the interest is in arrear at the time he took possession; and in the absence of special circumstances, if a mortgagee is not liable to account with annual rests, when he enters into possession, he does not become so liable, until the whole of the mortgage debt has been paid off.

Where, however, a mortgagee in possession came to an account with the mortgagor, whereby all the arrears of interest, &c., were converted into principal, leaving thereby no arrears, and he continued in possession, the rent being more than sufficient to keep down the interest, the Court directed annual rests.

This was a bill for redemption filed by a party entitled to the equity of redemption of the property in question against the representatives of the mortgagee.

In April 1789 Thomas Cluer mortgaged the property to his brother John Cluer, for securing £40 and lawful interest; this was effected by the assignment of an old term of 500 years. John Cluer in the same year took possession, but when, in particular, or whether any arrear of interest was then due did not clearly appear; he continued in possession until 1824.

In 1797 an account was taken between the parties, when it was ascertained and settled, that the sum of £128, 18s. 5d. was due to the mortgagee for principal interest and expenditure. In 1824 possession was retaken by the Plaintiff, and a sum of £40 was tendered by him to the mortgagee in payment of his demands.

John Cluer the mortgagee died in 1832, and the Defendant Hannah Cluer, who was his sole executrix brought an ejectment in 1833 and recovered possession in the following year; she had ever since retained possession.

At the hearing of the cause, it had been referred to the Master to take the accounts between the parties; by his report he treated the £128, 18s. 5d., found to

be [137] due in 1797 upon the settlement of accounts, as principal, and calculated interest thereon; and he found that £45, 5s. 7d. was due to the Defendant. It appeared that the annual rents were more than sufficient to discharge the interest on the £128, 18s. 5d.

The cause now came on for further directions on the Master's report, to which no exceptions had been taken.

Mr. Pemberton and Mr. Coleridge, for the Plaintiff. If the interest be not in arrear when a mortgagee takes possession and the rents exceed the interest, he is bound to apply the surplus in the liquidation of the principal, *Shepherd v. Elliot* (4 Mad. 254), and the Court in such a case will direct annual rests to be made against the mortgagee; this may be done on further directions, *Wilson v. Metcalfe* (1 Russ. 530). The mortgagee in this case took possession the same year in which the mortgage was made, and there could not have been any interest then due; besides which, by the settlement of accounts in 1797, the interest was converted into principal, and then, at least, nothing was due for interest. There ought therefore to be a reference back to the Master to review his report and take the account with annual rests, in which case it will appear that the Plaintiff has tendered more than was due.

Mr. Stinton, *contra*, contended that the pleadings and decree precluded the account now asked. That a very special case was required, to authorize an account with annual rests; *Davis v. May* (19 Ves. 382, and Cooper, 238), *Latter v. Dashwood* (6 Sim. 462; and see *Finch v. Brown*, 3 Beav. 70). That by the settlement of 1797 the parties agreed [138] amongst themselves in taking an account without rests, and had thereby recognized the principle that they should be taken in the usual mode.

Mr. Tinney and Mr. E. Montague, for other parties.

Mr. Pemberton, in reply.

August 1. THE MASTER OF THE ROLLS [Lord Langdale]. This cause came on for further directions on the Master's report, in a suit instituted for the redemption of a mortgage.

The mortgage consisted of a term of 500 years, which was created in the year 1758, and in the month of April 1789 was assigned to John Cluer to secure the repayment to him of £40 and lawful interest. The equity of redemption was then vested in Thomas Cluer the brother of John, the mortgagee.

John Cluer in the year 1789 (the same year in which the mortgage was assigned to him), took possession of the mortgaged estate, and he continued in such possession till the year 1834, a period of about thirty-five years.

At the time when possession was taken, there could not have been more than half a year's interest due on the mortgage money, and it does not appear whether, in fact, any interest was due at the time of taking possession in the year 1789.

The Master states in his report, that in the year 1797 an account was stated between John Cluer the mort-[139]-gagee, and his then late brother Thomas Cluer, of the 25th of March 1797, which contained an account of the expenditure of John Cluer the mortgagee in respect of the mortgaged premises, and also of the principal sum of £40 and interest secured thereon by the mortgage; and that by such account it was then ascertained and settled, that there was then due to John Cluer, the mortgagee, the sum of £128, 18s. 5d., upon the entire balance of such account for principal, interest, and expenditure; in the subsequent part of report, the Master treats this sum of £128, 18s. 5d., as principal money, and computes interest thereon. The particulars of the account are not stated, otherwise than as I have mentioned, nothing is said of rent, although at that time the mortgagee had been about eight years in possession of the estate; but taking this (as upon the Master's report not objected to I think I ought) as a settled account between mortgagor and mortgagee in possession, in relation to the mortgage debt and the amount due on the security, it appears, that all which was then due to the mortgagee, either was, or was then converted into, principal money; after the settlement of the account, £128, 18s. 5d., principal money was due on the mortgage, and nothing was due for interest. The mortgagee, having nothing due to him for interest, nevertheless continued in possession of the estate; and the rents and profits in every year exceeded the annual interest accruing due on the principal sum of £128, 18s. 5d., and on a further sum of £2, 0s. 4d., which at a subsequent period became due to the mortgagee for substantial repairs.

Under these circumstances, the question is, whether the surplus of the rents after satisfying the interest, ought or ought not to be annually applied in reduction of the principal money due on the mortgage; or in [140] other words, whether the account ought to be taken against the mortgagee with annual rests.

With some qualification perhaps, it may be said to be a general rule, not to direct annual rests to be made in the accounts of a mortgagee in possession, when the interest is in arrear at the time when he takes possession; and in the absence of any special reason, I conceive that if a mortgagee is not liable to account with annual rests when he enters into possession, he does not become so liable when the arrear of interest is paid off, or till after the whole of the mortgage debt has been paid off by receipt of the rents, although from the time when the debt is ascertained to be paid off, annual rests will be decreed, though none were ordered previously.

I am not aware of any case, in which, although the mortgagee may have taken possession under circumstances which did not render him liable to account, with annual rests, there was afterwards a settled account, by which it appeared either that no interest was due, or that any interest which was due was satisfied as interest, by being converted into principal, and the mortgagee continued in the receipt of rents of amount more than sufficient to satisfy the interest of such principal. But it appears to me, that such settlement of account ought to be considered as a rest made by the parties themselves; and that the mortgagee continuing in possession after the statement of such an account, and with no interest due to him, must, from that time, be dealt with as a mortgagee who takes possession, without any interest being in arrear.

Declare that from the 25th of March 1797, when the account was settled as in the report mentioned, the annual surplus of the rents after satisfying the in-[141]-terest of the principal, or so much thereof as remained due ought to be applied in reduction of the principal, and for that purpose refer it back to the Master to make annual rests in the account of rents and interest.

Having read the pleadings, I observe, that the account of 1797 is not mentioned, either in the bill or in the answer. There was in the year 1824 a tender of £40 which, upon taking the account as directed by the decree, appears to have been £2, 5s. 7d. less than the amount then actually due; and whether it was or not sufficient, being the principal point in the cause, the Plaintiff has failed in establishing his allegation, upon the mode of taking the account which he appeared to be entitled to upon his bill; the question of costs, under these circumstances, will have to be considered.

[141] *HICKS v. KEAT. August 7, 1840.*

Pending a suit for the administration of assets, and before the accounts had been taken, the Attorney-General presented a petition for payment out of the assets, of a sum which, under false representations, had been returned to the administrator as overpaid in respect of probate duty, and for the legacy duty payable by the administrator on his share of the residue. The administrator had wasted the assets, and the widow, who was entitled to one-third, had not been paid. Held, that the application was premature, and the petition was dismissed.

Whether the money thus repaid formed a primary charge on the fund, *quære*.

In an administration suit, the Court provides for the payment of the legacy duty before payment to the legatee.

Henry Gray Keat died intestate, leaving a widow and an only son Ebenezer Keat, who thereupon became entitled to his personal estate. His widow died shortly after, and Ebenezer Keat took out letters of administration to his father, swearing the property to be under £12,000, and paying £300 for probate duty.

[142] Upon the affidavit of Ebenezer Keat, stating that a mistake had been made in the valuation of the intestate's estate, and that the value thereof did not exceed £6000, the Commissioners of Stamps returned him £147, 15s. in respect of overpaid probate duty. Ebenezer Keat wasted the assets, and a suit was instituted against

him in this Court by the representatives of the widow, for the administration of the intestate's estate; the usual accounts had been directed to be taken before the Master, a sale of the leasehold property, which was the only remaining estate, had been directed, and a receiver appointed. No report had yet been made by the Master. Ebenezer Keat being called upon by the usual rule issuing out of the Court of Exchequer to render an account of the intestate's estate, rendered one, by which it appeared that the value amounted to £11,000 and upwards, and the duty of 1 per cent. on two-thirds, being the share of Ebenezer Keat, amounted to £77, 8s. 10d.

The Attorney-General presented this petition in the cause praying a declaration that the leaseholds were liable to answer the debt of £225, 3s. 10d., composed of the two above-named sums of £147, 15s. and £77, 8s. 10d., due to Her Majesty; that the same might be paid by the receiver out of the rents and profits, and if not paid out of the rents previous to the sale, then that it might be paid out of the produce of the sale.

Ebenezer Keat had become bankrupt.

Mr. J. Romilly, in support of the petition, contended that the probate and legacy duties were, under the statutes, a primary charge on the assets, and ought to be paid in priority to all other claims.

[143] Mr. Pemberton, *contra*, contended, as to the probate duty, that even if it were lien on the property, which he did not admit, still having been once actually paid, the assets had been released; and that the Commissioners had no right, under the statutes, to revert to the assets belonging to others, for payment of money, which the administrator, by false representations, had obtained from the Commissioners.

As to the legacy duty on the son's share, that it formed no lien, and that the Commissioners had no right to throw the burthen of the son's legacy duty on the mother's share of the residue.

That the present application was unwarranted by the practice of the Court, and altogether premature.

Mr. J. Romilly, in reply.

The 36 G. 3, c. 52, and the 55 G. 3, c. 184, were referred to.

THE MASTER OF THE ROLLS [Lord Langdale]. It appears that the probate duty having been properly paid, the Commissioners, on the representations of the Defendant, returned him £147, 15s. Upon that proceeding it would appear, that the Commissioners of Stamps and the Crown were defrauded; and the question made in that respect is this, what is the situation of the Crown as against the estate? what is the demand of the Crown? and how is it to be enforced? There was a *bond fide* debt due to the amount stated, which was *bond fide* paid; a part of it was repaid upon a false statement, and the question is, what are the rights of the Crown in respect of the sum so repaid? It is argued by the Petitioners, that the debt is remitted to [144] the very same situation in which it originally stood; and that the Crown has the same rights against the estate, as it would have had, if the sum of £300 had never been paid. On the other side it is said, that the £300 was actually paid; and if the Commissioners, having ample means of satisfaction, allowed themselves to be deluded in this manner, the Crown has not, to the prejudice of those entitled to the estate, the same remedy which it originally had.

The Act of Parliament is wholly silent upon this subject; yet this petition is presented during the administration of the estate, in an early stage of the cause, unsupported by any statement in the Master's report, desiring that this claim of the Crown may be satisfied out of the assets; I cannot help thinking that this is premature. I do not know how I am to arrive at a satisfactory conclusion upon the important point which has been raised; and I doubt whether I ought to take upon me to decide it without the assistance of another tribunal; at all events, it is not necessary to be decided in this stage of the cause.

The other part of the case is different. Legacy duty, or residue duty, is payable out of the shares which belong to the son and the widow; the usual mode is to pay the legacy duty at the time when the legacy is paid or retained; and I do not find any statement here that there has been any appropriation of the different parts of the residue, or that the son, who was entitled to two-thirds, ever did appropriate any part to himself, or retain any portion in satisfaction of his two-thirds; if he had done so, his share of the duty would be payable. It does not appear that the widow has

received anything, and nothing has been retained for [145] her; the time, therefore, has not arrived for the payment of her share of the legacy duty.

In the administration of property in a cause like this, care is always taken that the amount of the legacy duty shall be paid before the party receives anything by the order of the Court (36 G. 3, c. 52, s. 25). Then why is there to be a petition in this stage of the cause desiring the payment of the duty upon the share of the residue said to be retained?

It is said there is a portion of the estate existing in specie—that the son retained his share of the residue, and that therefore the duty on this ought to be paid out of what remains; in what character he retained that share of the residue we do not know; but it appears that the portion of the estate now existing in specie is in a due course of administration. I think this application is premature: whatever may be ultimately ascertained to be his share of the residue will no doubt be secured for the payment of the legacy duty. This Court would make no order for a party to receive any share of the legacy till the duty has been secured; and I do not understand, why the Court is to interpose at this early stage of the cause to order this payment out of the specific portion of the assets, when it has not been ascertained that it has been retained in satisfaction of this party's share. I do not give my opinion upon the real question, this is not the time for it; and I even doubt whether the first question can be properly decided in this Court. I make no order: and the petition must be dismissed.

[146] FORD v. FOWLER. July 24, August 7, 1840.

[8 C. 9 L. J. Ch. (N. S.), 352; 4 Jur. 958. See *Fish v. Attorney-General*, 1867, L. R. 4 Eq. 524; see also cases collected in *Mews' Digest*, vol. xv. p. 1342.]

A testator bequeathed to his daughter A., the wife of B., a legacy of £10,000, payable six months after his decease; and he recommended his daughter and her husband to settle it, together with such sum of money of the husband as he should choose, for the benefit of A. and her children. Held, a trust for the children, and that the legacy did not lapse by the death of A. in the lifetime of the testator.

In this case the testator William Fowler, after bequeathing to his daughter Elizabeth W. Fowler £10,000, to be paid to her in six months next after his decease, and to his son John W. Fowler, the sum of £10,000 to be paid to him in like manner, expressed himself as follows: "I also give and bequeath to my daughter Sarah Matilda, the wife of William Ford, &c., the sum of £10,000 to be paid to her in like manner; and I recommend to my said daughter and her said husband, that they do forthwith settle and assure the said sum of £10,000, together also with such sum of money of his own as the said William Ford shall choose, for the benefit of my said daughter Sarah Matilda, and her children.

The daughter Sarah Matilda died in the lifetime of the testator.

This bill was filed by the infant children of Sarah Matilda Ford, by the father, and next friend against the executors and the residuary legatees, for payment of the legacy of £10,000.

The infant Plaintiffs contended, that the words of recommendation created a trust for them.

The residuary legatees insisted, that no trust had been created, and that the legacy had lapsed by the death of the testator's daughter in his lifetime.

Mr. Pemberton and Mr. Osborne, for the Plaintiffs.

Mr. Kindersley and Mr. Hallett, *contrâ*. [147] *Malin v. Keighley* (2 Ves. jun. 333, 539), *Wright v. Atkins* (17 Ves. 255; and 19 Ves. 299; and G. Cooper, 111; 2 Eq. Ca. Ab. 291), *Lechmere v. Lavie* (2 Myl. & K. 197), *Eade v. Eade* (5 Mad. 118), *Curtis v. Rippon* (5 Mad. 434).

Mr. Pemberton, in reply.

August 7. THE MASTER OF THE ROLLS [Lord Langdale]. I am of opinion that a trust was created. The word "recommend" as here employed is imperative, according to the authority of several cases; the subject of the recommendation, the disposition of which the testator had power to command, was the certain definite

sum of £10,000, and the objects of the recommendation were the children of the daughter. I am of opinion, that the husband could not have claimed the legacy in right of his wife, and that the wife could not have claimed it for her own use. A settlement upon the wife and children was intended by the testator to be made by the husband and wife. The wife being dead, the settlement cannot be made; and I am of opinion, that the children are entitled equally. It was argued that the subject was uncertain, because the testator recommended, that besides the £10,000 of his own, something of the husband's to be settled also; but there being certainty as to that which was in the testator's power, the trust as to this does not fail, because the testator expressed a wish as to something over which he had no power. His wish or recommendation that the husband should settle something of his own is perfectly consistent with his wish or recommendation that the whole of the £10,000 should be settled, whether the husband settled anything or not.

[148] KNIGHT v. KNIGHT. Dec. 17, 18, 19, 20, 21, 1839; August 7, 1840.

[S. C. 9 L. J. Ch. (N. S.), 354; 4 Jur. 839; and in House of Lords (sub nom. *Knight v. Boughton*), 11 Cl. & F. 513; 8 E. R. 1195; 8 Jur. 923. See *Holmesdale v. West*, 1866, L. R. 3 Eq. 485; *Shelley v. Shelley*, 1868, L. R. 6 Eq. 544; *Ellis v. Ellis*, 1875, 44 L. J. Ch. 226; *In re Oldfield* [1904], 1 Ch. 553.]

Principles of construction, in cases of precatory words in wills, and the requisites to enable the Court to construe them as imperative.

Where property is given absolutely to one, who is by the donor recommended, intreated, or wished, to dispose of it in favour of another, the words create a trust, if they are such as ought to be construed imperative, and the subject and objects are certain: thus, if a testator gives £1000 to A. B., desiring, wishing, recommending, or hoping that A. B. will, at his death, give the same sum or any certain part to C. D., a trust is created in favour of C. D.

Bequest to A. B. of a residue, with a recommendation to him after his death to give it to his own relations, or such of his own relations as he shall think most deserving, or as he shall choose, has been considered sufficiently certain both as to subject and object, as to create a trust.

Where it is to be collected that the donor did not intend the words to be imperative, or if the first taker was to have a discretionary power of withdrawing any part of the subject from the object of the wish, or if the objects, or the interests they are to take, are not ascertained with sufficient certainty, no trust is created.

A testator, R. P. K., was entitled to real estates in tail male, with remainder to his cousins in tail, with remainder to himself in fee as right heir of the settlor, as to part under a settlement, made by his grandfather, and as to other part under the will of his same grandfather. R. P. K. suffered a recovery and acquired the fee-simple. He afterwards made his will, by which he devised all his estates, real and personal, to his brother T. A. K., if living at his decease, and if not to T. A. K.'s son, T. A. K. the younger, and in case he should die before the testator, to his eldest son or next descendant in the direct male line; and in case he should leave no such descendant, to the next male issue of his said brother, and his next descendant in the direct male line; but in case that no such issue or descendant of his said brother or nephew should be living at the time of his, the testator's decease, to the next descendant in the direct male line of his said grandfather, according to the purport of his will under which the testator inherited those estates which his industry had acquired, &c. He constituted the person who should inherit his said estates his sole executor and trustee, to carry the same and everything therein duly into execution, "confiding in the approved honour and integrity of his family to take no advantage of any technical inaccuracies, but to admit all the comparatively small reservations which he made out of so large a property according to the plain and obvious meaning of his words:" he then gave some small legacies, and proceeded thus: "*I trust to the liberality of my successors to reward*

any others of my old servants and tenants according to their deserts, and to their justice in continuing the estates in the male succession, according to the will of the founder of the family, my above-named grandfather." T. A. K. survived the testator. Held, that the words were not sufficiently imperative, and that the subject intended to be affected, and the interests to be enjoyed by the objects, were not sufficiently defined to create a trust in favour of the male line, and that T. A. K. took the property unfettered by any trust in favour of such male line.

Richard Knight being entitled to the manors of Leintwardine and Downton, executed an indenture of settlement, dated the 26th of April 1729, and made between himself and Elizabeth his wife of the [149] first part; his four sons, Richard Knight the younger, Thomas Knight, Edward Knight, and Ralph Knight, of the second part; and William Bradley and Joseph Cox of the third part: and it was thereby witnessed that the said Richard Knight, for the love and affection which he bore to his said wife and sons, and for settling an annuity by way of jointure upon his wife in lieu of dower, and "*for settling and assuring the hereditaments therein-after mentioned, to continue in the name and blood of the said Richard Knight the elder, so long as it should please Almighty God,*" &c.; and to the end that the hereditaments might be settled and established to and for the uses, intents, and purposes, and upon and under the powers, provisoes, limitations, and agreements after expressed, he, the said R. Knight, conveyed the manors of Leintwardine and Downton, and the hereditaments therein described, to trustees, to the use of himself for life; and after his decease, to the use, intent, and purpose, that his wife might receive the annuity therein mentioned, with powers of distress and entry, and subject to the annuity, and the remedies for the recovery thereof, to the use of Richard Knight the younger and his assigns for life; with remainder to the use of the trustees, to preserve contingent remainders; with remainder to the use of the first, second, third, fourth, fifth, sixth, and all and every other sons of the body of the said Richard Knight the younger, on the body of his then wife to be begotten, and the heirs male of such sons; with remainder to the use of the sons of the body of the said Richard Knight the younger, begotten on the body of any other wife in tail male; with remainder to the use of his son Thomas for life; with remainder to the sons of Thomas successively in tail male; with remainder to the use of his son Edward and his assigns for his life; with remainder to the sons of Edward successively in tail male; with [150] remainder to the use of his son Ralph and his assigns for life; with remainder to the sons of Ralph successively in tail male; with remainder to the use of the right heirs of Richard Knight, the settlor himself; the deed contained powers of jointuring and leasing.

Richard Knight, by his will dated the 27th day of October 1744, devised his real estates to trustees, to the uses, trusts, intents, and with and upon and under the same powers, provisoes, limitations, and agreements as he had theretofore settled, conveyed, and assured the manor of Leintwardine; and he directed the residue of his personal estate to be laid out in the purchase of lands, to be settled to the same uses.

The testator died on the 6th of February 1745, leaving his four sons surviving him. Richard, the eldest son, died in 1765, without leaving any issue male. Thomas, the second son, who died in 1764, was the father of the testator Richard Payne Knight and of Thomas Andrew Knight. Edward, the third son, who died in 1780, was the grandfather of the Plaintiff John Knight, and of the Defendant Thomas Knight. Ralph, the fourth son, died in 1754, leaving two sons, both of whom died long ago without issue male. (See the pedigree in the next page.)

The eldest son, Richard Knight, enjoyed the estates until his death in 1765, and was succeeded by his nephew Richard Payne Knight, who held the estates until his death in 1824.

Richard Payne Knight being tenant in tail of the estates, suffered common recoveries thereof, and having thereby barred the entail, became the owner thereof in fee.

[151] On the 3d of June 1814 he made his will. At that time, his nearest relation, and the next male descendant from Richard Knight his grandfather, was his brother Thomas Andrew Knight, who had an only son, Thomas Andrew Knight, the younger; after his brother and nephew, the next male descendants from Richard

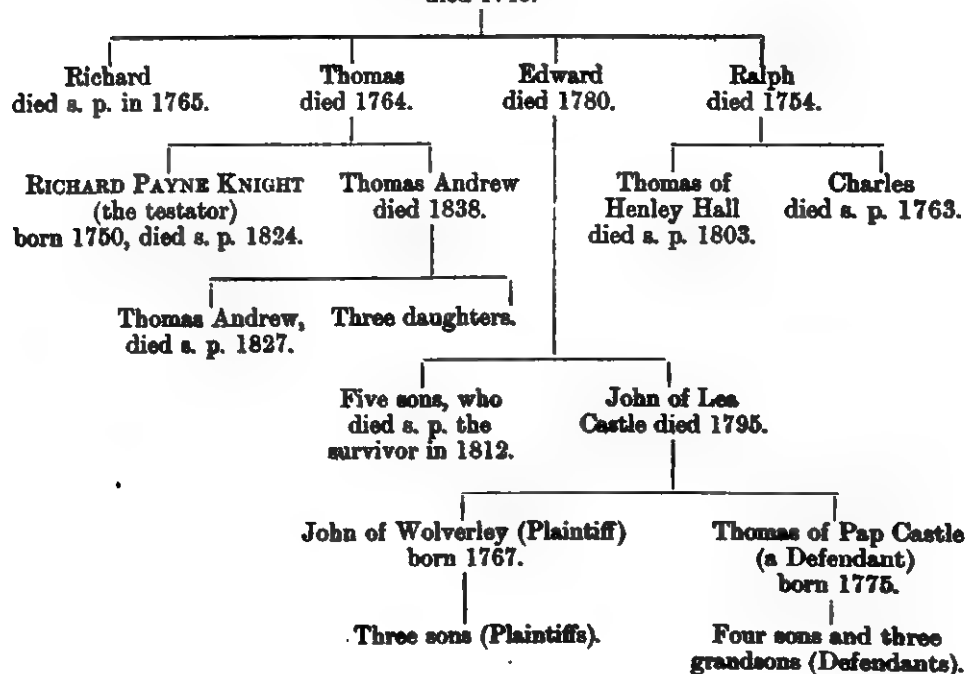
Knight the grandfather, were the Plaintiff John Knight and his sons, and the Defendant Thomas Knight and his sons.(1)

The will was expressed as follows:—"I give and bequeath *all my estates*, real and personal (except such parts as are hereinafter excepted), to my brother Thomas Andrew Knight, should he be living at the time of my decease; and if not, to his son Thomas Andrew Knight the younger; and in case that he should die before me, to his eldest son or next descendant in the direct male line; and in case that he should leave no such descend-[152]-ant in the direct male line, to the next male issue of my said brother, and his next descendant in the direct male line; but in case that no such issue or descendant of my said brother or nephew shall be living at the time of my decease, to the *next descendant in the direct male line of my late grandfather, Richard Knight of Downton, according to the purport of his will, under which I have inherited those estates which his industry and abilities had acquired, and of which he had therefore the best right to dispose*; subject, nevertheless, and liable in every case to the following reservations and deductions out of the rents and profits thereof, which I give and bequeath to the purposes and in the manner following, viz.: in the first place, I give and bequeath the sum of £300, to be distributed, within one month after my decease, among the poor of the several parishes of Downton, Barrington, Aston, Elton, Leinthall, Starke, and the northern division of Leintwardine, all in the county of Hereford, in such portions to each individual pauper or poor family as my executor, or such person as he shall appoint for that purpose, shall think equitable and expedient, on condition that no diminution of the parish allowance to any person receiving the same shall be made in consequence thereof."

"And I do hereby constitute and appoint the person who shall inherit my said estates under this my will *my sole executor and TRUSTEE, to carry the same and every thing contained therein duly into execution; confiding in the approved honour and integrity of my family, to take no advantage of any technical inaccuracies, but to admit all the comparatively small reservations which I make out of so large a property, according to the plain and obvious meaning of my words*; accordingly I give and bequeath in the second place, out of the said reserved rents and profits, the weekly sum of 25s. of good and

(1) PEDIGREE.

RICHARD KNIGHT (the founder)
died 1745.



lawful money of Great Britain to my faithful old servant Ann Payne, [153] to be paid into her hands every seventh day, commencing from the day of my decease, so long as she shall live. And I also give and bequeath the sum of £3 weekly out of the said reserved rents and profits, to be paid in the same manner into the hands of Caroline Elizabeth Gregory, commonly called Ford, of No. 44 Wells Street, Oxford Road, London, as a reward for the affectionate kindness and sincerity with which she has always behaved towards me."

"And I moreover give and bequeath all coins and medals, and all wrought and sculptured articles in every kind of metal, ivory, and gems or precious stones, together with all descriptive catalogues of the same, and all drawings, and books of drawings of every kind, which shall be found in the gallery or western room of my house in Soho Square, to the British Museum, on condition that, within one year after my decease, *the next descendant in the direct male line then living of my above-named grandfather* be made an hereditary trustee, with all the privileges of the family trustees, to be continued in perpetual succession to his next descendants in the direct male line, so long as any shall exist (see 5 G. 4, c. 60); and in case of their failure, to the next in the female line; and also on condition that all duties and other expenses attending the taking possession of and removing the said articles be paid out of the funds of the said Museum. I had, in a will which I hereby revoke, bequeathed these articles to the Royal Academy; and it is not out of any change of sentiment or disrespect towards that body that I now alter that bequest, but because I think that, under the regulations now adopted in the Museum, they will be of more service to the academicians and students, as well as to the public at large, if added to those of my late respected friends Townley and Cratchrode, so as to [154] make one great collection, such as no other nation can boast, and afford a more complete comparative view of the rise and progress of imitative art than is anywhere else to be obtained. *I trust to the liberality of my successors, to reward any others of my old servants and tenants according to their deserts, and to their justice, in continuing the estates in the male succession, according to the will of the founder of the family, my above-named grandfather, Richard Knight.*"

Richard Payne Knight died the 29th of April 1824, and his brother Thomas A. Knight proved his will.

The state of the family was not altered during the time which elapsed between the date of this will and the death of Richard Payne Knight.

Thomas Andrew Knight took possession of the estates, and certain indentures, dated the 27th and 28th days of December 1825, and made between Thomas Andrew Knight of the first part, Thomas Andrew Knight the younger of the second part, and Thomas Pendarves Stackhouse of the third part, were executed: whereby after reciting that it was apprehended that Thomas Andrew Knight was not made subject to or bound by any trust of the will of R. P. Knight; or if bound by a trust, that he might exercise or perform the same trust, by settling the devised real estate on Thomas Andrew Knight the younger, his only son in tail male, and by settling the personal estate on him and the heirs male of his body, subject nevertheless to an estate for the life of himself therein; and that T. A. Knight, with the consent and approbation of his said son, had determined to settle the said real and personal estate accordingly; it was witnessed that he conveyed the said real estates to a trustee and his heirs, to the use of Thomas Andrew Knight for life, [155] without impeachment of waste; with remainder to the use of Thomas Andrew Knight the younger, and the heirs male of his body lawfully issuing; with remainder to the use of Thomas Andrew Knight in fee, subject nevertheless to the trusts, if any, created by the will of the said R. P. Knight, and which were not thereby performed and duly executed. By the same deeds the personal estate was limited to a trustee, in trust to permit Thomas Andrew Knight to use the same during his life; and after his death, in trust for Thomas Andrew Knight the younger and the heirs of his body.

In Trinity term 1826, a common recovery was suffered of such of the real estates as were situate in the county of Hereford, and Thomas Andrew Knight and his son Thomas Andrew Knight the younger were vouched therein, and the uses thereof were declared to be in favour of Thomas Andrew Knight in fee.

On the 30th of November 1827 Thomas Andrew Knight the younger died intestate and without issue, and his father Thomas Andrew Knight became his legal

personal representative. The trustee of the deeds of December 1825 afterwards died, and the Defendant, Edward W. W. Pendarves, was his legal personal representative.

Thomas Andrew Knight the elder afterwards executed certain indentures, dated the 24th and 25th of April 1835, the release being made between Thomas Andrew Knight of the one part and Sir William Edward Rouse Boughton of the other part; and after reciting that doubts were entertained whether Thomas Andrew Knight was not tenant in tail at law or in equity of the lands therein mentioned, being lands devised by the will of the said Richard P. Knight, and that he was desirous and had [156] determined to bar the same estate tail, if any, and enlarge his estate and interest therein to a fee-simple, it was witnessed that, in pursuance of the said determination and of the statute of the 3 & 4 W. 4, c. 74, Thomas Andrew Knight conveyed the lands in Middlesex, Salop, and Gloucester, discharged of all estates in tail and interests of the nature of estates tail, to Sir William Edward Rouse Boughton and his heirs, to the use of Thomas Andrew Knight in fee. The memorial of this deed was duly enrolled.

On the 5th of February 1838 Thomas A. Knight the elder made his will; and thereby, after bequeathing certain legacies, he stated that in the lifetime of his son they had fully considered and arranged as to the settlement and future disposition of the real and personal estate of which his late brother R. P. Knight had died seized and possessed, over which they had a disposing power, and accordingly had executed the deeds of the 27th and 28th of December 1825; and that it was the avowed and fixed determination of his said deceased son, expressed to him in conferences and consultations between them on the subject of their family interests and affairs, that if it had pleased God that his said son should survive him and become possessed of the said real estate, and have no issue, he, the said son, would, in that event, settle or otherwise devise or bequeath the property of the said R. P. Knight unto or amongst or for the benefit of his three sisters Frances Acton, Elizabeth Walpole, and Charlotte Lady Boughton, or their issues, &c., in such manner as he should, under existing circumstances, for the time being and from time to time think most fitting and expedient; his said son considering that it would be, on his part, an act contrary to every principle of natural and moral justice, if, in the events of his surviving him and leaving no issue, whereby the power [157] of disposing of the said real estate would reside and rest solely in himself, he should pass by and disinherit those so nearly connected in blood with him as his sisters and their issue and descendants, in order to prefer and benefit remote relations' descendants in the male line of his great grandfather Richard Knight; and that therefore, as under the calamitous and heavily afflicting event which had happened in the death of his son the power and right of disposing of the real estate of his brother, as well freeholds in fee and for lives, as copyholds, and also his personal estate, had devolved on him, he thereby, in accordance with the wishes and intentions of his son, &c., and in the events before mentioned, and also according to his own sense of justice, and wish and desire in all things, made his said will, and thereby devised and bequeathed all his real estates, comprising as well those which were his late brother's as his own (with certain exceptions), to Sir W. E. R. Boughton and Charlotte his wife, and such son as therein mentioned of the said Sir W. E. R. Boughton and Charlotte his wife. And in case it should thereafter be decided that he had not the power of disposing of the estates and property which belonged to his late brother, but which upon the assumption and full conviction that they did belong to him, and that he had such power, he had included in the aforesaid general devise, then he devised his own estate in the manner therein mentioned. He then stated his will to be, that the costs, &c., of the said Sir W. E. R. Boughton, and every other party interested in his will, in establishing his right to the estates of his late brother, and of any appeal to the House of Lords, should, in case the decision should be pronounced against his claim, and such costs should not be decreed to be paid out of such estate of his said late brother, be charged upon and payable out of his own copyhold and leasehold estates.

[158] And the same testator, after giving various other directions by his will, further provided, that if by the judgment it should be ultimately decided that he had not the right and power of disposing of the said real and personal estates of his said brother, &c., as he had done by that his will, then, and in such case only, and if under

any devise and bequest, limitation, or power in his said brother's will contained, he was, in consequence of failure of his own issue male, authorized and empowered to direct the order of succession, and appoint the real and personal estate, &c., to such one or more of the male descendants of his grandfather, Richard Knight, as he should think most proper, he thereby in exercise of his best judgment and discretion, and in order to continue and preserve the real estate in the male line of the family descended from Richard Knight, by limiting and appointing the same in manner mentioned to the persons in succession, whom he considered the most likely to keep and preserve the same in the family, but subject to the previous devises and bequests, gave and devised the real estates which were the property of his late brother to his cousin the Defendant, Thomas Knight of Pap Castle, for life, and after his death to John Knight, his second son, and the heirs male of his body lawfully issuing, with other remainders over.

Thomas A. Knight the elder died in May 1838.

Previously, however, to this event, John Knight, who was the male heir of Richard Knight of Downton who died in 1745 (see pedigree, 3 Beav. 151 (n)), together with his three sons, filed this bill in May 1836, against Thomas Andrew Knight the elder and others; praying a declaration that according to the true construction of the will of Richard Payne [159] Knight deceased, all the real and all the residue of the personal estates of Richard Payne Knight ought to be conveyed and assigned in such manner as best to secure the enjoyment thereof to the male descendants of Richard Knight the grandfather, as long as the rules of law and equity would permit; and that the same ought to be so limited that Thomas Andrew Knight should have a life-estate therein, with such remainder to his issue male and to the Plaintiffs as might best answer the purposes aforesaid, and for accounts, &c.

Subsequently to the date of his will, Thomas Andrew Knight the elder put in his answer to the original bill in this cause, and thereby claimed under the will of Richard Payne Knight, with or without the aid of the further title derived under the indentures of the 27th and 28th of December 1825, and the indenture of the 23d day of March 1826, and the recovery suffered, and the said indentures of the 24th and 25th of April 1835, to be absolutely entitled to the whole of the real estates of the testator, Richard Payne Knight, in fee-simple and under the said will, or as next of kin of Thomas A. Knight the younger deceased, to be absolutely entitled to the leasehold and personal estate of the said testator.

Thomas Andrew Knight, as before stated, died on the 11th of May 1838, without having revoked or altered his will; and the necessary parties having been brought before the Court by a bill of revivor and supplement, and the preliminary enquiries having been made by the Master, the causes now came on for hearing.

The question in the cause was, whether the precatory words in the will of Richard P. Knight were imperative on Thomas A. Knight.

[160] Mr. Pemberton, Mr. G. Turner, Mr. J. Humphry, and Mr. Menteth, for the Plaintiffs. The dispositions contained in the will of the testator, Richard Payne Knight, imposed an imperative trust on his brother, Thomas Andrew Knight, to settle the property in the direct male line of the testator's grandfather, Richard Knight.

It has been now firmly established by a long series of decisions, "that whenever a person gives property, and points out the object, the property, and the way in which it shall go, that creates a trust; unless he shews clearly, that his desire expressed is to be controlled by the party, and that he shall have an option to defeat it." "If a testator shews a *desire* that a thing shall be done, unless there are plain express words or necessary implication, that he does not mean to take away the discretion, but intends to leave it to be defeated, the party shall be considered as acting under a trust;" *Malim v. Keighley* (2 Ves. jun. 335). To create by precatory words such a trust as the Court will carry into execution, there are three requisites; *first*, the precatory words must be sufficiently clear; *secondly*, there must be a certainty as to subject of the gift; and, *thirdly*, the objects to take must be certain; *Wright v. Atkyns* (Turner & Russ. 157), *Cary v. Cary* (2 Sch. & Lef. 189), *Cruyck v. Colman* (9 Ves. 322), *Morice v. The Bishop of Durham* (10 Ves. 535), *Paul v. Compton* (8 Ves. 380).

As to the first requisite, no particular form of words is necessary; it is sufficient for a testator "to express a *desire* as to the disposition of the property, and the desire

so expressed amounts to a command; *Cary v. Cary*. Thus "request," *Eade v. Eade* (5 Mad. 118); "desire," [161] *Harding v. Glyn* (1 Atk. 469); "my particular wish and request," *Foley v. Parry* (5 Sim. 138, and 2 Myl. & K. 138); "my last wish," *Hinaman v. Poynder* (5 Sim. 546); "recommend," *Tibbitts v. Tibbitts* (19 Ves. 656); *Horswood v. West* (1 Sim. & St. 387); *Malim v. Keighley* (2 Ves. jun. 333); "entreat," *Prevost v. Clarke* (2 Mad. 458, n.); "my dying request," *Pierson v. Garnet* (2 Bro. C. C. 38, and 226, and Pr. in Ch. 200, n.); "not doubting," *Parsons v. Baker* (18 Ves. 476); "trusting and wholly confiding," *Wood v. Cox* (1 Keen, 317, and 2 Myl. & Cr. 684); in short, "any words of recommendation and desire in a will are always expounded a devise," *Eales v. England* (Pr. Ch. 200). They also cited on this point *The Duchess of Buckingham's case* (2 Ves. jun. 580), and 1 Jarm. Pow. Devises, 355.

By the civil law, from which most probably the principle was adopted by Courts of Equity, "words of request or confidence *rogo, volo, mando, injungo, desidero, deprecor, fidei tue committo, acio te hereditatem meam restituerum*," &c. are those by which a *fidei commissum* is created; but effect is given to a *fidei commissum*, if it can be collected from any expressions in the instrument that it was the grantor or testator's intention to create it" (2 Burges Comm. 106): and like a declaration of a use in equity, where there has been a transmutation of possession, "any expression whereby the mind of the party may be known that such a one shall have the land is sufficient;" *Jones v. Morley* (12 Mod. 159).

Secondly, the subject of the gift is sufficiently certain, being the estates and personal property devised and bequeathed by the will.

[162] Thirdly, the persons to take are sufficiently defined being persons in the male line in succession; a description much more perfect than the expressions "family," "relations," which have been held sufficiently certain to be carried into execution; *Harding v. Glyn* (1 Atk. 470), *Cruwys v. Colman* (9 Ves. 322).

Applying these principles to the present case, the Court finds the testator "TRUSTS to the justice of his successors in continuing the estates in the male succession, according to the will of the founder of the family, his above-named grandfather Richard Knight;" and he "appoints the person who shall inherit his estates his sole executor and TRUSTEE, to carry the same and everything contained therein duly into execution, *confiding* in the approved honour and integrity of his family to take no advantage of technical inaccuracies." These words of trust and confidence are much stronger than many which have occurred, besides which, the person inheriting was also distinctly appointed a *trustee* to carry the will into execution. The clause respecting the hereditary trustees of the British Museum and the first gift over, in case of there being no issue of Thomas A. Knight and his son living at the testator's death, shew how anxious the testator was to keep up the distinction of the direct male line of his grandfather.

If, then, this be a trust binding on Thomas Andrew Knight, he was bound to carry it into effect by a settlement of the property, so as to run so far as was possible in the male order of succession. This was a trust to be executed by him; and the distinction between trusts executed and executory has always been recognised and admitted; *Mortimer v. West* (2 Sim. 282), *Jervoise v. The Duke of Northumberland* (1 Jac. & W. 570), 1 Preston Abet. 135. The estate ought, therefore, to have been settled so as to give successive life-estates to the parties *in esse*; *Leonard v. The Earl of Suffolk* (2 Vern. 526), *Papillon v. Voise* (2 P. Williams, 470), *White v. Carter* (Amb. 670), *Humberston v. Humberston* (1 P. Williams, 332), *Hopkins v. Hopkins* (1 Atk. 593). In *Lord Dorchester v. The Earl of Effingham* (G. Coop. 312, and *post*, p. 180, n.; and see 2 Pow. Devises, 443), a testator, having a power of revocation and new appointment, directed "his estates to be attached to his title as closely as possible," it was held that the effect of his will was to abridge the estates of all persons *in esse*, in the line of the title, from estates tail to estates for life. In *Woolmore v. Burrows* (1 Sim. 512), lands were to be purchased and closely entailed to the family estate; and it was decided that every person *in esse* at the testator's death must have life-estates, and no more.

The difficulty of making a settlement so as to meet every event will probably be relied on by the other side; but the Court has frequently, as in several of the cases already referred to, overcome that objection. The same argument was used in *Pierson v. Garnet* (2 Bro. C. C. 38); but there it was met by the Court in these terms: the

difficulty and impracticability of carrying the trust into execution has been pressed : "That argument has no weight with me ; because if an express trust had been raised, it must have been executed, though it would have been attended with all the same difficulties and impracticabilities stated in this case. However arduous the trust was, the Court must have carried it into execution."

[164] Mr. Spence, Mr. Coots, and Mr. Phillips, for the Defendant Thomas Knight of Pap Castle and his children, concurred in the argument of the Plaintiffs, that the precatory words used by the testator Richard Payne Knight were imperative upon Thomas Andrew Knight ; but they contended that he had, by implication, a power of selection amongst the male descendants of the founder of the family ; and that it had been duly executed by the will of Thomas Andrew Knight in favour of John Knight and his family ; *Brown v. Higgs* (4 Vea. 708). That the only object of the testator R. P. Knight was to continue the property in the male line, to the exclusion of females ; and there were many events which might happen, as the bankruptcy, insolvency or insanity of the elder male branches, which would render such a power of selection in T. A. Knight absolutely necessary to carry out the intention of the testator of continuing the estates in the family.

THE ATTORNEY-GENERAL [Campbell], Mr. Tinney, Mr. Wilbraham, and Mr. Hodgson, for the widow of the testator and for Mrs. Acton, his daughter, and Pendarves, a trustee ;

Mr. Kindersley and Mr. K. Parker, for Sir W. Boughton and children ; and

Mr. Richards and Mr. Torriano, for Mrs. Walpole, who claimed under the will of Thomas Andrew Knight, *contra*, argued to the effect following. The testator, Thomas Andrew Knight, became absolutely entitled to the real and personal estate of his brother Richard Payne Knight, under the will of the latter, unfettered with any trust ; or, supposing him to have taken an estate tail under the will, yet by means of [165] the recoveries it became afterwards converted in a fee-simple absolute.

The principle of holding precatory words to be imperative has been frequently disapproved of, and the current of modern authority is strongly against it. Lord Chief Baron Richards, speaking of the former decisions on the subject, thus expressed himself (10 Price, 265), "I hope to be forgiven if I entertain a strong doubt whether, in many, or perhaps in most of the cases, the construction was not adverse to the real intention of the testator.

"It seems to me very singular, that a person who really meant to impose the obligation established by the cases, should use a course so circuitous, and a language so inappropriate and also obscure, to express what might have been conveyed in the clearest and most usual terms—terms the most familiar to the testator himself, and to the professional or any other person who might prepare his will. In considering these cases, it has always occurred to me, that if I had myself made such a will as has generally been considered imperative, I should have never intended it to be imperative ; but, on the contrary, a mere intimation of my wish that the person to whom I had given my property should, if he pleased, prefer these whom I postponed to him, and who, next to him, were at the time the principal objects of my regard.

"I am happy to be enabled to state, that in this opinion I have the concurrence of a noble Judge, than whom there has never been, and, I believe, never can be, a person more active and acute in investigating the principles of the law in all its bearings, or more extensively learned on every legal subject."

[166] "In *Wright v. Atkyns* (1 Vea. & B. 315), Lord Eldon says, 'This sort of trust is generally a surprise on the intention, but it is too late to correct that.' Again, he says, 'We know the question was, what the word family meant? I do not believe that the testator intended a mere trust, but that must be the construction, if the word "family" is properly construed.' I have said so much as a justification, or rather the foundation, of the opinion which I entertain, that, though I hold myself bound by the decisions, and obliged to follow them, I do not consider it to be my duty to extend the rule of construction which has been adopted in them, and to add to the number of those where the Court appears to me rather to have made than to have given effect to the wills of testators."

In the same case Lord Redesdale said, that "all cases of this description were to be considered with very considerable strictness, as it was a very inconvenient mode of disposition : " *Meredith v. Heneage* (1 Sim. 566). And Sir Anthony Hart observes, as

to this equity, that "The first case that construed words of recommendation into a command, made a will for the testator; for every one knows the distinction between them. The current of decisions has, of late years, been against converting the legatee into a trustee:" *Sale v. Moore* (1 Sim. 540), and see *Lawless v. Shaw* (1 Lloyd & Goold, 154, and 165, n.; 5 Cl. & Fin. 129; 1 Drury & W. 512).

The words used by the testator are not, and were not, intended to be, imperative upon his successors. There are three instances in which he expresses his confidence; first, he "*confides* in the *approved honour and integrity* of his family to take no advantage of tech-[167]-nical inaccuracies, but to admit all the small reservations out of the property; secondly, he *trusts* to the *liberality* of his successors to reward old tenants and servants; and, thirdly, he trusts to their *justice* in continuing the estates in the male succession." In neither of these cases was it the intention of the testator to bind his family, and in every of them he would have deprecated the interference of this Court. If his wishes had been consulted, they undoubtedly would have been to have continued the estate in the family *for ever*. He was aware that this could not be effected by any legal means; he knew that he could not effectually settle his estate so as to be unalienable, further than the minority of the first tenant in tail; and he therefore considered the best mode to accomplish his wishes was to trust to the *honour* of his successors, and to impose on them what is termed "an imperfect obligation," which was to be binding morally only.

His intention, so far as can be collected, was to create a perpetuity, which the law will not allow, and which the Court cannot carry into execution; but taking it to be his wish to settle the estates "according to the will of the founder of the family," then the will of 1744 must be the scheme and model for effecting it. Under that will, Thomas Andrew Knight the elder would have been tenant in tail, and that estate has been barred, and converted into a fee-simple absolute. Again, at the date of the will of 1744, Richard Knight appears to have had seven grandchildren living, who were the children of his son Edward, yet he did not attempt to limit life-estates to the two generations, but gave estates tail to the children of Edward. If then this will is to be taken as a model, the settlement to be made would be very different from that asked by the Plaintiffs, namely, to limit successive life-estates to all the persons *in esse*; [168] or, as is stated in the prayer of the bill, to convey estates "in such manner as best to secure the enjoyment thereof to the male descendants of Richard Knight the grandfather of the testator, so long as the rules of law and equity will permit;" but would have been to Thomas A. Knight for life, with remainder to T. A. Knight the younger in tail.

This case has none of the requisites for enabling the Court to say, that the property is fixed with a positive trust in favour of the Plaintiffs.

First, the words are not sufficiently strong to be construed imperative. The testator trusts to their *justice*, a word clearly importing no legal obligation.

In *Harland v. Trigg* (1 Bro. C. C. 142) there was a gift to his brother of leaseholds, hoping he would continue them in the family, and it was held that no trust had been created. *Cunliffe v. Cunliffe* (Ambler, 686) was a devise to his son, recommending him if he died without issue to give and devise it to his brother the Plaintiff, and it was held that no trust had been created. In *Bland v. Bland* (2 Cox, 351), the testator earnestly requested the party by will to settle, and there no trust was created. In *Sale v. Moore* (1 Sim. 534), there was a gift to wife of a residue, recommending to her, and not doubting she would consider his near relatives, and there the decision was against there being any trust. In *Curtis v. Rippon* (5 Mad. 434), the testator trusted that the devisee would make such use of it as should be for her own and her children's spiritual and temporal good; remembering always, according to circumstances, the Church of God and the poor; and in *Lechmere v. Lavis* (2 Myl. & K. 197) where the [169] words were "of course they will leave what they have," &c.; and *Ex parte Payne* (2 Younge & C. 636), where the expressions were "I strongly recommend her to execute a settlement;" and *Meredith v. Heneage* (10 Price, 306, and 1 Sim. 542), it was successively held that no trust had been created.

The second requisite, namely, certainty in the subject, is also wanting; the property to be subject to the supposed trust is in the greatest degree of uncertainty. From the word "*continue*," one would suppose that those estates which passed by the will of Richard Knight the founder were alone to be included; as to which, however,

it seems strange that Richard Payne Knight should himself have defeated the will of his grandfather, by suffering recovery of those estates. There are, however, five distinct properties which may be the subject of the supposed trust: first, the realty settled by the deed of 1729; secondly, the realty afterwards acquired by Richard Knight, and devised by his will; thirdly, the personal estate of Richard Knight; fourthly, the real estates acquired by Richard Payne Knight; and fifthly, his personal estate. It is impossible to say, whether all or any, and which, of these different descriptions of property are to be included in the supposed trust. Again, it is clear, that the successors are to have the right of rewarding the old servants and tenants out of the property; and this, then, will have the effect of rendering the residue uncertain, and of making the trust void. *Wynne v. Hawkins* (1 Bro. C. C. 179); *Eale v. Eade* (5 Madd. 118).

Thirdly, the persons to take; the extent of their interest, and the estates they are severally to enjoy is in no way defined. How is this Court to carry such a trust into execution? What provision is to be made for jointures, [170] portions, leasing-powers, &c. ? When are the daughters to be let in to take in default of male issue? It is impossible to carry anything so vague and uncertain into execution; and to effectuate the wish fully, a perpetuity must be created, which is contrary to law.

The wish is addressed to all successors in the most remote line; why is it to bind the first taker only?

The distinction between trusts executed and trust executory has always been admitted, but here the testator had no reference to any settlement to be executed, there is no conveyance to execute. It is true, that where a deed is to be executed, the Court will mould the limitation, so as to effectuate the general intention, "but if a party will be his own conveyancer and create the estate, the Court has no jurisdiction to alter it." *The Countess of Lincoln v. The Duke of Newcastle* (12 Ves. 238), *Douglas v. Congreve* (1 Beavan, 59). In *Gower v. Grosvenor*, as reported in *Barnardiston* (page 62), the Court seems to have considered that a conveyance was to be executed. *Humberston v. Humberston* was a gift to trustees to convey. In *Woolmore v. Burrows*, there was a direct gift to the executors to be laid out, and closely entailed to the family estate. *Lord Dorchester v. The Earl of Effingham* appears to have been a legal devise under a power, and the estate was to be attached to the title as closely as possible.

There is no reported case in which the Court has directed a settlement to be executed upon precatory words, and no case in which words of request have been addressed to so indefinite a series of persons as successors.

Mr. Pemberton, in reply.

[171] August 7. THE MASTER OF THE ROLLS [Lord Langdale] (after stating the circumstances of the case, proceeded): The Plaintiff, John Knight of Wolverley, contends, that, under the will of Richard Payne Knight, his brother Thomas Andrew Knight was bound to make a strict settlement of the real and personal estates upon the male descendants of Richard Knight the grandfather.

The Defendant Thomas Knight of Pap Castle contends, that Thomas Andrew Knight was not bound to make a strict settlement of the estates, but was bound to make some settlement thereof upon one or more of the male descendants of Richard Knight, among whom he had a power of selection, which he has duly exercised by his will.

The Defendant Sir William Edward Rouse Boughton, and the widow and daughters of Thomas A. Knight, who claim under his will contend, that he had an absolute estate and interest in the property in question, and had a power of disposition, unfettered by any trust or obligation whatever.

The principal question is, whether a trust in favour of the male descendants of Richard Knight is created by the will of the testator Richard Payne Knight.

That the testator wished that his estates, or at least, that some estates should be preserved in the male line of his grandfather, and had a reliance, or in the popular sense, a trust, that the person to whom he gave his property, and those who should succeed to it, would act upon and realise that wish, admits of no doubt. He has expressed his wish and his reliance in terms which are, to that extent, sufficiently clear.

[172] But it is not every wish or expectation which a testator may express, nor every act which he may wish his successors to do, that can or ought to be executed or

enforced as a trust in this Court; and in the infinite variety of expressions which are employed, and of cases which thereupon arise, there is often the greatest difficulty in determining, whether the act desired or recommended is an act which the testator intended to be executed as a trust, or which this Court ought to deem fit to be, or capable of being enforced as such. In the construction and execution of wills, it is undoubtedly the duty of this Court to give effect to the intention of the testator whenever it can be ascertained: but in cases of this nature, and in the examination of the authorities which are to be consulted in relation to them, it is, unfortunately, necessary to make some distinction between the intention of the testator and that which the Court has deemed it to be its duty to perform; for of late years it has frequently been admitted by Judges of great eminence that, by interfering in such cases, the Court has sometimes rather made a will for the testator, than executed the testator's will according to his intention; and the observation shews the necessity of being extremely cautious in admitting any, the least, extension of the principle to be extracted from a long series of authorities, in respect of which such admissions have been made.

As a general rule, it has been laid down, that when property is given absolutely to any person, and the same person is, by the giver who has power to command, recommended, or entreated, or wished, to dispose of that property in favour of another, the recommendation, entreaty, or wish shall be held to create a trust.

[173] First, if the words are so used, that upon the whole, they ought to be construed as imperative;

Secondly, if the subject of the recommendation or wish be certain; and,

Thirdly, if the objects or persons intended to have the benefit of the recommendation or wish be also certain.

In simple cases there is no difficulty in the application of the rule thus stated.

If a testator gives £1000 to A. B., desiring, wishing, recommending, or hoping that A. B. will, at his death, give the same sum or any certain part of it to C. D., it is considered that C. D. is an object of the testator's bounty, and A. B. is a trustee for him. No question arises upon the intention of the testator, upon the sum or subject intended to be given, or upon the person or object of the wish.

So, if a testator gives the residue of his estate, after certain purposes are answered, to A. B., recommending A. B., after his death, to give it to his own relations, or such of his own relations as he shall think most deserving, or as he shall choose, it has been considered that the residue of the property, though a subject to be ascertained, and that the relations to be selected, though persons or objects to be ascertained, are nevertheless so clearly and certainly ascertainable—so capable of being made certain, that the rule is applicable to such cases.

On the other hand, if the giver accompanies his expression of wish, or request by other words, from which it is to be collected, that he did not intend the wish to [174] be imperative: or if it appears from the context that the first taker was intended to have a discretionary power to withdraw any part of the subject from the object of the wish or request: or if the objects are not such as may be ascertained with sufficient certainty, it has been held that no trust is created. Thus the words "free and unfettered," accompanying the strongest expression of request, were held to prevent the words of the request being imperative. Any words by which it is expressed or from which it may be implied, that the first taker may apply any part of the subject to his own use, are held to prevent the subject of the gift from being considered certain; and a vague description of the object, that is, a description by which the giver neither clearly defines the object himself nor names a distinct class out of which the first taker is to select, or which leaves it doubtful what interest the object or class of objects is to take, will prevent the objects from being certain within the meaning of the rule; and in such cases we are told (2 Ves. jun. 632, 633) that the question "never turns upon the grammatical import of words—they may be imperative, but not necessarily so; the subject-matter, the situation of the parties, and the probable intent must be considered." And (10 Ves. 536) "wherever the subject, to be administered as trust property, and the objects, for whose benefit it is to be administered, are to be found in a will, not expressly creating a trust, the indefinite nature and *quantum* of the subject, and the indefinite nature of the objects, are always used by the Court as evidence, that the mind of the testator was not to create a trust;

and the difficulty, that would be imposed upon the Court to say what should be so applied, or to what objects, has been the foundation of the argument, that no trust was intended ;" or, as Lord Eldon expresses it in another [176] case (*Turn. & Russ.* 159), "Where a trust is to be raised characterised by certainty, the very difficulty of doing it is an argument which goes, to a certain extent, towards inducing the Court to say, it is not sufficiently clear what the testator intended."

I must admit, that in the endeavour to apply these rules and principles to the present case, I have found very great difficulty ; that in the repeated consideration which I have given to the subject, I have found myself, at different times, inclined to adopt different conclusions ; and that the result to which I have finally arrived has been attended with much doubt and hesitation.

The testator, at the date of his will, was entitled in fee to a large real estate, and absolutely entitled to a very considerable personal estate. Of the largest part of the real estate he had been tenant in tail, under the dispositions made by his grandfather Richard Knight ; he had suffered recoveries, whereby he became entitled to the same estate in fee ; and the question is, whether by the will he meant to impose on his brother, Thomas Andrew Knight, the trust or duty of making such a settlement as is alleged by the Plaintiffs ; or such a settlement upon some of the male descendants of the grandfather as would, under the will of Thomas Andrew Knight, give a right to the Defendant, Thomas Knight of Pap Castle ; or did he mean that his brother was to have over the estate the same power which he himself had acquired and enjoyed ; and which by his will he exercised for the purpose of transmitting the estate to the next male heir of his grandfather, and which he wished his successors to use in the same manner for the further transmission of the estates in the same line. And I [176] am of opinion, though, I admit, after great doubt and hesitation, that the testator did not intend to impose an imperative trust on his successor, and that his will ought not to be construed to have that effect.

As he who had made himself absolute owner of the property had conceived himself bound in honour to transmit it to the male line of his grandfather, so he wished the same sentiment to govern his successors. He was pleased to speak of the honour and integrity of his family, and he expressed his trust or reliance on the justice of his successors ; but it does not appear to me that he intended to subject them, as trustees, to the power of this Court, so that they were to be compelled to do the same thing which he states he trusted their own sense of justice would induce them to do.

It is a common observation in all such cases, that the testator might, if he had intended it, have created an express trust ; but the authorities shew that if there be sufficient certainty, and nothing in the context of the will to oppose the conclusion, the trust may and must be implied ; and the question is, whether there is a trust by implication.

He gave all his estates, real and personal (except as therein mentioned), to his brother, or to the next descendant in the direct male line of his grandfather, who should be living at the time of his death. The gift is in terms which make the devisee the absolute owner, and give him the power of disposing of the whole property (with such exceptions as are mentioned) as he pleases. The exceptions, deductions, or reservations consist of certain gifts for charitable and other purposes ; and he constitutes his devisee sole executor and trustee to carry his will into execution, "confiding in the ap-[177]-proved honour and integrity of his family to take no advantage of any technical inaccuracies ;" and the context appears to me to shew, that these words relate to the reservations which he had made out of the general devise and bequest to his brother or the next descendant in the direct male line of his grandfather. The expressions used in his great bequest to the British Museum, afford additional evidence of his wish to maintain the distinction of his family in the same line ; but I think that the question in the cause depends on the effect to be given to the last sentence in the will. Having given all his estates, real and personal, to his successor, that is, the next male descendant, and having given a few legacies, he says, "I trust to the liberality of my successors to reward any others of my old servants and tenants according to their deserts, and to their justice in continuing the estates in the male succession, according to the will of the founder of the family, my above-named grandfather Richard Knight."

In this passage there is no doubt of the wish, or of the line of succession, in which

the testator desired the estates (whatever he meant by that term) to devolve or be transmitted.

Contemplating his successors, and, as it would seem, all his successors without limit in that line, he says, that he trusts to their liberality for one purpose, and to their justice for another. So far as he trusts to their liberality to reward any of his old servants or tenants, according to their deserts, he cannot be understood to have intended to create an imperative trust. Notwithstanding the use made of the word "trust," an indefinite discretion was, in that respect, left with the successors; and it is difficult to suppose, that having in this sentence used the word "trust" in a sense consistent with an [178] indefinite discretion in the person trusted, he should, in the same sentence, use the word "trust" in a sense wholly inconsistent with such discretion;—in a sense which imposed an absolute obligation to resort to the most refined subtleties of the law for the purpose of executing a trust in such a manner as to preserve, by compulsion, the succession to the estate in the same line for the longest time possible. Admitting the wishes of the testator, which seem to me sufficiently expressed, I have found an insuperable difficulty in coming to a satisfactory conclusion that he did not intend to rely on the honour, integrity, or justice of his family or successors for the performance of his wishes, but did intend to impose upon his successors an obligation to be enforced by legal sanction: and the impression arising from the last words in the will appears to me to be increased by a consideration of the preceding parts. He gave absolute estates; as to the gifts to other persons, he confides in the approved honour and integrity of his family that no advantage will be taken of technical inaccuracies to defeat them; and as to the succession of the estates intended to pass in the line he had chosen, he trusts to their justice. It seems to me, as if he had said, "you see my sense of what is due to the founder of the family; under his will, I have inherited the estates which his industry and abilities acquired, and of which he had, therefore, the best right to dispose. I have, by my own act, made myself absolute master of the estates, but I think it just to continue the succession in the same manner: this I do by my will, and I trust to your justice to do the like." If this were his meaning, it is consistent with an intention that each successor should take from his immediate predecessor, by gift proceeding from a sense of justice, or by descent from the same motive, an absolute interest in the estates; and that the continuance in the line designated should be provided for in that way.

[179] I think, therefore, that there is great reason to doubt the intention to create an imperative trust: and looking to the subject to which his wishes were directed—observing the absolute gift of all his estates, real and personal, with certain exceptions; and that, in the last clause, he has not used the words "my said estate," or any words clearly and certainly indicating all that he had given to those whom he has called his successors, but had simply used the words, "the estates," leaving it be matter of by no means easy construction, whether he intended under that expression to include the personal estate as well as the real; and it not being certain, having regard to the subsequent reference to the will of his grandfather, whether he meant to include more than the estates of his grandfather, to which he had himself succeeded; and observing that some part of the personal estate, at least, was subjected to the liberality of his successors, I think that there is reason to doubt whether the subject is sufficiently certain for a trust of this nature.

The objects do appear to me to be indicated with sufficient certainty, and it seems to me clear in what order he wished them to take. But, unless they were to take successively as absolute owners, I cannot discover what estates they were intended to take. I have not been able to persuade myself that the testator meant to tie down his successor to make such a settlement as is proposed by the Plaintiffs, and nothing less would give the Plaintiffs any right to ask for a decree of this Court in their favour; and if I might be permitted to adapt the words of Lord Rosslyn, in the case of *Meggison and Moore* (2 Ves. jun. 633), to the circumstances of this case, I should say, that "if I were imperatively to declare that the successors designated by the will should take only [180] for life and their issue in strict settlement, I should do a thing most foreign to the testator's intention. His successor might have done what is suggested. The testator intimated a wish to him, and gave sufficient power; but I cannot say that he has left it to the Court of Chancery to accomplish his wishes."

On the whole, I am under the necessity of saying, that for the creation of a trust, which ought to be characterised by certainty, there is not sufficient clearness to make it certain that the words of trust were intended to be imperative, or to make it certain what was precisely the subject intended to be affected, or to make it certain what were the interests to be enjoyed by the objects. -

It appears to me, therefore, that the Plaintiffs have not made out any title, and that the bill ought to be dismissed.(1)

Bill dismissed with costs.

(1) Lord Dorchester v. The Earl of Effingham. Rolls. Feb. 18, 19, March 9, 1813.

[See cases in note to *Knight v. Knight*, 3 Beav. 148.]

A. having a power of revocation and new appointment over an estate, of which B., his heir, was tenant in tail, by his will directed the estate "to be attached to his title as closely as possible." Held, that the estate of B. and all other tenants in tail in esse at A.'s death (being in line of the title) were abridged to estates for life only.

The facts of the case, as appearing by the decree, were as follows: under certain indentures, real estates were limited to the use of Guy Lord Dorchester for life, with remainder to his then eldest son Christopher for life, with remainder to Christopher's first and other sons in tail male, with remainder in succession to the other children of Guy Lord Dorchester for life, with remainder to their first and other sons in tail. A power of revocation of their uses, and of making a new appointment by deed or will, was reserved to Guy Lord Dorchester.

Christopher died in 1806, leaving the Plaintiff Arthur Henry, his eldest son, an infant.

Guy Lord Dorchester died in 1808. By his will, attested so as to pass real estate, he expressed himself as follows:—"All my landed estates to be attached to my title as closely as possible; all the timber woods [181] and trees on my estates I leave to my executors in trust to increase my landed property; all debts due to me from Government, and all my personal property not otherwise disposed of, I leave to my executors in trust to increase my landed property, all which trust shall be lodged in Bank stock, there to accumulate principal and interest, and profits arising therefrom, till my executors find an advisable purchase adjoining to or near my estates. The executors to have a power, with the consent and approbation of Lady Dorchester, to sell my estates for the purpose of buying others, which may unite or approximate the landed property."

By a codicil unattested, he gave all the timber on his estates, and all his personal property not otherwise disposed of, to his executors in trust to increase his landed property.

After the death of Guy Lord Dorchester, his grandson Arthur Henry, then Lord Dorchester, who, under the limitations in the deeds, taken independently of the will, would have been tenant in tail, filed this bill by his guardian, praying that he "might be declared to be tenant in tail of the said settled estates, under and by virtue of the limitations of the said deeds;" that the deeds and will might be carried into execution, and for a declaration of the rights of the parties.

The parties entitled in remainder, after the limitations to the Plaintiff and his issue, insisted "that the said testator did by his said will alter the uses of the said settlement, and that he had full right and power so to do; and that upon the true construction of the said will, the Plaintiff ought to be declared to be tenant for life of the estates of the said Guy Lord Dorchester; and that they would become entitled upon the death of the said Plaintiff to successive estates for life therein, with remainder to their respective sons in tail male; and the Defendant Guy Carlton claimed to be the first tenant in tail in being of the said estates."

It appears from the registrar's note-book, that the cause came on upon the 18th and 19th of February 1813, when it was ordered to stand over for a fortnight, with liberty for the Plaintiff to amend the bill, and bring the cause again to a hearing as

he should be advised. The cause accordingly came on upon the 9th of March 1813, when

Sir S. Romilly and Mr. Trower appeared for the Plaintiff.

Mr. Leach and Mr. Courtenay, for Lady Dorchester and the Defendants to the amended bill.

Mr. Richards, for the executors.

Sir William Grant, Master of the Rolls, declared "that by the effect of the said testator's will, the estate tail of the said Plaintiff Lord Dorchester, in the said settled estates, and the estates tail of all other the male issue [182] or descendants (if any) of the testator *in esse*, at the time of the testator's death, in the same estates were abridged to estates for life only, with remainder to their first and other sons successively in tail male in strict settlement." (NOTE.—See this case reported on another point in G. Cooper, 319; where the former part of the will is stated.)

[182] FRANKS v. PRICE. Dec. 6, 7, 10, 11, 13, 14, 1839; August 8, 1840.

[S. C. 9 L. J. Ch. (N. S.), 383; and at law, 5 Bing. (N. C.), 37; 6 Scott. 710.]

A testator gave life interests in real and personal estate to A. and B., with interests to their issue male in certain events only, and the estate was given over to the heir of the testator on a general failure of issue male of A. and B. Held, that A. and B. took estates tail by implication.

A testator devised his real and personal estate to trustees, and gave life-estates therein to several persons, namely, A., B., &c.; and after their deaths he directed the trustees to pay the income to Moses and Naphthali, during their respective lives, share and share alike; and in case either of them should, *after the deaths of A., B., &c.*, depart this life without leaving issue male of his body, in trust to pay the whole income to the survivor for life; and he directed that if Moses should, *after the deaths of A., B., &c.*, die *before Naphthali*, leaving issue male, then the trustees should convey, a moiety of the real estate, to the use of the first and other sons of Moses in tail male, with remainder to Naphthali for life, with remainder to his first and other sons in tail, and in default to the testator's right heirs, and lay out a moiety of the personal estate in land, and convey the same to trustees to the like uses. The testator made a similar disposition *mutatis mutandis* of the other moiety in case of the death of *Naphthali*, *after the death of A., B., leaving issue male*, and he provided that in case Moses and Naphthali should die without leaving issue male, or if such issue male should die without leaving any issue male, the trustees should convey the property to such person as should, at the death of the survivor of Moses and Naphthali, be the right heir of the testator. It will be seen that no provision was made for the event (which happened), of *Moses dying without issue before the death of A., B.* Naphthali survived Moses and A., B., &c., and Moses died without issue. Held, first, that the words "*after the deaths of A., B., &c.*" did not import contingency, but were merely words of reference, shewing that the gifts then in course of expression were subject to the prior gifts, and were not to have effect in possession until those prior gifts were satisfied or had become inoperative. Secondly, that the words, "*if Moses should die before the death of Naphthali, leaving issue male*," must have their natural meaning, and be taken to provide only for the particular cases expressly described. Thirdly, that to effectuate the general intent, Naphthali took an estate tail by implication in both moieties of the realty, and an absolute interest in the personalty. And, fourthly, that the trusts on which the question arose were not executory so as to alter the construction as arising on an executed trust.

The question in this case arose on the will of the testator Moses Hart, and was, whether, under the will and in the events which had happened, Naphthali Hart took an estate for life, or an estate tail by implication, in the real and personal estate of the testator. In the former case alone the Plaintiff would be entitled.

The testator, by his will, dated the 2d of April 1756 (after bequeathing several annuities and certain legacies, and specifying various personal property to which he

was entitled, and reciting that he was possessed of divers messuages and hereditaments and premises at Islesworth, as well freehold and copyhold, and at Richmond and Topsefield, and also divers other leasehold messuages, lands, and tenements), devised and bequeathed all his real and personal estate to trustees, their heirs, executors, and administrators, upon trust to sell his real estate at Islesworth and Richmond, and his personal estate, and invest the produce in Government securities; and out of the yearly income thereof, and out of the rents and profits of his estate at Topsefield, and of his leasehold estates, and all other his real and personal estate, to pay the annuities and legacies; and after payment thereof, he directed the trustees to pay the surplus yearly income of his estate, both real and personal, in manner following: that is to say, one moiety thereof to his daughter, Judith Levy, during her life, or so long as she continued the widow of her late husband; and the other moiety to his daughter Rachael Adolphus, during her life, for her separate use. The testator then proceeded in the following terms:—"And upon further trust, that if the said Rachael Adolphus shall survive the said Judith Levy, or if the said Judith Levy shall at any time hereafter intermarry with any other husband, that from the time of such death or marriage, the moiety of the surplus of the income of my real and personal estates made payable as aforesaid to the said Judith Levy shall be paid by half-yearly payments to the said Rachael Adolphus, for the term of her natural life, for her own sole and separate use, in the same manner as the other moiety is hereby [184] directed to be paid to her as aforesaid; and upon further trust, that if the said Rachael Adolphus shall die without having any issue of her body, and the said Judith Levy shall her survive, that then and in such case the moiety of the surplus of the income of my said real and personal estate, payable to the said Rachael Adolphus as aforesaid, shall by half-yearly payments be paid to the said Judith Levy, for and during the term of her natural life, if she so long continues the widow of the said Elias Levy. And upon further trust, that if the said Rachael Adolphus shall at her death have any issue of her body lawfully begotten, that then and in such case the moiety of the surplus of the income of my said real and personal estate payable to the said Rachael Adolphus as aforesaid shall from thenceforth by half-yearly payments be paid to all the children of the said Rachael Adolphus, during their respective lives, in equal proportions, share and share alike; and in case of the death of any of them, the part and share of such child so dying shall be equally paid to and amongst the survivors and survivor of them. And on further trust, that from and after the death or marriage of the said Judith Levy, the income of my said real and personal estates devised to her as aforesaid shall be paid by half-yearly payments to and amongst all and every of the children of the said Rachael Adolphus, in the same manner and with the like benefit of survivorship as the surplus of the income of my said real and personal estate payable to the said Rachael Adolphus as aforesaid is hereby directed to be paid. And on further trust, that in case my daughter Rachael Adolphus shall have any issue of her body lawfully begotten, that my said trustees do and shall lay out and expend so much money as they shall think necessary for the boarding, maintenance, and education of such children out of the yearly income and produce of my said real and personal estates devised to them as aforesaid, until such time as they shall respectively attain their [185] respective ages of twenty-five years; and that they my said trustees and executors shall respectively lay out the surplus of such yearly income and produce in Government securities for the use of such children respectively, to be paid to each of them, as he, she, or they shall respectively attain their age or ages of *twenty-five years*, share and share alike, with benefit of survivorship to each other. And upon further trust, from and after the decease of both my said daughters, and of the issue of the said Rachael Adolphus (or on the marriage of my daughter Judith Levy as aforesaid, she surviving the said Rachael Adolphus and her issue), that the trustees and executors, &c., do pay the yearly income, &c., of all my said estates, &c., among so many of my said three sisters, Margolus Simons, Judith Hart, and Jacobed Hart, as shall be then living, and to the survivors and survivor of them, share and share alike, for and during their respective natural lives, and the life of the longer liver of them, for their separate use."

"And upon further trust, from and after the decease of my said daughters, and of the issue of my daughter Rachael Adolphus, and of the decease of my said three sisters,

that my said trustees and executors shall pay the yearly income and produce of my said real and personal estates unto Moses Hart and Naphthali Hart, the sons of my brother-in-law, Solomon Hart, for and during the term of their respective natural lives, share and share alike; and in case either of them, the said Moses Hart and Naphthali Hart, shall, after the deaths of the said Judith Levy and Rachael Adolphus, and of the children of the said Rachael Adolphus (if any she shall have), and of the decease of my said three sisters, depart this life *without leaving issue male* of his body lawfully begotten, then in trust to pay the whole yearly income and produce of my said real and personal estate unto the survivor of them, for and during the term of his natural life."

[186] "And I do hereby further direct and appoint, *that if the said Moses Hart shall, after the deaths of the said Judith Levy and Rachael Adolphus, and the children of the said Rachel Adolphus (if any she shall have), and of the decease of my said three sisters, depart this life before the said Naphthali Hart, leaving issue male of his body*, that then and in such case my said trustees, or the survivor of them, and the heirs of such survivor, shall convey one moiety of my said real estate at Topsfield, and also convey one moiety of all such other parts of my freehold and copyhold estates as shall be then remaining unsold, to trustees to the use and behoof of the first and every other son and sons of the said Moses Hart, severally and successively in tail male; and in default of such issue, remainder to the said Naphthali Hart, for the term of his natural life, with remainder to his first and other sons, severally and successively in tail male; and in default of such issue, *to my right heirs*. And in case of such death in manner aforesaid of the said Moses Hart before the said Naphthali Hart, and of the said Moses Hart *leaving issue male*, I do hereby direct and appoint that my said trustees, and the survivor, &c., shall and do lay out one moiety of my *personal* estate and effects, and of such money as shall have arisen by sale of my freehold and copyhold estates, directed as aforesaid to be sold (in case they should then have been sold), in the purchase of lands of inheritance, and convey the same to trustees, *to the like uses* as I have hereinbefore directed, one moiety of my said real estate at Topsfield to be conveyed and settled on the issue of the said Moses Hart, on the contingency aforesaid."

"And I do hereby further direct and appoint, *that if the said Naphthali Hart shall, after the deaths of the said Judith Levy and Rachael Adolphus, and the children of the said Rachael Adolphus (if any she shall have),* [187] *and of the decease of my said three sisters, depart this life before the said Moses Hart, leaving issue male of his body* lawfully begotten, that then and in such case, my said trustees, or the survivor, &c., shall convey one moiety of my real estate at Topsfield, and also convey one moiety of all such other parts of my freehold and copyhold estates as shall be then remaining unsold, to trustees, to the use and behoof of the first and every other son and sons of the said Naphthali Hart, severally and successively in tail male; and in default of such issue, remainder to the said Moses Hart, for the term of his natural life, with remainder to his first and other sons severally and successively in tail male; and in default of such issue, *to my right heirs*. And in case of such death, in manner aforesaid, of the said Naphthali Hart before the said Moses Hart, and his, the said Naphthali Hart's, *leaving issue male*, I do hereby direct and appoint that my said trustees, and the survivor, &c., shall and do lay out one moiety of my *personal* estate and effects, and of such money as shall have arisen by sale of my freehold and copyhold estates, directed as aforesaid to be sold (in case they should have been then sold), in the purchase of lands of inheritance and convey the same to trustees *to the like uses* as I have hereinbefore directed, one moiety of my said real estate at Topsfield to be conveyed and settled on the issue of the said Naphthali Hart, on the contingency aforesaid."

"And in case the said Moses Hart and Naphthali Hart shall both die *without leaving any issue male, or such issue male shall die without leaving any issue male*, that then and in such case my said trustees and executors, or the survivor, &c., shall convey my said real estate at Topsfield, and all other my freehold and copyhold estates which shall then remain unsold, unto such person or persons as shall, at the death of the survivor of them, the said Moses Hart and Naphthali Hart, be [188] *my right heir or right heirs*; and shall in that case transfer, pay, and dispose of all my *personal* estate to and amongst such persons, and in such shares and proportions as they would, by virtue

of the Statute of Distribution of Intestates' Estates, be respectively entitled unto in case I had died intestate."

It will be seen that the will made no provision for the events which afterwards happened, namely, of *Moses dying without issue before the deaths of the previous tenants for life*.

The testator died in 1756.

All the devisees named in the testator's will survived him. The events which subsequently happened were these :

The testator's daughter Rachael, and his sisters, Margolus, Judith, and Jacobed, and Moses Hart, all died without issue, in the lifetime of Judith Levy and of Naphthali Hart.

In 1803 Judith Levy died.

In 1828 Naphthali Hart died a bachelor.

Judith Levy remained in possession of the property until her death. Naphthali Hart then entered into possession, and assuming to be tenant in tail in possession, he suffered recoveries of the freehold and copyhold property, and in 1821 conveyed all the freehold and copyhold and personal estate to a purchaser for valuable consideration.

The co-heirs at law and next of kin of the testator were the Plaintiff, Jacob Henry Franks, and the Defendants, Priscilla Franks and Dame Isabella Bell Cooper.

[189] Besides some leaseholds, there was a sum of £1600 East India stock, and £458 consols, forming the personal estate of the testator.

This bill was filed in 1829 by Jacob Henry Franks, against Price Priscilla Franks, and Sir William H. Cooper and Lady Cooper, and the personal representative of the testator and the heir at law of the surviving trustee of the real estate, and against parties claiming beneficially under the purchaser and their trustee, praying that the rights of all parties in the testator's real and personal estates might be declared, for consequential accounts and inquiries, and that the Plaintiff might be let into possession of his share of the real estates.

The preliminary inquiries having been made before the Master, the cause came on to be heard for further directions in March 1837, when a case was directed for the opinion of the Judges of the Court of Common Pleas on the following points :—

1. Whether Naphthali Hart took any and what estate, under the will of Moses Hart, in the real estate of the testator at Topsfield.

2. Whether Jacob Henry Franks, Priscilla Franks, and Dame Isabella Bell Cooper, the heirs at law of the testator living at the death of Naphthali Hart, took any and what estate under the will in the real estate at Topsfield ; and,

3. Whether Judith Levy, Rachael Adolphus, H. Isaac Franks, Philah Franks, and Priscilla Franks, the heirs at law of the testator living at the time of his death, took any and what estate under his will in the real estate at Topsfield.

[190] The case was argued in Michaelmas term 1838 (5 Bing. N. C. 37 ; and 6 Scott, 710), and the following certificate was returned :—

"We are of opinion, that upon the death of Moses Hart without issue, Naphthali Hart became and was seised, under and by virtue of the testator's will, of a vested estate in tail male in remainder expectant on the determination of the estates limited to Judith Levy, Rachael Adolphus and her children, and the testator's three sisters, in all the messuages, lands, and hereditaments at Topsfield. It having been intimated to us by the counsel on both sides, that, in the event of our opinion on the first question being such as is above stated, they do not desire to have our opinion on the matters referred to in the second and third questions, we forbear to say any thing in answer to them."

The cause now came on for further directions upon the certificate of the Court of Common Pleas.

Mr. Pemberton, Mr. Parker, and Mr. Lee, for the Plaintiff. The will contains no express gift in tail to Moses and Naphthali ; and it is only by implication that they can be held to take such an estate. It is said on the other side, that the ultimate gift over being on a general failure of the issue male of Moses and Naphthali, shews an intention, that all such issue shall be provided for ; but the testator not having, by the previous gifts, provided for all such issue, it is necessary, in order to effectuate the general intention of the testator, to imply an estate tail in the parents, through

whom the whole line of such issue may inherit. It has, however, been clearly established, that there can be no such estate by im-[191]-plication, if the preceding gifts exhaust the whole issue, on failure of which the gift over is to take effect.

It is said then by the Defendants, that in this case there are not previous limitations to the issue male of Moses and Naphthali in every event; and for this reason, because the gifts to them are contingent on their parents surviving the several tenants for life; the answer, however, is this:

First, that if the words sound in contingency, then such contingency runs through the whole will, subsequent to the life-estates to Moses and Naphthali, and consequently none of the subsequent devises took effect at all; by importing contingency, every devise subsequent to those to Moses and Naphthali has failed, and the Plaintiff and the other co-heirs will then become entitled.

Secondly, if the words be not read in a contingent sense, but as importing the period at which, consistent with the previous gifts, the estate is to vest in possession or enjoyment, then it will be found that there is a previous limitation to all the issue of Moses and Naphthali, in respect of both the moieties of the estate, and no necessity will then exist for implying an estate tail in their parents.

Thirdly, if any doubt exists whether the prior limitations would, by express devise, exhaust all the issue male as to both moieties; yet it is clear, that as to one moiety, it does exhaust all such issue male, and therefore, as to that moiety, it is impossible to imply an estate tail in Naphthali.

Fourthly, if the Court is compelled to imply an estate tail at all, it must be implied in favour of the issue of [192] Moses and Naphthali, and not in favour of Moses and Naphthali themselves.

Fifthly, if this Court should concur in the certificate of the Court of Common Pleas on the case stated to them, in which the words of the will have been varied, so as to make the devises legal devises, yet that in this Court a different conclusion must prevail on the words of the will themselves, on the ground of their creating an executory trust; and,

Sixthly, That the gifts to the children of Rachael Adolphus at twenty-five, and those subsequent thereto, are too remote; and that the heir becomes consequently entitled.

If the words be read as importing contingency, how did Naphthali take an estate for life in the whole? The words are, if either Moses or Naphthali shall, after the deaths of Judith, &c., die without leaving issue male, then to pay the whole income to the survivor for life; and this event never took place as to the moiety of Moses. But it is absurd to suppose that the gift of the whole to Naphthali was to be dependent not only on the event of Moses dying without issue male, but also on the contingency of Moses surviving the previous tenants for life. If you read the words as contingent, the event never took place, and Naphthali never became entitled for life to the moiety of Moses; but if you construe them as providing for the period at which the limitations were to take effect, without prejudicing the estates previously limited, then everything will be consistent. The next clause must be construed in a similar way. It is, that if Moses shall, after the deaths of Judith, &c., depart this life leaving issue, then there is to be a conveyance to the first and other sons of Moses in tail, with re-[193]-mainder to Naphthali for life, with remainder to his first and other sons in tail. Here again it would be absurd to consider the gifts over to Naphthali and his issue, depended either on the contingency of Moses surviving Judith, &c., or of his leaving issue male; the object was to give it over to them after first providing for those persons to whom previous gifts had been limited, and it will be found from the authorities subsequently referred to, that in construing these limitations there is no contingency whatever, and that all the male issue have been provided for.

Again: the words "depart this life before Naphthali" must be read as words of limitation, and not of contingency, for nothing would be more absurd, than to make the estate of the first and other sons of Moses depend on the uncle being alive or dead at the time of the death of their father. The reason of the introduction of these words was this, that there was a subsequent gift to Naphthali for life which could only take effect in the event of his surviving Moses.

In a legal devise, but more especially in an executory trust, it is sufficient to find the order on which the devisees are to take: it is quite immaterial how the devisees

themselves are mixed or misplaced in the will; and, bearing this in mind, it will be found that this will contains a provision for the issue of Moses, with remainder to Naphthali and his issue in every event which can possibly happen.

The settlement of the moiety of Moses was not to depend on his surviving his brother, or on his leaving issue male, but was to take place at all events, and then there would be limitations of his moiety to his first and [194] other sons in tail, with remainder to Naphthali for life, with remainder to his first and other sons in tail.

With respect also to Naphthali's moiety the same arguments apply: it is merely reading the words *redendo singula singulis*.

In *Murray v. Jones* (2 Ves. & B. 313) Lady Bath gave certain property "in case, she should have but one child living at the time of her decease," to Mrs. Markham. She never had any child at all, and it was argued, therefore, that the gift could not take effect, because the specified event had not happened; but the answer of Sir William Grant was this; The condition has been more than performed; she did not mean that there should be one child in order that Mrs. Markham should take, but that there should not be more than one child. So here, it is not necessary that there should be children of Moses to entitle Naphthali and his children to take: but it is sufficient, if there are no children of Moses to take, to the exclusion of Naphthali and his children. Similarly in *Aiton v. Brooks* (7 Sim. 204), there was a gift over to B. in case A. should have children living at her decease, who should all die under twenty-one, and it was held, that the gift over took effect, though A. never had a child.

The principle is thus stated in 2 Jarman's Pow. Devise, 217, "where an estate in remainder is limited in terms of contingency, on the happening of certain events, and the events described are precisely those on which, the preceding estates having determined, it will fall into possession, it is construed to be, not a contingent gift conditioned to take effect on these events, but as a devise [195] immediately vested, the possession of which is necessarily dependent on the events in question."

This proposition is fully borne out by a long series of cases, as *Webb v. Hearing* (Cro. Jac. 415), *Anon.* (2 Vent. 363), *Pearsall v. Simpson* (15 Ves. 29), *Massey v. Hudson* (2 Mer. 130), *Napper v. Sanders* (Hutton, 118), stated in *Lethieullier v. Tracy* (3 Atk. 781).

It does not, however, follow that where all the issue will not take under the preceding limitations an estate tail is to be implied upon a gift over, in default of issue; because such issue, may be construed, that issue to whom limitations have been previously made; *Blackborn v. Edgley* (1 P. Wms. 600), *Morse v. Lord Ormonds* (5 Mad. 99; 1 Russ. 382), *Ellicombe v. Gompertz* (3 Myl. & Cr. 127).

On the fourth point: even if the gift to the issue of Naphthali be held to depend on Naphthali surviving Moses, or Moses Naphthali, it is clear, that as to one moiety of the estate, there is no contingency; for either Naphthali must survive Moses, or Moses Naphthali. One of these events must necessarily take place; and in either case, there is a limitation to the issue of Naphthali. As to a moiety, therefore, there is no necessity whatever for implying an estate tail in the parent.

As to the fifth point. Assuming that an estate tail must be implied, it is to be implied not in favour of the parents, so as to enable them by a recovery to defeat all the subsequent gifts, but in favour of the children of Moses and Naphthali. The ultimate gift over being [196] in case Moses and Naphthali shall die without leaving issue male, or such issue male (meaning first and other sons), shall die without leaving any issue male; *Doe dem. Barnard v. Reason* (3 Wils. 244), *Southby v. Stonehouse* (2 Ves. sen. 610), *Lewis v. Waters* (6 East, 336), *Smith v. Horlock* (7 Taunt. 129). There is this difficulty also in implying estates tail in the two parents, if there were but one that would be easily effected, but it is far different where there are two or more. How are they to take? Are they to take as tenants in common in tail, or joint-tenants, or in succession, or with cross-remainders? The difficulty had great weight with C. J. Vaughan in *Gardner v. Sheldon* (Vaughan, 259).

Lastly, this is an executory trust to be carried into effect by a conveyance from the trustees; in such case the Court will mould the most inflexible expressions, as "heir," "heirs of the body," &c., so as to effectuate the full intention of the testator; and will take care, by giving an estate for life only to the parents, to preserve the property for their issue. *Papillon v. Voice* (2 P. Wms. 470), *Leonard v. Earl of Sussex* (2 Vern. 527), *Jervoise v. Duke of Northumberland* (1 Jac. & W. 559).

Mr. Tinney and Mr. Stuart, for Defendants in the same interest with the Plaintiff.

Mr. Kindersley, Mr. Bethell, Mr. Barry, and Mr. Hedge, for the other Defendants, *contra*. Naphthali took by implication an estate tail in the whole real estate, and he destroyed the remainders by suffering the recoveries; he took also an absolute interest [197] in the personalty. First, from the frame of the record, it is incompetent for the Plaintiff now to insist that all the limitations after the several life-estates to the daughters, sisters, and the children, are contingent; for by the bill they are treated as vested, and the Plaintiff thereby claims *one-half* as one of the co-heirs at the time of the failure of the prior limitations, and not one-fourth, which he would have been entitled to as representing one of the co-heirs at the testator's death, or if claiming upon failure of the prior limitations, and not under the will. The Plaintiff has done so, for this obvious reason, viz., because the adverse possession of Naphthali for twenty-five years, would, as to one moiety, have been a complete answer to any claim he might make, otherwise than under the ultimate limitation in the will.

On the second point. The general rule seems free from all doubt: that as the ultimate gift over is in default of issue male of Moses and Naphthali, they will take an estate tail if it can be shewn that such issue male are not provided for by the previous limitations; *Langley v. Baldwin* (1 Eq. Ca. Abr. 185), *Attorney-General v. Sutton* (2 Bro. P. C. 382), *Allanson v. Clitherow* (1 Ves. sen. 24), *Stanley v. Lennard* (1 Eden, 87; and Ambler, 355), *Parr v. Swindells* (4 Russ. 283). We contend that such is the case, and that the previous limitations to the issue male being limited to them in certain contingent events only, which may not occur, it is necessary to give by implication an estate tail to their parents. There are three events contemplated by the testator, in which a totally distinct disposition is made by him of his property, and however absurd they may seem, yet if clearly expressed, they must determine the rights of the parties.

[198] First, if Moses or Naphthali should die without issue male, then to pay the whole rents to the survivor of them, but in that case there is no limitation to the issue, if any, of the survivor.

Secondly, if *Moses should die before Naphthali, leaving issue male*, then and then only a conveyance is to be made to the sons of Moses in tail, with remainder to Naphthali for life, with remainder to his first and other sons in tail, with remainder both as to the real and personal estate *to the testator's right heirs*, and similarly in the other alternative, *if Naphthali should die before Moses, leaving issue male*.

Thirdly, in case both Moses and Naphthali should die without issue male, then there is to be a conveyance not to the testator's *right heirs* as before directed, but a conveyance of the realty to *such person as at the death of the survivor of Moses and Naphthali, should be the testator's right heir, and the personalty to his next of kin*. So that, in these particular events, the ultimate limitation is altogether different. It is, therefore, clear that the property was not, in every event, to go according to the scheme proposed by the Plaintiffs, and that in the several contingent events before stated, the destination of the property was to be different. We contend, therefore, that the expressions, "*if Moses shall die before Naphthali, leaving issue male*," are to be construed as contingent, and that the case does not come within the class of authorities cited on the other side, commencing with *Boraston's case* (3 Rep. 19). The principle is this: where a remainder is limited in words which seem to import a contingency, but on events *precisely those* on which the preceding estates will determine, then such words do not amount to a [199] condition precedent, but only denote the time when the remainder is to vest in possession. The words are considered mere surplusage, as they do nothing more than would be implied without them; as to A. for life, with remainder to B. in tail, if he survive A., B.'s estate would not be contingent on his surviving A.; but the case is far different where the contingency stated does not correspond with the determination of the previous estates, as to A. for life, with remainder to B. in tail, if he survive A. *and* C. This case then comes within the third class stated in *Jarman's Pow. Dev.* (2 vol. 224), who very accurately states the effect of the several cases which have been cited on behalf of the Plaintiff: he says, "The several preceding classes of cases clearly demonstrate that the Courts will not construe a remainder to be contingent merely from the inaccurate and

inartificial use of expressions importing contingency, if the substance and effect of the limitations afford ground for concluding that they were not used with a view to suspend the vesting. They may be considered, however, as exceptions to the general rule; and agreeably to the maxim *exceptio probat regulam*, they confirm rather than oppose the doctrine, that devises limited in clear and express terms of contingency do not take effect, unless the events upon which they are made dependent happen, which cases we now proceed to consider." The author then proceeds to another class of cases, and to which the present belongs, in which estates limited in clear terms of contingency have been so construed, notwithstanding the absurd consequences. He says of this class: "The first observation suggested by this class of cases is, that an estate will be construed to be contingent, if clearly so expressed, however absurd and inconvenient such a [200] construction may be, and however inconsistent with what it may be conjectured was the testator's actual intention." This statement is fully borne out by the cases cited; thus in *Denn dem. Radcliffe v. Bagshaw* (6 Term R. 512) was a devise to M. for life, and after her decease to the first son of her body, *if living at the time of her death*, and it was held that the estate of the son who died before the mother never arose; *Holmes v. Cradock* (3 Ves. 317), *Shulthan v. Smith* (6 Dow. 22).

The words "if Moses shall die leaving issue male" must, therefore, necessarily be construed as contingent. The consequence is, that Moses having died without leaving issue male, the contingency never took effect; and in that event, therefore, there was no limitation of his share to the children of Naphthali. As to Naphthali's share, he did not die in the lifetime of Moses, and therefore as to his share the limitation to his children failed. In the events therefore, which happened, no child of Naphthali, if he had happened to have had one, could have taken under the limitations. Further than this, if either Moses or Naphthali had left children, it is plain they could only take one moiety, and that only in the event of their father surviving their uncle; and if both left issue male, the issue male of the survivor would take nothing in their parent's moiety. Thus, then, it appears, that in many events, the children of Moses and Naphthali would have been totally unprovided for under the will as to the whole or a moiety of the property. This case then becomes the ordinary one of implying an estate tail in the parents, in order to effectuate the general intention of the testator, and to let in the whole issue male.

[201] Fourthly, the implied estate tail must be given to the parents, and not to the children. *Stanley v. Lennard* (1 Eden, 87) is in point, which was a devise to A. for life, with remainder to the eldest son of A. and the issue male of such eldest son, and for want of issue of A. to B., it was argued that all the sons of A. should take an estate tail, but Lord Northington held that A. took an estate tail. *Lewis v. Waters*, and the other authorities cited on this point, were not cases of implication, and do not apply.

Fifthly, we contend that this is not a case of executory trust, for although in particular events, which have not happened, the testator has directed a conveyance to be made, yet on all the clauses on which any controversy arises, the testator has executed the trust himself. The gifts to his daughters, his sisters, and to Moses and Naphthali, consist of a direction to pay, and are trusts executed, and the limitation of which must receive the same construction as limitations of the legal estate. Even if they were executory, the Court would not change the estates expressly directed to be given to the several parties 2 Pow. Devise 447, or insert estates to parties which are not warranted by the expressions in the will.

If any error has arisen in the statement of the case to the Common Pleas, which we deny, the fault rests with the Plaintiff who prepared it. We submit that the certificate of the Court of Common Pleas is satisfactory, and ought to be confirmed.

Mr. Pemberton, in reply.

The Master of the Rolls postponed giving his judgment.

[202] August 8, 1840. THE MASTER OF THE ROLLS [Lord Langdale]. This is a bill filed by Jacob Henry Franks, who is one of the co-heirs of Moses Hart deceased, claiming to be entitled to a share of the real estates of the same Moses Hart, and for consequential relief.

The Defendants claim as purchasers from Naphthali Hart, who was a devisee named in the will of Moses Hart. If Naphthali Hart took under the will an estate

for life only, the Plaintiff is now entitled as one of the heirs of Moses; but if Naphthali took an estate tail under the will he barred it, and the Plaintiff has no title.

The necessary parties to the consideration of the question having been ascertained by the Master's report, the cause came on to be heard on the 2d day of March 1837, and it was ordered that a case be made for the opinion of the Judges of the Court of Common Pleas on the will of the said Moses Hart, and that the questions be—

1. Whether Naphthali Hart took any, and what estate under the will of Moses Hart, dated the 2d of April 1756, in the real estate of the said testator at Topsfield.

2. Whether the heirs at law of the testator living at the death of Naphthali Hart took any, and what estate under the said will in the said real estate at Topsfield.

3. Whether the heir at law of the testator living at the time of his death took any, and what estate under his said will in the said real estate at Topsfield.

On the 1st question, the Judges on the 4th of July 1838 stated their opinion to be, that on the death of [203] Moses Hart without issue, Naphthali Hart became and was seized under and by virtue of the testator's will of a vested estate in tail in remainder (expectant on the determination of the estates limited to Judith Levy and Rachael Adolphus and her children, and the testator's three sisters) in all the messuages, lands, and hereditaments at Topsfield.

And such being their opinion upon the first question, they were not requested to give any answer to the second and third questions.

It is now contended before me that this opinion is erroneous, and I am desired either to decide in opposition to it, or to send the question to the same or some other Court for reconsideration.

The will of Moses Hart, on the construction of which the question depends, is dated the 2d of April 1756. The testator died in the course of the same year, and he had three sisters, viz., Judith Hart, Jacobed Hart, and Margolus Simons, and two sons of his brother-in-law, Solomon Hart, viz., Moses Hart and Naphthali Hart.

He intended to give interests in his estate to his daughters, Mrs. Levy and Mrs. Adolphus, to the issue or children of his daughter Mrs. Adolphus, to his three sisters, and to his nephews of the half blood Moses and Naphthali Hart. Mrs. Adolphus died without issue in the year 1773, leaving Mrs. Levy surviving her; and Mrs. Levy was entitled during her life or widowhood to the income of the testator's estate. The three sisters died in the lifetime of Mrs. Levy. Moses had a son who died before his father, and Moses himself died in the lifetime of Mrs. Levy.

[204] Mrs. Levy died in 1803, and upon her death Naphthali Hart took possession of the estate, and the question is, what was the estate to which he was entitled under the will.

The testator after bequeathing certain annuities and specific legacies, proceeds to state the property to which he was entitled, and he gives the same to trustees and directs them to sell various parts thereof, and place out the money arising from the sale thereof on Government securities, and out of the yearly income or produce thereof, and of his real and personal estate, to pay the annuities and legacies which he had before given; and after payment thereof he directed the trustees to pay the surplus income and produce of his estate in manner therein mentioned to his daughters, Judith and Rachael, and to the children of his daughter Rachael, and after the decease of both his daughters, and the issue of Rachael, to his sisters Margolus, Judith, and Jacobed, and the survivors or survivor of them for life. It thus appears that Moses and Naphthali were not to take anything during the lives of the daughters Judith and Rachael, or the life of any child of Rachael, or the life of any of the three sisters, Margolus, Judith and Jacobed. The testator then proceeds to direct his trustees to hold his estate on trust, "from and after the decease of my said daughters, and of the issue of my daughter Rachael, and the decease of my said three sisters, that my said trustees shall pay the yearly income and produce of my said real and personal estates unto Moses Hart and Naphthali Hart, the sons of my brother-in-law Solomon Hart, for and during the term of their respective natural lives, share and share alike: and in case either of them the said Moses Hart and Naphthali Hart, shall, after the deaths of the said Judith and Rachael, and of the children of the said Rachael, if any she shall [205] leave, and the decease of my said three sisters, depart this life without leaving issue male of his body lawfully begotten, then in trust to pay the whole

yearly income and produce of my said real and personal estate unto the survivor of them, for and during the term of his natural life: and I do hereby further direct and appoint that if the said Moses Hart shall, after the deaths of the said Judith and Rachael, and the children of the said Rachael, if any she shall have, and the decease of my said three sisters, depart this life before the said Naphthali Hart, leaving issue male of his body, that then and in such case my said trustees, &c., shall convey one moiety of my said real estates at Topsfield, and also convey, one moiety of all such other parts of my freehold and copyhold estates as shall then be remaining unsold, to trustees, to the use and behalf of the first and every other son and sons of the said Moses Hart, severally and successively in tail male, and in default of such issue remainder to the said Naphthali Hart for the term of his natural life, with remainder to his first and other sons severally and successively in tail male, and in default of such issue to my right heirs; and in case of such death in manner aforesaid of the said Moses Hart, before the said Naphthali Hart and his the said Moses Hart's leaving issue male; I do hereby direct and appoint that my said trustees, &c., shall and do lay out one moiety of my personal estate and effects, and of such money as shall have arisen by sale of my freehold and copyhold estates, directed as aforesaid to be sold (in case they should then have been sold), in the purchase of lands of inheritance, and convey the same to trustees to the like uses as I have hereinbefore directed one moiety of my said real estate at Topsfield to be conveyed and settled, on the issue of the said Moses Hart on the contingency aforesaid; [206] and I do hereby further direct and appoint, that if the said Naphthali shall, after the deaths of Judith and Rachael, and the children of Rachael, if any she shall have, and the decease of my said three sisters, depart this life before the said Moses Hart leaving issue male of his said body lawfully begotten; that then and in such case my said trustees, &c., shall convey one moiety of my said real estate at Topsfield, and also convey, one other moiety of all such other parts of my freehold and copyhold estates as shall be then remaining unsold, to trustees to the use and behoof of the first and every other son and sons of the said Naphthali Hart, severally and successively in tail male, and in default of such issue, remainder to the said Moses Hart for the term of his natural life, with remainder to his first and other sons severally and successively in tail male, and in default of such issue to my right heirs; and in case of such death in manner aforesaid of the said Naphthali before the said Moses Hart, and his the said Naphthali Hart's leaving issue male; I do hereby direct and appoint that my said trustees, &c., shall and do lay out one moiety of my personal estate and effects, and of such monies as shall have arisen by sale of my freehold and copyhold estates, directed as aforesaid to be sold, in case they should have been then sold, in the purchase of lands of inheritance, and convey the same to trustees to the like uses as I have hereinbefore directed; one moiety of my said real estates at Topsfield be conveyed and settled on the issue of the said Naphthali Hart on the contingency aforesaid: and in case the said Moses Hart and Naphthali Hart shall both die without leaving any issue male, or such issue male shall die without leaving issue male, that then and in such case my said trustees, &c., shall convey my said real estate at Topsfield, and all other my freehold and [207] copyhold estates which shall then remain unsold, unto such person or persons as shall at the death of the survivor of them the said Moses and Naphthali, be my right heir or right heirs, and shall in that case transfer, pay, and dispose of all my personal estate to and amongst such persons, and in such shares and proportions as they would by virtue of the Statute of Distribution of Intestates' Estates be respectively entitled unto in case I had died intestate.

The directions of this will, if applied to the events relating to Moses and Naphthali which happened, are, that the trustees should pay the surplus income to Moses and Naphthali, share and share alike, during their joint lives, and upon the death of Moses without leaving male issue in the lifetime of Naphthali, to pay the whole surplus income to Naphthali for life, and upon the death of both Moses and Naphthali without leaving issue male, that the trustees should convey the real estate to the testator's right heirs, and transfer and pay the personal estate to his next of kin.

As the heir at law and next of kin were not to take unless both Moses and Naphthali should die without leaving male issue, the testator must have intended such issue, if any such there had been, to take, and unless there are other parts of the will by which the estates are given directly to such male issue, the rules of law

will upon this construction of the will give to the parents such estates as might enable the issue to take the interests intended for them.

It was argued in this case, that in the clauses of the will which precede the gift over, by which if at all the gift by implication is to be sustained, estates were directly given to the issues of Moses and Naphthali in such a manner as to exhaust the whole, and by that means to prevent the gift by implication.

In considering those clauses, it has appeared to me that the words "after the death of the said Judith and Rachael, and of the children of Rachael, and the decease of my said three sisters," which so frequently occur, do not import contingency, but are merely words of reference, shewing that the gifts then in course of expression were subject to the prior gifts, and not to have effect in possession till those prior gifts were satisfied or become inoperative; but there are other words in some of the same clauses which do seem to me to import contingency. There are four events or states of things which the testator seems to have distinctly contemplated with respect to Moses and Naphthali:—

1. Their joint lives; in this case they were to enjoy the surplus income share and share alike during the continuance of their lives.

2. The death of either of them without leaving any issue male, leaving the other surviving in this case (which happened), the survivor was to receive the whole surplus income for his life.

3. The death of either, in the lifetime of the other leaving issue male. This case is provided for by clauses distinctly applicable to Moses and Naphthali respectively, but the effect in terms applicable to either was that the trustees of the will were directed to convey and transfer one moiety of the real and personal estate to trustees for the issue of the nephew who died first, as to the real estate in tail male with remainder to the surviving nephew for life; with remainder to the issue [209] male of the surviving nephew; with remainder to the testator's right heirs. Neither of the two clauses which thus provide for a moiety of the estate being settled on the issue male of the nephew dying first, makes any provision for the moiety which by the former clauses was given to the other nephew for life; and then comes the last case.

4. Both nephews dying without leaving issue male, or such issue male dying without leaving issue male. In this case there is a gift over to the heir and next of kin of the testator.

The testator having thus distinctly contemplated the event which happened, and having thereupon given the estate to his heir and next of kin, the gift ought to take effect, if consistent with the rules of law, and the intention appearing on the whole will, it can do so.

If the words which the testator used with reference to the event of Moses dying before Naphthali leaving issue male, and to the event of Naphthali dying before Moses leaving issue male, could be construed as merely referential, and not confined to the particular event provided for, it would follow that all the issue of both Moses and Naphthali were in every event provided for in the clauses which precede the gift over, and no estate tail would be implied from words in which the gift over is expressed; but it appears to me from the words used, and even from the care taken to repeat the words as applied to the case of Moses and Naphthali respectively, that the words must have their natural meaning, and be taken to provide only for the precise cases which are expressly described, and it seems as if the testator intending to provide, that in all events, the gift over should not take effect if there were any issue [210] male of either Moses or Naphthali, and doubting whether he had contemplated or provided for all the events which might happen, expressed the gift over in such a way as to comprise any issue male of Moses and Naphthali which might have been omitted. I think, therefore, that the words operate to create an estate tail by implication.

It is said, that even if this should be so as to one moiety, it is not so as to the other: but it appears to me, that as to this purpose no sufficient distinction can be made between the two. Naphthali as survivor was by direct gift tenant for life of the whole, and the gift over applies to the whole, and I think that the implication which arises as to a moiety must be held to arise as to the whole.

It is then said, that if any estate tail is to be implied it should not be in favour of Moses and Naphthali or either of them, but in favour of their issue male. In the

consideration of the gift over, with a view to this question, it is to be observed, that although the testator has on different occasions throughout his will used the words issue and children synonymously, yet that, except in the particular cases specified, there is no direct gift either to children or issue, and consequently, that the issue of children must take through children, and that the children, if at all, take through their parents by an implied gift to them. The case differs materially from those which were cited. In *Lewis v. Waters* (6 East, 336) there was an expressed gift to the first and other sons and their heirs, and the words "such issue" were construed to refer to the heirs of the sons. In the case of *Ginger v. White* (Willes, 348) there were express gifts to all the [211] male children successively, and to their heirs, and then to the female children and their heirs; and the words "such issue" were construed to refer not to the issue of the parent generally, but to such issue as he had mentioned before. In the present case the sons or issue of Moses and Naphthali do not appear to have given to them any estate capable of being affected by implication arising upon the construction of the gift over.

It is lastly said, that although this may be an estate in tail in Naphthali if the will is conceived to contain only legal or equitable limitations; yet that upon the true construction of the will, the trusts are executory, and ought to be carried into effect by this Court according to the manifest intention, which was, to give the estates to the heir, in default of issue male of Moses and Naphthali.

That some of the trusts were executory is plain; whether Moses or Naphthali died first, leaving issue male, there was to be a conveyance of a moiety to the trustees; but as to the other trusts, it does not appear that any discretion was given, or that any act was required to give the *cestuis que trust* the beneficial interest intended. Acts were required to be done, to place the property in the condition in which the testator intended it to be enjoyed, but the trusts and limitations upon which the questions in this cause arise seem to be expressly declared; and it does not appear to me that this Court has any authority to interfere with their legal effect.

On the whole, therefore, I concur with the opinion of the Judges of the Court of Common Pleas; and it [212] does not appear to me that I ought to send the case to the same, or any other Court, for further consideration.

Mr. Pemberton called the attention of the Court to the fact, that the bill applied both to freehold and leasehold estate, and that a different construction might possibly prevail as to the latter; but

THE MASTER OF THE ROLLS said, that the will gave an estate tail in the freeholds, and consequently an absolute interest in the leaseholds.

[213] TOWNLEY v. DEARE. August 2, 1839.

[*Cf. Glover v. Reynolds*, 1867, 16 L. T. 113.]

Two parties claimed a real estate under different wills, the validity of which were in controversy. An action being brought against the tenant by one of the claimants, he filed his bill of interpleader against both claimants, and obtained an injunction on bringing his rent into Court. Some delay having occurred in getting in the answer of one of the Defendants, the other, who had filed his answer, moved to dissolve the injunction, and have the rent paid out to him. The answer of the other Defendant having been filed before the motion came on, the Court, on the motion, directed an issue to determine the rights of the Defendants, and continued the injunction on the tenant continuing to pay his rent into Court.

Peter Rainer died in 1837, seized in fee of some chambers in the Albany, which had been let by him to the Plaintiff. He left two wills, dated respectively in 1836 and 1837, and which were contested in the Ecclesiastical Court. The Defendants Deare and Mayhew claimed under the former, and the Defendants Elwyn and wife under the latter. In September 1837 the Ecclesiastical Court decided in favour of the latter, but an appeal from this decision was pending in the Privy Council.

Mr. Elwyn gave notice to the Plaintiff not to pay his rent to Deare and Mayhew; the latter, in consequence [214] of the Plaintiff's refusal to pay, commenced an action against him for the recovery of the rent.

The Plaintiff, Townley, on the 15th of January 1838, filed a bill of interpleader against Deare, Mayhew, and Mr. and Mrs. Elwyn; and upon the usual affidavit he obtained an order to pay £120, the arrears of rent, into Court, and an injunction to restrain the proceedings against him at law. The Defendants all appeared, and on the 30th of May 1838 Deare and Mayhew put in their answer. On the 27th of July 1839 they gave notice to dismiss for want of prosecution, and on the following day the Plaintiff filed a replication.

No answer having been put in by Elwyn and wife, the Defendants Deare and Mayhew, on the 27th of July 1839, gave notice of motion to dissolve the injunction with costs, so far as regarded them; and that the £120 cash in Court might be paid out to them. The answer of Elwyn and wife was put in on the 30th of July 1839, and the motion now came on.

Mr. Pemberton and Mr. James Parker, in support of the motion, contended, that as the Plaintiff had evinced very great delay in getting in the answer of Elwyn and wife, the Defendants Deare and Mayhew were warranted by the authority of *Hyde v. Warren* (19 Ves. 322) in moving to dissolve the injunction, and to have the money paid out to them, *Stevenson v. Anderson* (2 V. & B. 407); and that, at all events, the Court ought now to put the right in a train of enquiry, by directing an issue at law. (*The Thames and Medway Canal Company v. Nash*, 5 Sim. 280.)

[215] Mr. Tinney and Mr. Young, for the Plaintiff, argued that there had been no collusion or neglect on the part of the Plaintiff.

Mr. Loftus Wigram, for Elwyn and wife, did not object to the injunction being dissolved, but resisted the payment of the fund in Court to the other Defendants; he contended that as the value of the property was small, it would be wholly spent in the trial of an issue, which he therefore opposed.

Mr. Pemberton, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. In this case the bill is filed by the Plaintiff, a lessee of a portion of the real estate of the testator. The rent which became due from him having been claimed by persons claiming under two devises, the only question lies between the Defendants; and is this, which is the valid will? which of the two wills confers the right to this property?

The Plaintiff, being the lessee, and having claims made on him by two persons, files this bill of interpleader in the ordinary way, desiring to be protected; and he has made the ordinary affidavit of there being no collusion. The bill being filed in January 1838, one of the parties filed his answer in May 1838, but the other Defendants did not answer till July 1839. In the meantime, an injunction was obtained restraining both parties from proceeding, and an order was also obtained that the Plaintiff should pay his rent into Court, which he has done. On the 27th of July last, the answer of the other Defendants not having been put in, the Defendants who had answered gave notice of this motion to dissolve the injunction, and to have the money in Court paid out, and the rents paid to them.

[216] It is to be observed, that in all cases of interpleader the Plaintiff, to a certain extent, admits the right of each of the Defendants as against himself, and he undertakes the duty of bringing the Defendants into controversy to ascertain their rights; not having done this, the Plaintiff has been guilty of such negligence as might have deprived him of protection against the party whose right, as against himself, he admits by the fact of filing the bill of interpleader. It appears, however, that after the notice of motion was given, the answer of the other Defendants was put in, and then for the first time the parties are really brought into conflict. The circumstance of the remaining answer having been put in, pending the notice of motion, makes a great difference; for although the Defendant was right, when he gave the notice of motion, in consequence of the negligence of the Plaintiff, yet when the answers are all put in another question arises, namely, how can the matter in litigation be best decided? I think, notwithstanding the argument to the contrary, I have known bills of interpleader brought to a hearing, but never without observations falling from the Court as to why the matter had not in an earlier stage been put in a train of investigation. However, in this case, both parties have now put in their answers; both claim the money in Court; and an application being made to pay the money to the parties making this motion, the question is, whether I have not jurisdiction to put the matter in a course of enquiry; and if so, how can it be best effected? I think I

have such jurisdiction, and that the question in this case being, who is entitled to the testator's real estate, it can be properly determined only by means of an issue.

The Defendants must, therefore, proceed to an issue *devisavit vel non*; the Elwyns being Plaintiffs, and Deare and Mayhew Defendants; and the Plaintiff must continue to pay his rent into Court. I make no order as to costs on this occasion, but will give liberty to the parties to apply.

It is said that though the right to the personal estate only can be determined by the Ecclesiastical Court, yet as the real estate is of comparatively small value, the question respecting it will virtually be settled by the same decision; but that can only be so by arrangement.

I recollect a case of *Dew v. Clarke* (1 Sim. & St. 108; and 5 Russ. 163), in which the father of Mrs. Dew had a large personal estate, but a very small real estate; there was litigation in every Court into which it could be carried; the Plaintiff, Mrs. Dew, was successful in maintaining that the will was invalid as to the personal estate, but she could not establish her right to the real estate without an action, and to avoid the trial she gave up her claim to the real estate altogether. (NOTE.—14th Nov. 1840. The Lord Chancellor refused with costs a motion, by way of appeal, of Elwyn and wife.)

[218] JOHNSTON v. TODD. April 29, May 2, June 25, 1840; Feb. 18, 1841.

[For subsequent proceedings, see 5 Beav. 394, 597.]

Disapproval of the practice of advancing money out of funds in Court, to enable parties to try an issue directed by the Court.

An issue being directed which was to be conducted on one side by persons not parties to the cause, the Court refused to direct the depositions and affidavits used in the cause of witnesses who had since died, to be read on the trial of the issue.

Where an issue is directed by the Court, and the Plaintiff makes default in going to trial, it will be taken *pro confesso* against him, unless reasonable cause for the neglect be shewn.

A negotiation for a compromise held, in such a case, to be a reasonable cause.

The object of this suit was to administer the real and personal estate of Robert Marshall, the testator, who died in Jamaica in 1820. The residuary and some other legatees having died in the testator's lifetime, it became necessary to ascertain who, in the character of next of kin, and heir at law, were entitled to the undisposed-of real and personal estate of the testator.

The Plaintiffs claimed to be sole next of kin.

A reference had been made to the Master to ascertain the next of kin and heir at law, in which certain other persons, not parties to the cause, came in before the Master, and claimed to be the next of kin, as related to the testator in a nearer degree of propinquity than the Plaintiffs. The Master, however, reported that the Plaintiffs were the only next of kin. The other claimants took exceptions to his report, which came on for argument.

Mr. J. Anderson, in support of the exceptions.

Mr. Pemberton, for the executors.

Mr. Kindersley, Mr. Turner, and Mr. Parry, for the Plaintiffs.

Mr. Stuart and Mr. Moor, for a party claiming to be heir at law.

[219] THE MASTER OF THE ROLLS, after argument, which turned principally on the evidence, directed an issue to ascertain who were the next of kin and heir at law, and he ordered the new claimants to be Plaintiffs in the issue.

The Plaintiffs in the cause afterwards presented a petition to have a sum of £500 paid to them out of the funds in Court, for the purpose of enabling them to defend the issue. They contended, that having been found to be next of kin by the Master, they had a *prima facie* case, and also that they had been placed in the situation of executors defending the estate, and ought consequently to be indemnified.

Peck v. Beechey (2 Sim. 40), *Gregg v. Taylor* (4 Russ. 279), were cited for the Plaintiffs; and *Nye v. Maule* (4 Myl. & C. 343) *contra*.

June 25. THE MASTER OF THE ROLLS [Lord Langdale]. The parties on whose behalf this application is made have produced before the Master a great deal of very important evidence, and have succeeded before him in establishing their claim; he has accordingly found in their favour. Having myself examined the whole of the evidence, I am perfectly aware of its importance; and if the application could be granted, consistently with the principles and the caution with which this Court finds it its duty to act, it would certainly be a satisfactory thing to myself personally if I could comply with this application. That feeling is very much strengthened by the strong sense I have of the great [220] hardship imposed upon persons who have to establish their claim at so great an expense as must have been incurred in such a case as this. But the question here is, whether there is in Court a sum which I judicially know to be properly applicable to the purpose for which it is asked; and I confess the way in which it is brought before me leaves me in very great doubt upon that subject; there being a doubt in my mind, I conceive it to be inconsistent with my duty so to dispose of this fund. There is a fund in Court; but there is nothing to enable me to know judicially that ultimately the fund will properly be applicable to this purpose, especially having regard to the doubt which exists as to the right of these parties.

The case of *Gregg v. Taylor* (4 Russ. 279) has naturally and properly been pressed upon me. It is said to be a case in circumstances precisely similar to the present. I confess after hearing that case, that I have very considerable doubt as to the principle upon which it was founded. It has been over and over again stated to me, that these parties are defending an issue which the Court has directed; and upon that ground I have been asked to shew favour and indulgence to them. It is said (but how far correctly I think is worthy of some consideration) that evidence has been produced which satisfied the Master; the same evidence, contrasted with the other evidence which has been produced in the cause, has not so far satisfied me as to enable me to say I can confirm the Master's report. What interest has the Court, or has justice, to say that either of these parties ought to be preferred to the other in the future prosecution of the case? It rests upon this, that the case is doubtful. There has been, in [221] the opinion of the Master, a preponderance of evidence on one side, and I will not say there may not be a bias in my own mind upon that subject; but still the preponderance is not such as to enable me to say that the case is not doubtful, and ought not to be subjected to a further investigation. As far therefore as I can form an opinion upon that subject, justice is in no way concerned in saying that either party ought to have a preference over the other. The matter is to be subjected to an investigation, and that investigation must take place between these parties in the usual form.

With regard to the policy of making advancements of money for these purposes, I must say that I think the policy of giving that species of advantage to one party or the other extremely doubtful; if you advance money to one party, and leave the other to struggle with poverty, I cannot think you are promoting the ends of justice. I concur also in the observation of my Lord Chancellor in *Nye v. Maule*, that such advancements have the effect of inducing parties to indulge in idle litigation. Having regard to the state of this fund, and the uncertainty of the claims that are made, it does not appear to me that I can safely, and consistently with the principles upon which the Court usually acts, order the advance here required.

I am therefore under the necessity of refusing this application with costs.

The Plaintiffs in the cause also made an application to the Court to be at liberty to read the depositions taken upon commission in the cause, and affidavits taken *ex parte* and used in the Master's office, of witnesses who had died in the *interim*. On this point,

[222] THE MASTER OF THE ROLLS said, I have caused enquiries to be made with respect to orders of this sort, and I believe a very extensive search has in consequence been made by the registrars. They have not been able to find any case in which, upon an issue of this kind, an order has been made for reading on the trial of an issue between persons, all of whom were not parties to the record, depositions which were taken between those persons only who were parties to the record; and it appears to me, that, according to the practice, such an order cannot properly be made.

It is true that in some cases this Court finds it necessary to order evidence to be

received, which, without such an order, would be rejected by a Court of law; but the circumstances of this case do not appear to me to make it necessary or proper to direct any evidence, which may not be legal evidence, to be received, and this application must also be refused.

Feb. 18, 1841. A further point subsequently arose in the cause.

The issue had been directed to be tried at the then next ensuing Summer Assizes for Newcastle, which were held in August 1840. After the terms of the issue had been finally settled, the Plaintiffs made an offer of compromise, which was accepted by the person claiming to be heir at law, but rejected by the person claiming to be next of kin. The latter not having gone to trial with his issue at the Summer Assizes, the Plaintiffs in the cause moved that the issue should be taken *pro confesso* against him. In support of this motion, they contended that a Plaintiff in an issue directed by the Court of Chancery was not at liberty to commit one default in not going to trial; and that if he allowed the [223] time at which the trial was directed by the Court to take place to pass, the Defendants were entitled to have the issue taken *pro confesso*. *Casborne v. Barsham*, L. C. 21 March 1840.

On the other hand, it was contended, that all that was decided in *Casborne v. Barsham* was, that the Plaintiff in an issue was not entitled as of right to pass over the assizes at which it was directed to be tried; but he might justify himself by shewing reasonable cause for not going to trial. That the negotiation for a compromise was such reasonable cause.

THE MASTER OF THE ROLLS said, that the case of *Casborne v. Barsham*, having established that an issue might be adversely taken *pro confesso* against a party who appeared and was willing to go to trial, but had once made default, it must be followed as a precedent. That the rule, however, was not without exception; and if the Plaintiff in the issue could shew such cause for not going to trial, as in the opinion of the Court appeared reasonable, the rule would not apply. That the negotiation for the compromise was in his Lordship's opinion reasonable cause, as the parties could not be expected to prepare for trial while such a negotiation was pending.

The motion was refused with costs.

NOTE.—See *Oliver v. Leman*, 2 Rep. in Ch. 124. *Wilson v. Ginger*, 2 Dick. 521. *Anon.* 4 Mad. 255. *Bearblock v. Tyler*, 1 Jac. & W. 225. *Powell v. Wood*, 1 Russ. & Myl. 354. *Willis v. Farrer*, 3 Y. & Jer. 381. 2 Fowler's Exch. 232; and *Downing v. Downing*, Reg. Lib. 1746, which was a case before Baron Clarke and three Masters, in the absence of the Lord Chancellor, in which the party who had made default not appearing to oppose the motion, the order was made absolute in the first instance on affidavit of service.

[224] STRICKLAND v. STRICKLAND. Feb. 15, 1840.

A bill was filed to establish a will as to real estate. It set forth the will, and stated that it had been proved in the proper Ecclesiastical Court, and it contained an allegation of a pretence on the part of the Defendant, that the will had been altered, whereas it charged the contrary, and that the will was executed in several parts, one copy of which was in the possession of the testator at his death unaltered. The Defendant put in a plea, stating that the will as *proved* did not contain certain passages; and from which it attempted to draw the conclusion that the bill was defective for want of parties. There was no answer accompanying the plea. Held, that the plea was irregular in point of form.

The bill stated the will and codicil of the testator, under which, in the events stated, the Plaintiff claimed to be entitled to a life-estate in certain premises, and it stated that the will had been duly proved in the proper Ecclesiastical Court. It also contained an allegation of a pretence made by the Defendant that the testator had altered his will and codicil by striking out certain stated limitations, and it charged the contrary, and "that the testator duly executed several parts of the said will and codicil as the same were thereinbefore set forth; and that his execution of each and every part thereof was duly attested for passing real estate by devise; and that if it

were the fact that there was any striking out or altering of any portion, either of the said will or first codicil as thereinbefore stated, the same appeared in one part only of the said will and first codicil," and that the other parts which were in the testator's own custody at his death were entire and undefaced, and that, if any part had been defaced, the same was not done by the testator.

The bill prayed for the establishment of the will, and a declaration that the Plaintiff was entitled for life to the real estate in question, and consequential relief.

The Defendant put in a plea stating "that the first codicil, as in the said bill was mentioned, duly proved in the proper Ecclesiastical Court, as the first [225] codicil to the will of Sir George Strickland the testator, did not appear to contain either of the following passages [stating them]." The conclusion attempted to be drawn by the plea was, that the bill was defective for want of parties. The plea was not accompanied by any answer.

Mr. Kindersley and Mr. Shadwell, for the plea, argued that it appeared from the plea, that the passages in question were not contained in the testator's will; in which case the bill was defective for want of parties.

Mr. Pemberton and Mr. Bethell, *contra*, raised many objections to the plea in point of form, and amongst them, that the will which the plea alleged not to contain the passages in question was the will *proved in the Ecclesiastical Court*; that the question here related to real estate, and it was therefore quite immaterial in what terms the will had been proved in the Ecclesiastical Court, which had no jurisdiction in questions relating to real estate.

Mr. Kindersley, in reply. The Plaintiff states the will to have been proved in the Ecclesiastical Court, and the plea, properly enough, identifies that will as the will stated to be proved in the Ecclesiastical Court, and negatives the existence in it of the passages in question. *Doe dem. Burtonshaw v. Gilbert* (Cowper, 49) was cited.

THE MASTER OF THE ROLLS [Lord Langdale] was of opinion that the plea could not be sustained in point of form. That the plea did not negative the fact alleged, namely, that the will and codicil were as stated in the bill, but traversed the fact of the copy proved in the Ecclesiastical Court [226] being so. That the question here was, what was the will to be established in this Court in respect of the real estate, and not what will had been proved in the Ecclesiastical Court.

His Lordship also said, that the plea required proper averments to lead to the conclusion attempted to be deduced.

[226] WHITLEY v. MARTIN. March 4, 1840.

Letters proved in the cause, but not referred to in the pleadings are inadmissible in evidence, even on the question of costs.

The only question in this case was, who ought to pay the costs of the suit, as to which

Mr. G. Richards, as a ground for charging the Defendant with the costs of the suit, proposed to read letters which had passed before the institution of the suit shewing that the Defendant had refused to furnish accounts.

Mr. Anderdon admitted that the letters had been proved in the cause, but he stated that they had not been referred to in the pleadings.

THE MASTER OF THE ROLLS [Lord Langdale] said he could not take this evidence into his consideration, as the Plaintiff had in no way called these letters to the attention of the Defendant, or given him the least opportunity of explaining them. (See *Howell v. George*, 1 Mad. 1.)

[227] PALMER v. WAKEFIELD. March 20, 1840.

A testator appointed two trustees, and gave them a power of making advancements to his children; and he directed if either declined to act, a new trustee should be appointed. One alone (the mother of the children) acted, and made, as was alleged,

advancements without the concurrence of the other trustee, or the appointment of a new trustee. Held, that the proper discretion had not been exercised, and that no enquiries could be directed as to the alleged advancements with a view to their being allowed.

A widow was absolutely entitled to legacies of £3500, of which her husband by his will professed to give to her and her children £2500, which he directed to be invested in the funds or real securities. He gave his widow other benefits out of his own property. The widow received the money, and invested it in the funds, but treating it as her own, she afterwards sold it out, and applied it to her own use. A case of election arose on the will, but it did not appear when she had elected. Held, that the widow electing to take under the will was responsible for £2500 only, and not for the stock purchased therewith.

Liability of husband for the breach of trust of his wife before marriage.

The testator Richard Palmer, being entitled in right of Elizabeth his wife (now the wife of the Defendant Wakefield) to two legacies of £3000 and £500 each, which had not been reduced into possession, by his will, dated in 1807, bequeathed to his wife Elizabeth, the sum of £1000 part of these legacies, "and he gave and bequeathed the sum of £2500, being the remainder of the aforesaid legacies amounting to £3500, as aforesaid, and the interest that should become due thereon until the principal should be paid, unto his said wife, and to his brother the Rev. John Palmer, their executors and administrators, upon trust to lay out and invest the same in or upon some or one of the public stocks or funds, or upon Government or real securities, in their names at interest, with power to vary and transfer such stocks, funds, and securities for others of a similar nature until the same, or the money thereon to be invested, should become transferable and assignable under the trust thereafter declared concerning the same; and he declared that his said wife and brother, and the survivor of them, or other the trustees or trustee for the time being of his said will, should stand possessed of the stocks, funds, and securities after the said sum of £2500 should be so invested as aforesaid, and of said sum of £2500 in the meantime, in trust to pay to and permit and suffer his said [228] wife or her assigns to receive the interest, dividends, and annual produce thereof during her life for her and their own use; and from and immediately after her decease in trust for all and every his present and future children by his said wife that should be living at his decease or born in due time afterwards in equal shares," &c. The testator devised all his freehold, copyhold, and leasehold estates to his wife and brother upon similar trusts. The will contained a clause, whereby the testator declared and directed that it should be lawful for the trustees or trustee for the time being of his will after the decease of his said wife, and also during her life with her consent, to levy and raise by mortgage, sale, transfer, or other disposition of the presumptive or expectant shares of his said children, of and in the therein aforesaid stocks, funds, securities, and trust estates, or any part thereof, any sum or sums of money not exceeding the sum of £600 for any one child towards the maintenance and education of his said children, or towards placing out his said children in any profession, trade, or employment, or otherwise for their advancement or benefit, notwithstanding such children should not have attained vested interests; and the testator directed new trustees to be appointed if the said Elizabeth Palmer and John Palmer, or either of them, or any future trustees or trustee, should die or refuse or decline to act, and he appointed his wife sole executrix and guardian of his children.

The testator died in 1808, leaving his wife and six infant children surviving, the eldest of whom was then about sixteen years of age; his will was proved by his widow alone; she thenceforward enjoyed the testator's property devised and bequeathed to her for life. John Palmer, the testator's brother, survived the testator, and died in 1817, and (as was stated in the bill and answer) without having acted in the trusts.

[229] In March 1816 Elizabeth Wakefield, the widow, received the sums of £3000 and £500, and on the 28th of March 1816 she invested the same in her own name in the purchase of £3878, 2s. 4d. Navy 5 per cents. This sum was afterwards converted into £3228, 18s. 9d. 4 per cents., and was sold out by her in different sums in the years 1827, 1829, and 1830, through the intervention of the Defendant Thomas Wakefield;

the produce was received by him and applied in the reimbursement of advances made by him to Elizabeth Palmer.

In October 1831 Elizabeth Palmer married the Defendant Thomas Wakefield, and on their marriage a settlement was made on him of the property devised by the testator's will. A separation took place between Defendant Wakefield and his wife, and in 1835 the testator's children filed this bill against Thomas Wakefield and Elizabeth his wife, to compel them to replace the stock which might have been purchased with the £2500. The bill alleged that a case of election had arisen under the testator's will, and that Elizabeth, the widow of the testator, had elected to take under the testator's will; it also alleged that Thomas Wakefield, both when the stock was sold out, and on his marriage, had notice of the trusts of the fund.

Thomas Wakefield, who appeared separately from his wife, denied all notice of the trust; none was proved against him further than the constructive notice which might arise from the marriage settlement.

The Defendant, by his answer, insisted that the legacies belonged absolutely to his wife, and that if any case of election did arise, no election had been made; he further said "he believed that the Plaintiffs had, in fact, long since had and received from Elizabeth [230] Wakefield the full benefit to which they would have been entitled from such bequest; for he said that Elizabeth Wakefield remained unmarried from the death of her first husband, in 1807, to October 1831, when she intermarried with the Defendant; and that during that period the Defendant believed that she not only maintained and educated the Plaintiffs, her children, but also advanced considerable sums of money in placing out the Plaintiffs, her sons, and on the marriage of the Plaintiffs, her daughters; and that the sums of money paid and applied by her for the purposes aforesaid, were fully equal to the shares of the Plaintiffs, her children, of and in the sum of £2500 in the testator's will mentioned to be bequeathed to them out of the legacies of £3000 and £500."

At the original hearing of the cause, in 1838, it was referred to the Master to enquire whether Elizabeth Wakefield, before her marriage, had elected to take the benefits given by the testator's will; the Master found in the affirmative.

The cause now came on for further directions, when

Mr. Kindersley and Mr. Koe, for the Plaintiffs, asked for a decree against the Defendants to replace the amount of stock in which the £2500 had been invested, with costs, contending that the Defendant Wakefield had constructive notice of the breach of trust committed by his wife, and, moreover, that he was responsible for the liabilities of his wife at the time of the marriage.

Mr. Pemberton and Mr. Wilbraham, for the Defendant Mr. Wakefield, contended that the Defendant was not affected by notice of the trusts, and, if responsible, was responsible for the £2500 sterling only; and further [231] that from this sum the amount advanced by Mrs. Wakefield to her children for their maintenance and advancement (being ascertained by a further enquiry), ought to be deducted.

THE MASTER OF THE ROLLS [Lord Langdale] (after stating the principal circumstances of the case) said, I think that as Mr. Wakefield on his marriage obtained from his wife a conveyance of the interest in the real estate which she took under the will of her first husband, he must be assumed to have had notice of its contents at that time, but there is not the slightest evidence to shew that he was acquainted therewith at the time when the stock was sold. I apprehend, therefore, that the circumstance of his being employed by Mrs. Palmer, as an agent to procure the sale of that stock, in no way affected him with the knowledge of the will. Some time after the second marriage, Mr. and Mrs. Wakefield separated, and Mr. Wakefield being then called upon to make good the stock which the legacies would have purchased if invested when first received, his wife, who was the person by whom and for whose benefit it was sold, and who had used it, appears, upon the hearing of this cause, separately from her husband, saying, she makes no objection to the relief which the Plaintiff seeks. This certainly is one of those cases which can never be contemplated without great pain. The law is rigid, and in respect of breaches of trust must compel parties to perform their duty; but in this case we find the children, educated and maintained by the mother, out of her means and not out of any fortune or property of their own, many years after they have attained the age of twenty-one years, and after a separation between their mother and her second husband, come and demand a restoration of

this stock, and resisting the slightest allowance in respect of the [232] benefits which they, from time to time, received from her during the period in which she was applying her own means for their maintenance. It is fit, I think, to advert to these proceedings, though my judgment must not in the least be guided by considerations of that nature. In cases of breaches of trust the law must be rigidly applied, however hard it may press in particular cases.

A question was made whether, under this will, a case of election arose. It appears to me there clearly did. It was referred to the Master to enquire whether she had elected; and the Master has found that she has. Having elected, it was her duty, as I conceive, to treat the money originally belonging to her, but of which the testator assumed the right of disposing, as a legacy given by the will and subject to the trusts contained in the will; she must be taken to have known the right, and ought to have performed her duty, and I think that she must be considered as owing that money from the time when it came into her hands. She appears, however, not to have considered herself subject to any duty, but to have treated the money as her own. She had the option in what sort of security she would invest it, and might have invested it upon real security, and the rights of the parties would have been fully satisfied by the production of the principal sum of £2500 given by the testator in this case; and, looking at the circumstances of this case, I do not think that I am acting at all contrary to the rules which this Court has adopted, when I say, that the sum for which she was answerable was the sum of £2500, the principal money; she became answerable for it, in respect of what must be considered as her breach of trust, because, upon her election, it became trust money. Having become answerable [233] for it, she married Mr. Wakefield, and it was by the marriage, and by his assuming the liabilities to which she was subject, that he also, as I think, became liable to pay it, notwithstanding he is called upon to make good that liability by these children, who are aided in doing so by the mother, who, before her marriage, applied this money to her own use as she thought fit. The children, nevertheless, who are the objects of the trust, and entitled to the benefit of that which the testator intended to give them, have a right to call upon him to make good that sum.

The next question which has been raised is, whether any allowance is to be made. There is a proviso in the will, giving the trustees a power to apply sums of money, to the extent of £600 for each child, for their maintenance, education, or advancement. Could anybody do it but the trustees? Did the testator intend that this discretionary power should be vested in anybody but the trustees? I must say that it is with great regret that I come to the conclusion that the trustee, not having been here introduced, because the lady applied the money herself, and without applying to Mr. J. Palmer to act as trustee, there was not that discretion in the application of this money which was necessary under all the circumstances in this case. It happened that this lady, thinking herself the absolute owner of this property, applied what she considered her own monies for the maintenance of the children. She might, by the assistance of the trustee or of this Court, have had the money applied for them; and the question is, whether, after so many years, we can review the matter, and say, she ought to be allowed this sum. I am much afraid, according to the rules which have been adopted, we cannot.

[234] Considering that the suit has other objects than the relief in respect of the breach of trust, the decree must be against the Defendant, Mr. Wakefield, without costs.

[234] HINDE v. BLAKE. June 2, 1840.

[For subsequent proceedings, see 4 Beav. 597.]

One of the presumptive next of kin assigned the share to which he might become entitled in the personal estate of a lunatic who was then living, on trust to pay the costs, and any sums which might be advanced for the purposes of the trust, then to pay an annuity to the assignee, and afterwards to pay his debts. No creditor was party to the deed. The trustees made some payments in advance. On the death of the lunatic, the trustees of the deed filed a bill against the administrator

and the assignor for payment of the assignor's share, alleging that the assignor was desirous that it should be paid to them. Held, that a general demurrer by the administrator could not be supported on these allegations, and *semble* that there was a sufficient consideration for the deed.

This was a general demurrer to a bill, which in substance stated as follows :—

William Blake became a lunatic in August 1833, being possessed of a sum of £11,403 consols.

After his lunacy, and in January 1834, Sir Francis Blake, who was one of the brothers and presumptive next of kin of the lunatic, by a deed made between himself of the one part, and the Plaintiffs who were trustees of the other part, conveyed and assigned to the Plaintiffs all his real estate, and all the part, share, and interest in the said sum of £11,403 consols, and of any other monies belonging to the said William Blake, the brother of the said Sir Francis Blake, and a lunatic, to which he the said Sir F. Blake should or might become entitled upon the decease of the said W. Blake as his next of kin, or as one of his next of kin, whether such part, share, or interest should be a third or a moiety, or a greater part, share, or interest, with a power of attorney and covenant [235] for further assurance; and by an indenture of even date, and made between the same parties, the trusts were declared to be in the first place to pay the costs, charges, and expenses, and any sums they might advance for the purposes of the trust, in the next place to pay to Sir F. Blake an annuity of £500 a year, and then for payment of his debts.

It did not appear that any creditors were parties to this transaction.

The lunatic died in 1838, leaving Sir F. Blake the Defendant Robert D. Blake, and Mrs. Stag, his next of kin, who became entitled to his personal estate; administration was granted to R. D. Blake, who possessed himself of the personal estate.

This bill was filed by the trustees of the creditor deed against R. D. Blake the executor, Mrs. Stag, and Sir F. Blake, to obtain payment of the share of Sir F. Blake.

The bill stated that the Plaintiffs had paid, for the purposes of the trust, more than they had received, and that there was then due to them on the balance of account the sum of £1806; and it also stated that they had made application for payment to R. D. Blake, the administrator, which he refused to make; and that Sir F. Blake was desirous that the one-third of the said sum of £11,100 consols should be paid to them upon the trusts of the deed.

To this bill R. D. Blake filed a demurrer for want of equity.

Mr. Tinney and Mr. Lovat, in support of the demurrer, contended that there was no valid assignment [236] of this property, it being at the time a mere possibility, and that nothing passed to the trustees. *Fearne Cont. Rem.* 549, *Wright v. Wright* (1 Ves. sen. 409). That the deed was inoperative, no creditors being parties to it.

Walwyn v. Coutts (3 Mer. 707), *Garrard v. Lord Lauderdale* (3 Sim. 1; and 2 Russ. & Myl. 451), *Colyear v. The Countess of Mulgrave* (2 Keen, 81).

Mr. Purvis (in the absence of Mr. Pemberton), in support of the bill. In equity a possibility is assignable for valuable consideration, *Metcalf v. The Archbishop of York* (1 Myl. & Cr. 547); and the payment of the debts and of the costs incurred by the trustees form a sufficient consideration; besides which, it must be taken to be the fact that Sir F. Blake is desirous that the amount should be paid to the Plaintiffs.

The deed contains a power of attorney, which, being coupled with an interest, is irrevocable until the money advanced has been repaid.

Mr. Tinney, in reply. In *Metcalf v. The Archbishop of York* there was an actual consideration at the time: here the deed is attempted to be supported by payments subsequently made.

If the subject-matter be not assignable, it matters not whether the assignor is desirous that payment should be made to the Plaintiffs or not; the question being whether, under the deed, they have in themselves such an interest as will enable them to maintain the suit.

[237] THE MASTER OF THE ROLLS [Lord Langdale]. The Defendant admits that he is the legal representative of William Blake, who died a lunatic possessed of personal estate, and that the next of kin of William Blake were Sir Francis Blake, R. D. Blake, and Mrs. Stag. It is admitted that the Defendant R. D. Blake, as the legal personal representative, has possessed himself of the estate, and that he must

account for it to the next of kin, one of whom is Sir Francis Blake, but it is denied that the Plaintiffs have any right to sue.

William Blake, the intestate, became a lunatic in August 1833, and the Defendant Sir Francis, who was one of the presumptive next of kin at the time of the lunacy, executed two contemporaneous deeds, by one of which he assigned all his possible interest of the personal estate of the lunatic. The other was a declaration of trust: it recites that several debts were due from Sir F. Blake at the time, and the trusts are for payment of costs, and any sums which they might advance for the purposes of the trust, and then to pay Sir F. Blake an annuity of £700 a year, and afterwards to pay his debts. Sir Francis had no actual interest in the property of the lunatic at the time, but he might have, if living, at the lunatic's death. It is admitted that the deed was executed; but the objections taken are, first, that there was no proper subject of assignment, because the assignor had only a possibility, and secondly, that there was no sufficient consideration for the deed.

The money is payable to Sir Francis Blake, or those claiming under him; the Plaintiff alleges, and it is admitted by the demurrer, that Sir Francis Blake is desirous that payment should be made to the Plaintiffs; [238] and it is alleged and admitted by this record that the deed was executed by Sir F. Blake, and that monies have been expended by the trustees on the faith of it. I am inclined to think there is a sufficient consideration; but Sir F. Blake being admitted to be desirous that the money should be paid to the Plaintiffs, I think the demurrer must be overruled.

[238] Between ANN RYCROFT, the Wife of HENRY RYCROFT, and PAMELA RYCROFT, an Infant, by their Next Friend, *Plaintiffs*; and WILLIAM M. CHRISTY and HENRY RYCROFT, *Defendants*. June 15, 1840.

A *feme covert* made a disposition of property, as to which it was doubtful whether it was settled to her separate use. The husband disclaimed. Held, that whether separate property or not, the husband's disclaimer gave effect to the disposition of the wife.

A. B., the *cestui que trust* of money in the hands of a trustee, by deed, without consideration, directed part of the dividends to be paid by him for the maintenance of an infant, a stranger to A. B., and covenanted to indemnify him, and agreed to allow the same out of the dividends of the trust fund. The trustee accepted the new trust, and acted upon the deed. Held, that there was a valid executed trust created, which A. B. could not revoke.

The testator John Price, by his will, dated in 1831, bequeathed his personal estate to the Defendant William Miller Christy, on trust to sell and invest, and pay the dividends, &c., "unto, or permit the same to be received and taken by Ann Rycroft, then residing with him as his housekeeper, or her assigns, during her life, for her and their own absolute use and benefit," and after her decease in trust for his natural daughter Pamela by the said Ann Rycroft.

[239] The testator died in the same year, leaving Ann Rycroft and her daughter Pamela, and also another natural daughter by one Ann Elf.

William M. Christy proved the testator's will.

Ann Rycroft was a married woman, her husband being living at the death of the testator.

The daughter of Ann Elf being wholly unprovided for, Ann Rycroft, by an instrument dated the 21st of December 1831, and made between the Plaintiff Ann Rycroft of the one part, and William M. Christy of the other part, after reciting the will, and that the testator had another child by Ann Elf, and that it was his express wish and desire, although not stated in his will, that the said Ann Elf should be paid or allowed out of his estate 7s. a week for the maintenance and support of his said child by the said Ann Elf, as the said Ann Rycroft did thereby acknowledge; it was witnessed that, in order to carry into effect the wish and desire of the testator, Ann Rycroft did thereby direct W. M. Christy, out of the interest of £500, forming part of the produce of the estate of the testator secured by the warrant of attorney of one Richard Meeson, to pay 7s. a week to Ann Elf for the maintenance of her child until

she should attain sixteen years. Ann Rycroft thereby covenanted to indemnify Christy in respect of such sum, and agreed to allow the same to Christy out of the dividends payable to her under the will. At the time of Ann Rycroft's executing the deed she was a married woman, having married the Defendant Henry Rycroft in 1811; they were then and were now living separate.

The trustee accepted the trusts of the deed of 1831, and acted upon it.

[240] In 1835 Ann Rycroft and her daughter filed a bill against her husband and Christy the trustee, for the administration of the estate. H. Rycroft, the husband, by his answer, disclaimed all interest in the funds.

By an order on further directions, it was referred to the Master "to inquire and state to the Court, whether the agreement in the answer of the Defendant W. M. Christy was binding on Ann Rycroft." The Master found in the affirmative.

The Plaintiff took an exception to the report, alleging that the Master ought to have found that the agreement was not binding on the Plaintiff. This exception now came on for argument.

Mr. C. P. Cooper, for the Plaintiff, contended that the words of the will did not create a separate estate in Mrs. Rycroft; *Tyler v. Lake* (2 Russ. & M. 183). That her deed, therefore, as a married woman, was inoperative, and could not become effectual by the subsequent disclaimer of her husband. That this was an executory and voluntary trust, which could not be enforced in this Court.

Mr. Tinney and Mr. Keene, *contra*, contended that the words used by the testator were sufficient to create a trust for the separate use of Mrs. Rycroft, who therefore became, as regarded the property, a *feme sole*, *Prichard v. Ames* (Turner & R. 222); and that if not, then that the effect of the disclaimer of her husband confirmed her previous disposition. That a valid executed trust had been created, which had become irrevocable and binding on the settlor, her husband and the trustee.

[241] Mr. Cooper, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. This case has been very ably argued by the counsel on both sides; and though I feel considerable difficulty, yet, on the whole, I cannot do otherwise than come to the same conclusion as the Master. The will gives the income to this lady and her assigns during her life, "for her and their own absolute use and benefit." I have, undoubtedly, very great difficulty in saying that, by the form of words contained in this will, the property is given to her for her separate use; when the circumstances are considered, it is very probable that the testator so intended it; but I cannot say that such is the effect of the words. At the testator's death, Mrs. Rycroft was living separate and apart from her husband; the income was at her disposal, to do as she pleased with it, for her husband, it appears, did not in any way concern himself therewith, and having afterwards been informed of the gift, he actually disclaimed all interest in it, and thus gave effect to that which his wife had done with it. The question, therefore, turns on that which Mrs. Rycroft had done in the meanwhile; she had executed this deed, which recites (upon what foundation in fact is not stated here) that it was the wish and intention of the testator, from whom she derived this income, that this child should be maintained and supported. What did she do? There was a sum of £500 in the hands of the trustee, to the income of which she was entitled, and which, when received, it was then the duty of the trustee to pay to Mrs. Rycroft; she executed an instrument which contains an express direction to Mr. Christy, the trustee, to pay a certain portion of that property to the child of Ann Elf. So far as Mrs. Rycroft had the power, she trans-[242]-ferred the trust from herself to the object she desired to be benefited, namely, to this child, and from the moment when that direction was signed and accepted by Christy, it became his duty to pay the sum directed to Ann Elf. This duty being imposed upon him, and there being no further instrument or formality to be executed, it became a trust binding on Mr. Christy to the extent of that direction. Then the question is, whether a trust, which is executed in this way, can be rendered executory back again by an accident which subsequently occurs, namely, by a transfer of this fund into Court? The duty which is once fixed is not to be changed by any circumstance which afterwards occurs. I do not think upon that part of the case there is any doubt, although there may be upon the other point; I think the Master's report ought to be confirmed.

[242] STRICKLAND v. STRICKLAND. August 5, 1840.

Where a Plaintiff, by amendment, abandons a part of his claim, and it appears he has in that respect acted vexatiously, the Court, on motion, will direct him to pay the costs thereby occasioned.

A Plaintiff having filed two bills, in which his claims were inconsistent, abandoned part of the relief originally asked. Held, that he had acted vexatiously, and he was ordered to pay the additional costs incurred by the abandoned claim.

The Plaintiff by his original bill claimed to be tenant for life of three estates which had been devised by the will of the testator, Sir George Strickland, to three different persons, with remainders over.

The Defendant having put in his answer, the Plaintiff amended his bill, by which he abandoned all claim to one of the three estates, which had been devised by [243] the testator to his son Charles. Though the amendments were not of any considerable length, yet a new engrossment of the bill had become necessary.

The Plaintiff, it appeared, had also filed a bill in the Vice-Chancellor's Court, in which (as was considered by the Master of the Rolls in this case) the claims of the Plaintiff were inconsistent with the claims which he put forward in this suit, i.e., he claimed under the will in this suit, and against it in the other.

It was now moved on the part of the Defendant, that the Plaintiff ought to pay all the costs of the original bill, and the costs of so much of the amended bill as related to the third estate.

Mr. Girdlestone and Mr. Shadwell, in support of the motion, cited *Massarene v. Lydon* (2 B. C. C. 291), *Smith v. Smith* (G. Cooper, 141), *Bullock v. Perkins* (1 Dickens, 110), *Mavor v. Dry* (2 Sim. & St. 113), and *Monck v. The Earl of Tankerville* (10 Sim. 284), and see *Dent v. Wardel* (1 Dickens, 339), *Watts v. Manning* (1 Sim. & St. 421), and *Peel v. Cassens* (1 Sa. & So. 176).

Mr. Pemberton and Mr. Bethell, *contra*.

THE MASTER OF THE ROLLS [Lord Langdale]. I cannot help regretting that a motion of such a nature as the present should have been brought forward in this form. A great part of the motion is wholly groundless, and has been attempted to be sup-[244]-ported by reasoning which, if it were to prevail, would render it impossible to amend a bill with any, the least safety.

The Plaintiff has, by his bill, claimed estates which were originally devised by Sir George Strickland to three different persons. He has amended the bill, and continues his claim as to two estates, and has dropped his claim as to the third. It is said, and may be said truly, that if the claim which has been excluded from the amended bill had also been excluded from the original bill, the Defendant would have been spared some costs, both in the copy of the bill, and in answering these particular claims. That can hardly be otherwise on amending a bill, when any part of the relief is waived; but at the same time it is very advantageous for all parties, that where a Plaintiff finds he cannot sustain any part of his claim, he should abandon it at the earliest stage of the proceedings.

It is said that if a Plaintiff makes a claim, and strikes out the statement on which it is founded, the Court cannot, at the hearing, judge of the amount of expence occasioned thereby, as the matter is no longer on the record; there is that technical difficulty, but it is frequently overcome, and many cases have occurred in which relief in respect of costs has been given as to parts of the bill which have been abandoned; but is the Defendant to wait until the hearing of the cause, if vexatious amendments have been made? I have no doubt he is not, but is entitled to a speedier remedy. The question therefore comes to this, whether the Plaintiff has acted vexatiously.

As to the length of the amendments, there is nothing here to call for particular observation. I think there [245] is not, from quantity of matter, any proof of vexation. It is then said that the matter has been brought forward vexatiously, because, in another bill, the Plaintiff was asking relief quite inconsistent with his claim in this suit. I think, from the circumstances, that the claims are totally inconsistent; and the proceeding does, therefore, appear to be vexatious. All I can do, is to direct an

inquiry what additional costs have been incurred by this claim, which has been abandoned. These costs must be taxed and ascertained; but I must refuse the costs of this application, on the ground that too much is asked by the notice of motion.

[245] *In re SHARP'S PATENT, Ex parte WORDSWORTH.* Nov. 5, 6, Dec. 22, 1840.

[S. C. 10 L. J. Ch. 86. Observed upon, *In re Berdan's Patent*, 1875, L. R. 20 Eq. 346. See also Patents, Designs and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), s. 91.]

Extent of the jurisdiction of the Master of the Rolls to alter the enrolments of the specifications of patents.

Under the 5 & 6 W. 4, c. 83, a patentee by the authority of the Solicitor-General, entered a memorandum of alteration of the enrolment of the specification, and which it was alleged extended the patent and infringed upon another patent granted to the Petitioner. Held, that the Master of the Rolls had no jurisdiction to order such memorandum of alteration to be expunged.

On the 8th of October 1836 John Sharp obtained a patent for an alleged invention of machinery "for converting ropes into tow, and of improvements in machinery for preparing hemp or flax for spinning, part of which improvements were also applicable to the preparing of cotton, wool and silk for spinning." A specification of the invention was enrolled on the 8th of April 1837.

On the 31st of May 1838 the Petitioner, Joshua Wordsworth, obtained a patent for an alleged invention of improvements in machinery, "for heckling and dressing flax, hemp, and other fibrous materials."

[246] After the date of this patent, and before the specification of the Petitioner's invention had been enrolled, Mr. Sharp, in September 1838, obtained from the Solicitor-General an order or certificate, directed to the Clerk of the Patents, whereby it was certified that John Sharp had applied to the Solicitor-General for leave to enter with the Clerk of the Patents, certain memorandums of alteration of part of the specification of the invention for which letters patent had been granted to him; and that the Solicitor-General, on considering the said application, had directed the said John Sharp to advertise his said alterations in the *London Gazette* and certain other papers; that such advertisements had been duly made, and that no objection having been made to the said application, the Solicitor-General had accordingly granted leave to the said John Sharp to file his said memorandums, of alterations pursuant to the statute of the 6 W. 4, c. 83.

By this statute it is enacted, that any patentee may, if he think fit, enter with the Clerk of the Patents of England, "having first obtained the leave of His Majesty's Attorney-General or Solicitor-General in case of an English patent," certified by his *fiat* and signature, "a disclaimer of any part of either the title of the invention or of the specification, stating the reason for such disclaimer; or may with such leave as aforesaid, enter a memorandum of any alteration in the said title or specification, *not being such disclaimer or such alteration as shall extend the exclusive right granted by the said letters patent*; and such disclaimer or memorandum of alteration being filed by the said Clerk of the Patents, and enrolled with the specification, shall be deemed and taken to be part of such letters patent, or such specification in all Courts whatever." It then provides that any person shall have a right to enter a *caveat*, and be heard [247] before the Attorney or Solicitor-General, who before granting the *fiat* may require the disclaimer or alteration to be advertised.

The specification of the Petitioner's invention was enrolled on the 30th November 1838, before the Petitioner had been informed of the memorandum of alteration filed by Sharp.

The Petitioner Wordsworth now presented his petition to the Master of the Rolls, alleging that the machinery described in Sharp's memorandum of alteration, constituted a new machine, or arrangement of machinery, and extended the exclusive right granted by Sharp's patent; and was also in substance the same machinery which was invented by the Petitioner, and was described in his specification.

The petition prayed "That such portions of the said memorandums of alterations in the said specification of the 8th of April 1837, filed by Mr. Sharp, as were in substance descriptive of the same machinery, as was invented by the Petitioner, might be expunged from the memorandum of alterations and the Rolls of the Court," with costs.

Mr. Pemberton and Mr. James Russell, in support of the petition.

The alteration which has been made in the specification of the patent is such as the Act of Parliament does not warrant. The Act expressly provides that the alteration shall not extend the patent, but here it is extended in such a manner as to infringe upon the patent right of the Petitioner to his very great prejudice; from this he ought to be relieved.

[248] The statute provides that the alteration in the specification shall be taken as part of the letters patent in all Courts whatever; if this alteration, unwarranted by the statute, is to be considered as part of the records of the Court, then this Court has jurisdiction to expunge the irregular entry on its Rolls. The records of the different Courts have always been subject to their jurisdiction and authority, and if the Court finds they are not in the state they ought to be, it will correct them. In *Redmond's case* (5 Russ. 44) Sir J. Leach ordered an error in the enrolment of a specification to be corrected.

The Legislature could never have intended that the Attorney and Solicitor-General should have an uncontrolled authority to order any alteration whatever in a patent, or to direct any entry they pleased on the Rolls of the Court; for if they are to decide conclusively without giving parties, in whose absence they decide, the power of appealing, then, if the *fiat* of the Attorney-General were granted by fraud, accident or mistake, there would be no means of correcting the error. There is no other jurisdiction to which this application can be made, and if this Court ever had jurisdiction to correct its own records, it can only be taken away by express enactment; *Attorney-General v. Aspinall* (2 Myl. & Cr. 613), *Attorney-General v. The Corporation of Norwich* (2 Myl. & Cr. 430), *Attorney-General v. The Corporation of Poole* (4 Myl. & Cr. 17), and see *Attorney-General v. Wilson* (1 Cr. & Ph. 1); there is no exclusion of the jurisdiction of this Court in the statute in question, it must consequently still remain. The Court, therefore, has authority to control the dis-[249]cretion of the Attorney-General, and to judge whether, under the Act of Parliament, the memorandum is such as to be proper to be added to the record.

Again, the Attorney-General is only authorised to sanction such a memorandum as does not extend the patent. Here the memorandum does extend the patent. The Act of Parliament therefore does not apply, and the amendment may be treated as surreptitious, and as forming no part of the Rolls. It will be said, that in this view of the case, the Petitioner will not be prejudiced, as on the trial of an action at law, the fact will appear that the alteration was unwarranted; but the Act expressly provides that the alteration "shall be deemed and taken to be part of such letters patent or specification in all Courts whatever:" the altered specification will therefore be conclusive. Independently of this, the Petitioner has a right to try an action without these words; and as where a deed or other instrument forms a cloud over the title of a party, this Court will order it to be delivered up, so here the Court will relieve the Petitioner from the effects of an improper entry on the records of the Court made in his absence.

They cited *Perry v. Skinner* (2 Mes. & W. 471), in which it was held that where a patent is originally void, but amended under 5 & 6 W. 4, c. 83, by filing a disclaimer of part of the invention, that Act has not a retrospective operation, so as to make a party liable, for an infringement of the patent, prior to the time of entering such disclaimer.

Mr. M. D. Hill and Mr. Bacon, *contra*, contended that the Master of the Rolls had no jurisdiction to do that which was asked by the petition; that the alteration [250] was not even a record in its strict sense, and that, if it were, the Master of the Rolls, sitting as the Keeper of the Records, had no power to expunge the alteration sanctioned by the proper authority: for his jurisdiction, in this respect, was confined to the amendment of clerical errors only.

They admitted the principle laid down in the decisions on the Municipal Corporation Act, that an old jurisdiction was not excluded by the erection of a new tribunal;

but contended, that before the Act relating to patents, this Court had, in reality, no jurisdiction whatever on the subject. That the right of disclaimer, and of effecting an alteration in the title in specification was a new creation, for the determination of the questions regarding which, the Legislature had created a special tribunal, from which there was no appeal to this Court; that if this Court could rehear the decision of the Solicitor-General, the same right applied to the Judicial Committee of the Privy Council; that this petition was a mere contrivance for trying, all questions on alterations or disclaimers in patents, before the Master of the Rolls.

That no hardship existed, as in an action at law, a Defendant was not estopped by the statements in the patent, but might disprove the recitals therein that the invention was new and useful.

They also contended that the remedy, if any, was by *scire facias*, and not by petition to the Master of the Rolls.

Mr. Pemberton, in reply.

THE MASTER OF THE ROLLS [Lord Langdale] (after stating the circumstances). The Petitioner complains of this proceeding [251] as injurious to him, as it undoubtedly is, if the facts be as alleged; and he prays that such portions of the memorandum in Sharp's specification as are in substance descriptive of the machinery invented by the Petitioner, may be expunged from the memorandum of alterations and the Rolls.

The question now is, whether, supposing the facts to be as alleged, I have authority to do what is asked, and I am very clearly of opinion that I have not.

Patents for inventions are granted on condition of a specification of each invention being enrolled in a limited time, and except for the purpose of correcting mere verbal or clerical errors, proved to have arisen from mistake or inadvertence, I am of opinion that I have no authority to make any alteration in the enrolment of the patent or specification.

The party enrolling his specification does it at his own peril; and if in his specification he expresses something by which his patent is rendered invalid, he must submit to all the legal consequences; and those who have a right to take advantage of any error of his, must do so in a legal course: they cannot require the Keeper of the Records or Rolls to alter that which the patentee has claimed or disclaimed in his specification, and compel him, by such enforced alteration, to say something which he never intended to say.

There were very good reasons for relieving patentees from some of the risks and difficulties to which they were liable from errors in their specifications: and the statute 5 & 6 W. 4, c. 83 authorised disclaimers and memorandums of alteration to be filed and enrolled with the leave of the Attorney or Solicitor-General: and [252] enacted, that when filed and enrolled, the same should be deemed and taken to be part of such letters patent or specification, *i.e.*, as the Act has been expounded (*Perry v. Skinner*, 2 Mees. & W. 471), shall be deemed and taken to be part of the letters patent or specification from the time of filing the memorandum of alteration.

And considering the memorandum of alteration as now being part of the specification, I conceive that it ought to be dealt with as such, and no otherwise.

If it were alleged that the enrolled memorandum of alteration, by mistake of the writer, contained verbal or clerical errors by means of which something was enrolled contrary to the true intent of the party, and if sufficient evidence were given of the fact, I should think myself authorised, by precedent, to correct the error and make the enrolment accord with the proved intention of the party at the time of the enrolment.

But it has never been supposed that the Master of the Rolls, as Keeper of the Records, had authority to permit or to order an erroneous claim to be expunged or amended. The party may have claimed too much, and thereby made his patent good for nothing, or may have omitted to claim something which he was justly entitled to; but on such grounds the Keeper of the Records could not interfere on his behalf or at his instance; and I apprehend that no attempt has ever been made to induce the Keeper of the Records to expunge by his authority some claim which the patentee desired to sustain, and was willing to defend in due course of law.

Under the late statute the disclaimer is not to be such as shall extend the exclusive right granted by the letters [253] patent. But the Keeper of the Records as such

has no authority to decide whether there is any extension; nor has he, in that character, any means of investigating the truth and justice of the case. It is no part of his duty, when he receives the enrolment into his custody, to consider whether the Attorney or Solicitor-General has improperly given leave to file the memorandum, nor can he afterwards determine any such question.

I delayed my decision in this case for the purpose of inquiring what had heretofore been done in the amendment of enrolments in this Court; and from the information which I have received, it would seem that it has always been usual to amend clerical errors. When errors have been made in grants, as was said "*per incuriam et ex mansi inadvertentiâ scriptoris*," they have been amended by the Master of the Rolls; sometimes under the authority of a warrant from the Crown, sometimes with the consent of the Attorney-General, sometimes in consequence of a reference to him by the Lord Chancellor; and there is an instance of an amendment being made by an order of the Lord Chancellor, pursuant to an order of the king. The errors have been proved and rectified by comparison with the writ of Privy Seal, or with the signed bill, or with the original grant.

At an early period the enrolment of the acknowledgment of a deed was amended at the request of the grantor who had acknowledged it.

I have not been supplied with any early instance of amending the specification of a patent invention, but the recent instances of such amendments have been of this kind: In a case before Lord Gifford in 1824, the word "*wire*" had been written instead of "*fire*," and he ordered the specification to be amended. In the [254] case of Redmond, an erroneous transposition of numbers was amended by order of Sir John Leach, who, in a subsequent case, ordered to be amended two errors, by one of which the word "*which*" was written instead of "*wheel*;" and by the other, of which the word "*increase*" had been written instead of the word "*inverse*."

I have had some similar cases before me, in which there have been errors more or less numerous, but all of the same kind.

And in every case which has occurred, it has plainly been intended to do no more than to amend mere slips or clerical errors made by the parties, or the agents of the parties, who intending to make an accurate enrolment, have, by mere inadvertence, made an enrolment which was not what it purported to be, a true statement of that which the party intended at the time; and not only has strict evidence of error been required, but in order to enable any third party to dispute the validity of the amendment and of the order, it has been directed that the order itself should be endorsed on the enrolment.

It does not appear that the Master of the Rolls, as Keeper of the Records in Chancery, has ever exercised any greater authority than I have stated in matters of this kind; and being of opinion that I have no jurisdiction to make any such order as is asked by this petition; I must dismiss the petition with costs.

[255] THE ATTORNEY-GENERAL v. CHAPMAN. Nov. 25, 1840.

[S. C. 10 L. J. Ch. 90.]

Payment of interest by an executor, commencing six years after the testator's death, and continuing seven years: Held to be such an admission of assets as to make the executor personally liable.

The testator, George Perkins, by his will, dated in 1799, directed his executors, therein named, to purchase out of his personal estate so much in the 3 per cent. consolidated Bank annuities as would produce a yearly sum of £20, and to stand possessed thereof upon trust to pay the dividends to the vicar and churchwardens for the time being of the parish of Barrow-upon-Soar, to be distributed by them on the 21st of December yearly amongst the necessitous poor of that parish; and the testator declared that the sum necessary to make such purchase should be the first charge on his personal estate, and should be paid before his debts and other legacies, which he thereby charged upon his real estates in the event of his personal estate being insufficient to satisfy them after such investment as aforesaid had been made; and

after devising his real estates charged as aforesaid to William Chapman and Daniel Chapman, and directing his personal estate to be valued and divided between them, he appointed them his executors accordingly.

The testator died in the following year.

It could not be ascertained whether any investment had been actually made to answer the £20 a year, though it was supposed there had been, and that the amount had been sold out. No such investment, however, existed.

William Chapman, one of the executors, died in 1804, and Daniel Chapman, the other executor, died in 1820, having regularly paid the £20 down to the time of his death.

[256] Daniel Chapman appointed his son, the Defendant Joseph Chapman, his executor, and devised his real estate to his other sons. After Daniel Chapman's death, his devisees, considering the £20 a year to be a charge on the real estate, continued to pay it down to the year 1826, when they refused to make any further payments, whereupon the Defendant, Joseph Chapman, the executor of D. Chapman, continued to pay it down to the year 1833; but from that time he also refused to continue any further payment.

An information was filed by the Attorney-General against Joseph Chapman, to compel him to purchase, such a sum of stock as would produce £20 per annum, for the charity, and insisting that as executor of Daniel, he had, by his conduct, admitted assets of Daniel so as to make himself personally liable.

The information now came on for hearing.

Mr. Pemberton and Mr. Blunt, for the Attorney-General, asked for a decree, with costs, in the first instance, on the ground that he had admitted assets, and made himself personally liable.

Mr. Kindersley and Mr. Messiter, for the Defendant Joseph Chapman, insisted that the Defendant was entitled to have an account taken of the assets of Daniel Chapman, possessed by him; and that his liability would be limited to the balance found against him.

Mr. Stevenson, for the vicar and churchwarden.

THE MASTER OF THE ROLLS [Lord Langdale]. The Defendant has, for seven years, paid the £20 to the charity, and the first payment was made six years [257] after the death of his testator. He had, therefore, ample time to ascertain the state of the assets. In this situation of circumstances he must be taken to have admitted assets, and is no longer entitled to have any account of them, but must be declared liable to make good the fund.

[257] PLATT v. ROUTH. Nov. 3, 4, 1840; Jan. 16, 1841.

[S. C. 10 L. J. Ch. 131; and in House of Lords (sub nom. *Drake v. Attorney-General*), 10 Cl. & F. 257; 8 E. R. 739; and see 6 Mee. & W. 756; 10 L. J. Ex. 105. Commented on, *In re Hoskin's Trusts*, 1877, 5 Ch. D. 233. See *In re Power* [1901], 2 Ch. 663.]

A testator gave his residuary estate in trust for his daughter for life, with remainder to such persons (other than A., B., and C. and their relations) as she should by will appoint, and in default, over; and if the daughter married or received visits from A. or any of his relations, then she was to forfeit her power. The daughter appointed the property by her will. Held, on her death; *first*, that under the Legacy Duty Act, she had a general and absolute power of appointment, and that, therefore, legacy duty was payable on the residue, under the first will; *secondly*, that no probate duty was payable on the probate of the daughter's will, in respect of such residue; and, *thirdly*, that legacy duty was also payable on the same residue so appointed under the will of the daughter.

The testator John Ramsden, by his will dated in 1825, devised and bequeathed his real and personal estate to his daughter Judith Ann Platt, J. Routh, and two other persons, whom he appointed executrix and executors, in trust to sell and convert and invest the produce in the funds, and pay the dividends to J. A. Platt for her life;

and after her death upon trust, to pay two legacies of £3000 each; and the said testator thereby directed, that after such last-mentioned payments, his then surviving trustees should stand and be possessed of the said trust monies, stocks, funds, and securities, and the dividends, interest, and income thereof, and of the rents and profits of his said freehold and copyhold hereditaments and premises, until the sale of the same, upon trust for such person or persons (other than and except Joseph Woodhead, otherwise Woodward, of Russia Row, Cheapside, and his relations, Moses Hoper of Dorset Street Esquire, and his rela-^[258]tions, and the relations of the late husband of the testator's said daughter, and every of them), in such parts, shares, and proportions, for such intents and purposes, and in such manner and form as the said J. A. Platt, as well when covert or sole, and notwithstanding her coverture, by her last will and testament in writing, or any writing purporting to be or being in the nature of her last will and testament, or any codicil or codicils thereto, to be by her signed and published in the presence of and attested by two or more credible witnesses, should direct or appoint; and in default of such direction or appointment, and so far as any such direction or appointment, if incomplete, should not extend, upon trust for the next of kin of Dyson Ramsden, late of Waterclough, in the parish of South Oram, near Halifax, in equal shares and proportions, and to pay the same accordingly.

And by the testator's will it was provided, and he did thereby expressly declare his will and mind to be, that in case his said daughter Judith Ann Platt should at any time thereafter intermarry with the said Joseph Woodhead, otherwise Woodward, or with any of his relations, or in case she should reside with, or should visit, or receive visits from him the said J. Woodhead, otherwise Woodward, or any of his relations, then, and in any or either of the said cases, the said testator declared, that all and singular the gifts and bequests to, and the trusts contained in his said will in favour of, and the power of appointment thereinbefore given to, the testator's said daughter, should from thenceforth be absolutely null and void to all intents, and effects, and purposes; and then and from thenceforth the said testator directed that his said trustees, their executors, administrators, and assigns should stand and be possessed of all and singular the said trust ^[259]monies, stocks, funds, and securities, upon trust with and out of the said dividends, interest, and income thereof, to pay to his said daughter the weekly sum of 40s. and no more, during her life; and subject thereto, it was the testator's will, that the whole of his said trust monies, stocks, funds, and securities, and the dividends, interest, and income thereof, should go and belong to, and be held in trust for, the next of kin of the said Dyson Ramsden, to whom the said testator gave and bequeathed the same accordingly.

The testator died in May 1826, the estate was realized, and the income of the residue was paid to Mrs. Platt during her life. She married George Edward Platt, who survived her, and on the 27th of April 1837 she made a will in execution of the power given to her by her father's will, and thereby gave and appointed her father's residuary estate to various persons, and amongst other sums, gave £10,000 Bank 3 per cent. annuities, to the descendants of Dyson Ramsden, and she appointed the residue to Mr. Walter Drake.

All the persons named as *cestui que trusts* in the appointment made by the will of Mrs. Platt were strangers in blood both to Mr. Ramsden and to Mrs. Platt, except the descendants of Dyson Ramsden; Dyson Ramsden was a first cousin of the testator, John Ramsden.

Mr. Platt died in September 1837.

The estate was administered in this Court, and a question having arisen respecting the amount of probate and legacy duty payable upon the property bequeathed by the wills of John Ramsden and Judith Ann Platt, a sum of £40,000 3¹/₄ per cent. Reduced annuities was carried over to an account, entitled, "The Claims of ^[260] Probate and Legacy Duty Account," and a case was submitted for the opinion of the Judges of the Court of Exchequer upon the subject.

The Judges certified their opinion to be (6 Meeson & W. 756),

That, on the death of Judith Ann Platt, a legacy duty of one per cent. became payable in respect of the bequest in the will of John Ramsden of the residue of his estate and effects to the said Judith Ann Platt, after allowing any duty already paid in respect thereof.

That no probate duty was payable upon the probate of the will of Judith Ann

Platt in respect of the estate and effects of her late father, appointed by her in pursuance of the power given to her by his will; and

That legacy duty was payable in respect of the bequests contained in the will of the said Judith Ann Platt, at the same rate at which such duty would have been payable if the bequests had been mere legacies given by her payable out of her personal estate.

Both the Attorney-General and Mr. Drake, who was entitled to the fund in Court subject to the payment of the duty, were dissatisfied with the certificate, and each presented petitions to this Court on the subject.

Mr. Drake, by his petition, alleged that no legacy duty whatever was payable in respect of the residuary estate of the testator John Ramsden, which, by his will, was given after the death of Judith Ann Platt to her appointees; or, if any duty was payable thereon, that such duty only was payable as would have been payable, if the appointment made by Judith Ann Platt had been part of the will of John Ramsden, and the appointees [261] of Judith Ann Platt had been named in the will of John Ramsden, to take his residuary estate in the manner directed by the appointment and he submitted, that the certificate of the Court of Exchequer was, as to the opinion in respect of the legacy duty, erroneous.

The Attorney-General by his petition alleged, that according to the statutes in that behalf made and provided, not only legacy duty was payable in respect of the residuary estate of the testator John Ramsden, which was given by his will, but that probate duty was payable upon the probate of the will of Judith Ann Platt, in respect of the estate and effects appointed by her in pursuance of the power given to her by the will of John Ramsden.

The Attorney-General, by his petition, prayed that there might be paid to the Receiver-General of Stamps not only the legacy duty which the Judges certified to be due, but also the probate duty upon the probate of the will of Judith Ann Platt which the Judges certified not to be due. And Mr. Drake, by his petition, prayed either that the whole fund in Court might be transferred and paid to him without deducting anything for legacy or probate duty; or that the same fund might be transferred and paid to him, after deducting only such legacy duty as would have been payable if the appointees of Judith Ann Platt had been named in the will of John Ramsden.

The questions as to the legacy duty, turned on the statute of the 36 G. 3, c. 53. The second section of which enacts, "That upon every legacy, specific or pecuniary or of any other description, &c., given by any will, &c., of any person," &c., "*out of the personal estate of the person so dying* ; and also upon the clear residue [262] and upon every part of the clear residue of the personal estate of every person who shall die, &c. ; there shall be paid the several duties following (the section then enumerates the amount of duties, varying according to the relationship between the parties, but no duty whatever was by this Act charged upon children and their descendants).

By the seventh section of the same Act, which defines what shall be deemed legacies within the Act, it is enacted, "That any gift by any will or testamentary instrument of any person dying after the passing of this Act, which shall, by virtue of such will or testamentary instrument, have effect, or be satisfied out of the personal estate of such person so dying, or out of any personal estate which such person *shall have power to dispose of as he or she shall think fit*, shall be deemed and taken to be legacy within the intent and meaning of this Act, whether the same shall be given by way of annuity or in any other form," &c.

By the eighteenth section of the same Act, which regulates how the duty on legacies subjected to powers of appointment shall be charged with duty, it is enacted, "That where any legacy, or the residue or any part of the residue of any personal estate shall be subjected to any power of appointment *to or for the benefit of any person or persons specially named or described as objects of such power*, such property shall be chargeable with duty as property given to different persons in succession; and in so charging such duty, not only the person and persons who shall take previous or subject to such power of appointment, but also any person and persons who shall take under or in default of any such appointment, when and as they shall so take respectively, shall in respect of their several interests, whether previous, or [263] subject to, or under or in default of such appointment, be charged with the same duty, and in the same

manner, as if the same interests had been given to him, her, or them respectively, in and by the will or testamentary disposition containing such power, in the same order and course of succession as shall take place under and by virtue of such power of appointment, or in default of execution thereof, as the case may happen to be. And where any property shall be given for any limited interest, and a general and absolute power of appointment shall also be given to any person or persons, to whom the property would not belong, in default of such appointment, such property, upon the execution of such power, shall be charged with the same duty, and in the same manner, as if the same property had been immediately given to the person or persons having and executing such power, after allowing any duty before paid in respect thereof; and where any property shall be given with any such general power of appointment, which property, in default of appointment, will belong to the person or persons to whom such power shall also be given, such property shall be charged with, and shall pay the duty by this Act imposed, in the same manner as if such property had been given to such person or persons absolutely in the first instance, without such power of appointment."

By the subsequent statute of the 45 G. 3, c. 28, legacy duty was first charged upon children and their descendants, and thereby it was enacted that there should be levied, &c., upon all legacies, and upon all residues or shares of personal estate left by any will, or divided by force of the Statute of Distributions, or by custom, the duties following, that is to say, "Upon every legacy, specifick, pecuniary, or of any other description, &c., given by any will, &c., for the benefit of any child, &c., [264] and upon the clear residue, and every part of the clear residue," the sum of 1 per cent.

This statute afterwards increased the amount of legacy duty payable by other persons; but it neither defined, as in the former Act, what should be considered legacies, or contained any clause regulating the charge of duties in cases of powers of appointment.

The schedule to 55 G. 3, c. 184, regulates the present amount of duties on probates, administrations, and legacies; but the body of the Act contains no clauses affecting the questions in this case.

The question of probate duty under the will of Mrs. Platt depended on the 55 G. 3, c. 184, the second section of which enacts that the duties in the schedule annexed to the Act shall be levied; and in the third part of the schedule containing the duties on probates of will and letters of administration, &c., it is stated as follows:—

"Probate of a will and letters of administration, with the will annexed, to be granted in England."

<p>"Where the estate and effects for or in respect of which such probate, letters of administration, confirmation or oik respectively, shall be granted or expedied, or whereof such inventory shall be exhibited and recorded, exclusive of what the deceased shall have been possessed of or entitled to as a trustee for any other person or persons, and not beneficially, shall be above the value of £—— and under the value of £——."</p>	<table border="1"> <tr> <th data-bbox="838 1161 979 1190">Duty.</th> </tr> <tr> <td data-bbox="838 1190 979 1325"> <table border="1"> <tr> <th data-bbox="838 1190 979 1218">£</th> <th data-bbox="838 1218 979 1247">s.</th> <th data-bbox="838 1247 979 1275">d.</th> </tr> <tr> <td data-bbox="838 1275 979 1325"></td> <td data-bbox="0 0 1 1"></td> <td data-bbox="0 0 1 1"></td> </tr> </table> </td> </tr> </table>	Duty.	<table border="1"> <tr> <th data-bbox="838 1190 979 1218">£</th> <th data-bbox="838 1218 979 1247">s.</th> <th data-bbox="838 1247 979 1275">d.</th> </tr> <tr> <td data-bbox="838 1275 979 1325"></td> <td data-bbox="0 0 1 1"></td> <td data-bbox="0 0 1 1"></td> </tr> </table>	£	s.	d.			
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[265] And by the thirty-eighth section no Ecclesiastical Court is to grant probate without requiring an affidavit, "that the estate and effects of the deceased, for or in respect of which the probate or letters of administration is or are to be granted," exclusive of trust property, or under the value of a certain sum to be therein specified, "in order that the proper and full stamp duty may be paid on such probate," &c.

The two petitions now came on for hearing together.

Mr. Tinney, Mr. Pemberton, and Mr. Teed, in support of the petition of Mr. Drake, and in opposition to that of the Attorney-General.

The certificate of the Court of Exchequer ought not to be confirmed. The defect in the reasoning on which it is founded is this, that the Court has applied an equitable construction to a revenue law, whereas such a principle is inapplicable to a case where, in the shape of taxation or imposition of duties, a charge is imposed upon individuals. The admitted rule of construction is this, that every charge upon the subject must be imposed in clear and unambiguous terms; Revenue Acts are to be construed strictly and favourably to the subject; and before the Crown can levy a shilling on an

individual, the authority of some Act of Parliament must be produced, which, in plain and distinct terms, warrants it. It is idle to say that the Legislature contemplated all cases, or that if this particular case had occurred it would have been provided for; it is enough, in answer to observe, that the particular case is not comprised in the statute.

That Courts of law will not apply a revenue law to a case which does not strictly come within the letter of [266] the Act, appears from *Tomkins v. Ashby* (6 Barn. & Cr. 541), *Denn dem. v. Diamond* (4 B. & C. 243); in the latter case Justice Bayley says, "It is a well-settled rule, that every charge upon the subject must be imposed by clear and unambiguous language."

Bearing, therefore, in mind this rule of construction, the first question is, whether the property is liable to legacy duty except in respect of Mrs. Platt's life interest? That depends on the eighteenth section of the 36 G. 3, c. 52, which relates to legacy duty charged on property made subject to powers of appointment. There are three cases only enumerated, viz., where the power is for the benefit of persons specially named; secondly, where there is a general and absolute power of appointment; and, thirdly, where there is a general power of appointment, which, in default of appointment, would go to the donee of the power. The question is, under which of these three classes the present case ranges itself: if under neither, then no duty is payable. It is clearly not within the first, because there are no persons specially named, in whose favour the power is to be exercised; there is an exclusion of a certain class, but no description of any particular individuals in whose favour the power must necessarily be exercised. Nor is it under the second class; it is not a general and absolute power, because it could not be exercised in favour of Mrs. Platt herself, or in favour of Woodhead and his family, and the other individuals to whom the daughter was restricted from giving any benefits. The Act, by a general and absolute power, contemplated such a power as would be equivalent to ownership; here, during the life of Mrs. Platt, the power was in suspense; she could not exercise [267] it in her own favour; she could not mortgage or charge the property; and if she had married or visited Woodhead, she would have forfeited her power. The case does not come under the third class, because, in default of appointment, the property was to go over to different parties, viz., to the next of kin of Dyson Ramsden. The Court of Exchequer, though they admitted that it did not literally come within either of the descriptions, and "that some violence must be done to the language of the clause in question," thought that there was less difficulty in treating it as a general and absolute power, than as a power to appoint for the benefit of persons specially named or described. "The power," said the Chief Baron, "is one which might have been exercised by Mrs. Platt solely for her own benefit;" and his Lordship founded that opinion upon the decisions which hold that where a party has a power to appoint property by deed or will, and executes it in favour of volunteers, the volunteer appointees take, subject to the testator's debts. This, though a forced construction, is quite true when the power may be exercised by deed or will, because there the appointor has always the power of making the property his own, and the Court therefore regards him as the absolute owner of that property; but such a principle has never been extended to a case, in which the power was exercisable by will only, and in which, consequently, the appointor had never the power of taking the property himself beneficially. In *Jenney v. Andrews* (6 Mad. 264), there was no such decision; the power, it is admitted, was, in that case, to be exercised by will, but the contest was between the assignees of a bankrupt appointor who had obtained his certificate, and parties taking under the appointment in his will, and the creditors, who became such after the bank- [268] ruptcy, were not parties to the cause; the decision was, that the creditors anterior to the certificate were not entitled by reason of that certificate; but there was no decision that the subsequent creditors were entitled as against the appointees.

Secondly, as to whether probate duty became payable on this fund in respect of the will of Mrs. Platt. This depends on the statute of the 55 G. 3, c. 184. The affidavit thereby directed to be made, in order to determine the amount of duty to be paid is, as to the amount of the estate and effects in respect of which the probate is to be granted. (Sect. 38.) So the schedule to the Act, determining the amount to be paid, is regulated by the amount of the estate and effects *for or in respect of which such probate shall be granted*. The probate duty, therefore, can only be chargeable upon the

property to be possessed and administered under the grant of probate. If it were otherwise, an executor would be personally liable to pay probate duty on assets which the probate would not authorise him to get in. The point has been decided by the highest authority. In *The Attorney-General v. Dimond* (1 Cr. & Jer. 356), the testator was possessed of French *rentes*, which the executors obtained after his decease; and it was held that probate duty was not payable thereon, on the ground that the probate had not been obtained in respect of these *rentes*. This decision was affirmed by the House of Lords in *The Attorney-General v. Hope* (1 Cr. M. & R. 530; and 8 Bligh, 44), in which it was held that property in a foreign country belonging to an English testator, brought to England to be administered, was not liable to probate duty.

[269] The question then is, was administration to Mrs. Platt's estate granted in respect to this property, or could the executors have obtained it under the grant of probate? clearly not; for the property never formed part of her estate, and her executors acquired no right whatever to meddle with it: it passed directly to the appointees, independent of the executors. A Court of Equity requires probate of a will executing a power, but this it regards merely as the best evidence of the testamentary appointment. In *Palmer v. Whitmore* (5 Sim. 178), which will be cited by the other side, the testator had a general power to appoint by deed or will, which was regarded as equivalent to the absolute ownership; and in *The Attorney-General v. Staff* (2 Cr. & Mes. 124), the original power was to be executed by deed or will, and by the first deed the donee of the power, by creating for herself a new power, had made the property her own. In *Vandiest v. Fynmore* (6 Sim. 570), a case not cited in the Exchequer, a testator gave to A., a power to dispose by his will of £5000, part of his estate, and on which probate duty was paid. A. exercised the power by will: it was held, that probate duty was not again payable in respect of the £5000.

Thirdly, no *legacy duty* is payable on this property under the testamentary appointment of Mrs. Platt. The second section of the 36 G. 3, c. 52 charges duty on legacies given "out of the personal estate of the person dying;" and the seventh section defines what shall be deemed legacies, describing them as gifts by will, to be satisfied out of the personal estate of the person dying, or out of the personal estate which such person "shall have power to dispose of as he or she shall think fit." Then was this property, thus subject to this restricted power, either the personal estate of Mrs. Platt, or property which she [270] had power to dispose of as she should think fit? clearly not; for she could not, for the reasons before stated, dispose of the property in her lifetime, nor could she appoint it in favour of the several individuals stated in the will of the original testator.

Mr. Romilly, in the absence of the Attorney-General, *contra*. The Crown is entitled to legacy duty of one per cent. on the whole estate which was bequeathed by the will of the original testator to his daughter for life, with a power of appointment by will; and to probate duty upon the fund appointed by her will, together with legacy duty thereon, at the rate of 10 per cent., the appointees being strangers to the appointor.

It is not necessary to discuss the question, whether the Court can apply equitable considerations to a fiscal statute which is for the benefit of the community, because the decision of the Court of Exchequer did not proceed on that ground, but on the fair construction of the whole statute; if, however, it were necessary to argue that question, it would be found that the principle referred to by the other side of construing statutes strictly, is one applicable only to penal statutes, and not to those concerning the revenue.

The statute of the 36 G. 3, c. 52, by the second section enacts, that all legacies given out of the personal estate of a testator shall be charged with certain duties; and the seventh section declares, that any gift by will to be satisfied out of the personal estate of a testator shall be deemed a legacy. So far the legacy duty was payable on every thing which passed under Mr. Ramsden's will. The eighteenth section merely regulates [271] the mode in which property subjected to powers is to be charged; for this purpose it adopts the usual classification, and regards all powers either as special or general, so that every power must fall within one of these two classes; if it be not special, it must be general. The other side have, however, introduced a third species of power, which they say is not comprised within either of these two classes, and then say that this peculiar species of power has not been

provided for. No such third class of power has ever been recognised either in the cases or in the text books.

It is said, that because three families are excluded from becoming objects of the power, there is a restriction which prevents the power being general and absolute; all powers are subject to some restriction as to formality, or otherwise; but can it be said, because a power is so limited, that it can only be executed by will or at a particular time, or in a particular mode, or to the exclusion of a particular person, that, therefore, it is not a general power? If the distinction contended for were to prevail, then by excluding a single individual from becoming the object of a power, the legacy duties may be wholly evaded.

One test of the generality of a power is, whether the property, on the execution of the power in favour of volunteers, would or not be assets for the payment of the appointor's debts. The case of *Jenney v. Andrews* (6 Mad. 264) shews clearly that, in the opinion of Sir J. Leach, there was no distinction between a power exercisable by will and one to be executed by deed: he said, "Where there is a general power of appointment *by will*, and an appointment is made, the appointee is a trustee for credi-[272]-tors." In this case, then, there can be no doubt but that the creditors of Mrs. Platt would be entitled to take in priority to voluntary appointees, and according to this test, the power would be general.

Another mode of ascertaining whether a power is general or particular, is to see how an appointment under it would be affected by the doctrine of remoteness. It is clearly settled, that where an estate for life is limited to one with a power of appointing among a class of persons, the donee of the power cannot appoint to any person, who would have been too remote to take, if comprised in the deed creating the power; but where the power is general, the donee may appoint to persons to whom, if the same estate had been appointed to them by the original instrument, the appointment would have been void for remoteness. Examine the present power by this test, and see if Mrs. Platt could not have made a valid appointment to any persons *in esse* at the expiration of any lives existing at her death, though born after the decease of persons not living at the death of Mr. Ramsden; she clearly might have appointed the property to any person to whom she might have appointed her own absolute property.

As to probate duty, the point has been decided by the Vice-Chancellor in *Palmer v. Whitmore* (5 Sim. 178), and in *Nail v. Punter* (5 Sim. 563), and his decision has been followed by the Court of Exchequer in *The Attorney-General v. Staff* (2 Cr. & Mee. 124). In the first of these cases, a testator having a power to appoint by deed or will, executed it by his will, and the question was, whether a sum paid by the executor for probate duty in respect of the fund appointed was a proper payment; the Vice-Chancellor held that the [273] payment was proper, and that the probate duty was payable: His Honor observed, that the testator was at liberty to execute the power either by deed or will, and that having adopted the latter mode, "he made the fund, over which he had such general power, part of his general personal estate, and liable to be dealt with as part of his general personal estate;" and having adverted to the Acts of Parliament, His Honor added, "It was absolutely necessary that probate should be granted, for the purpose of giving effect to the execution of the power. The testator, therefore, has, by the instrument by which he exercised the power, created the necessity of having probate taken in respect of property, part of which was the fund in question. I think, therefore, that the payment made by the executor was right."

In *Nail v. Punter*, a wife had a testamentary power of appointment, and exercised it in favour of her husband, whom she appointed executor; the Vice-Chancellor held, that the husband who claimed as her executor was liable to pay probate duty. So, in *The Attorney-General v. Staff*, the testatrix, under a power, appointed property by her will; and it was held by the Court of Exchequer that probate duty attached.

Thirdly, as to legacy duty under the will of Mrs. Platt. It is plain, that as against parties taking the benefit of her disposition, legacy duty is payable; for, with respect to them, she "had power to dispose of the property as she thought fit."

She had a life estate with an absolute power of appointment restricted as against three families; but in effect, the whole dominion of the property was vested in her. She might have given it as part of her own estate to her executors, or to her

creditors, and in case [274] of an appointment to volunteers, it would have been assets for the payment of her debts. Such a power over property is equivalent to ownership as regards the party having the power. Sir Wm. Grant, on this point, observes in *Holmes v. Coghill* (7 Ves. 504), there is an evident difference between a power and an absolute right of property: not so much with regard to the party possessing the power, as to the party to be affected by the execution of it. If our attention is to be confined to the former entirely, there is no reason why the money he has a right to raise should not be considered his property, as much as a debt he has a right to recover. But the latter can only be charged in the manner, and to the extent specified at the creation of the power."

The point is also settled by authority. *In re Cholmondeley* (1 Cr. & Mee. 149), it was held that legacy duty was payable in a case where a wife, having a power of appointment by will, executed it by her will:

Mr. George Turner, for the executors.

Mr. Tinney, in reply.

THE MASTER OF THE ROLLS. I must take some time to consider this case, because the points, though short, include a variety of important considerations. The Court of Exchequer evidently considered that this property was so situated as not to be property belonging to the testatrix, but merely subject to a power, and upon that consideration they have expressed their opinion that it was not subject to probate duty as belonging to her; but having regard to the nature of the power, as expressed in the will, they say [275] that, though this was not her property, so as to be subject to probate duty, yet, by the very words of the Act of Parliament, the power was of such a nature that the property ought to be charged with legacy duty as if it had belonged to her. They have accordingly certified, that the estate ought to pay the amount of duty which would have been payable if it had been an absolute legacy to her, and further, that the legacies given by her out of it ought also to be charged with the same duty as if they had been given out of her own property. It is argued for the Attorney-General, that the property being hers, probate duty is also payable on it. I have been asked, if I do not agree with the Court of Exchequer, to set at once in contradiction to it. I could not do that without the greatest hesitation; but if, as I understand, both parties have determined to proceed to the highest Court of Appeal, however reluctant I might feel to express an opinion differing from the unanimous certificate of the Court of Exchequer, I should think it a reason for not putting the parties to any further expense in the Courts below. I will not, at present, intimate my opinion on the points argued.

Jan. 16, 1841. THE MASTER OF THE ROLLS [Lord Langdale]. In this case a question having arisen respecting the amount of probate and legacy duty payable upon the property bequeathed by the wills of John Ramsden and Judith Ann Platt, a sum of £40,000 3½ per cent. Reduced annuities was carried over to an account entitled "The claims of probate and legacy duty account," and a case was submitted for the opinion of the Judges of the Court of Exchequer upon the subject.

[276] The Judges have certified their opinion to be (6 Meeson & W. 756):—

First. That on the death of Judith Ann Platt a legacy duty of 1 per cent. became payable in respect of the bequest in the will of John Ramsden of the residue of his estate and effects to the said Judith Ann Platt, after allowing any duty already paid in respect thereof.

Secondly. That no probate duty is payable upon the probate of the will of Judith Ann Platt in respect of the estate and effects of her late father, appointed by her in pursuance of the power given to her by his will.

And, thirdly. That legacy duty is payable in respect of the bequests contained in the will of the said Judith Ann Platt, at the same rate at which such duty would have been payable if the bequests had been mere legacies given by her payable out of her personal estate.

Of this certificate complaint is made, both by the Attorney-General, claiming the probate and legacy duty for the Crown, and by Mr. Drake, who is entitled to the fund in Court, subject to the payment of the duty which ought to be paid.

Mr. Drake alleges that no legacy duty whatever is payable in respect of the residuary estate of the testator John Ramsden, which, by his will, is given, after the death of Judith Ann Platt, to her appointees; or that if any duty is payable thereon,

that such duty is payable only as would have been payable if the appointment made by the said Judith Ann Platt had been part of the will of John Ramsden, and the appointees of Judith Ann Platt had been named in the will of John Ramsden to [277] take his residuary estate in the manner directed by the appointment.

The Attorney-General alleges that probate duty is payable upon the probate of the will of Judith Ann Platt, in respect of the estate and effects appointed by her, in pursuance of the power given to her by the will of John Ramsden.

And in this state of things petitions have been presented; one by the Attorney-General, praying that there may be paid to the Receiver-General of Stamps, not only the legacy duty which the Judges have certified to be due, but also the probate duty upon the probate of the will of Judith Ann Platt, which the Judges have certified not to be due. And the other petition by Mr. Drake, who prays, either that the whole fund in Court may be transferred and paid to him, without deducting anything for legacy or probate duty, or that the same fund may be transferred and paid to him after deducting only such legacy duty as would have been payable if the appointees of Judith Ann Platt had been named in the will of John Ramsden.

The doubts which attend the questions, and the amount of the sums in contest, have induced both parties to say that, whatever may be the decision here, the case must ultimately be brought under the consideration of the House of Lords; and I was therefore requested not to ask any further assistance from the Judges, but to make an order upon which the parties might proceed at once to the highest Court.

The case is that John Ramsden, by his will, dated the 10th of March 1825, gave his residuary personal estate to his executors and executrix, upon trust to permit his [278] daughter Judith Ann Platt to receive the interest thereof during her life, and after her decease (subject to certain payments), upon trust for such person (other than and except Joseph Woodhead and his relations, Moses Hoper and his relations, and the relations of Mrs. Platt's late husband and every of them), in such parts, shares, and proportions, and in such manner as she, whether sole or covert, should by will appoint, and in default of appointment in trust for the next of kin of Dyson Ramsden; and by a distinct clause in the will, the testator declared that if Mrs. Platt should intermarry with Joseph Woodhead or his relations, or should reside with, or receive visits from him or them, the bequests in her favour, with the power of appointment given to her, should from thenceforth be absolutely null and void.

The testator died in May 1835: the estate was realized, and the income of the residue was paid to Mrs. Platt during her life. She married George Edward Platt; and on the 27th of April 1837 she made a will in execution of the power given to her by her father's will, and thereby gave and appointed her father's residuary estate to various persons, and amongst other sums gave £10,000 Bank 3 per cent. annuities to the descendants of Dyson Ramsden.

The questions are:—

Firstly. Whether Mrs. Platt or her estate is liable to pay any legacy duty beyond that which was payable on the life interest given to her for her own benefit.

Secondly. Whether any probate duty is payable on the probate of her will in respect of her father's residuary estate thereby appointed.

[279] And, thirdly, what, if any, legacy duty is payable upon the sums appointed by her will.

The first and the last of these questions appear to me to be attended with considerable difficulty. The first depends on the construction which ought to be put upon the eighteenth section of the Act 36 G. 3, c. 52. It is argued on behalf of the Crown, and the opinion of the Judges of the Court of Exchequer is so declared, that the power given by the will of John Ramsden is a general and absolute power within the meaning of the Act. On the other hand, it is contended for Mr. Drake, that a power to be exercised only by will, which cannot be exercised in favour of certain excepted classes of persons, and the continued existence of which depends on the donee abstaining from certain specified Acts, cannot be deemed an absolute and general power; and then it is said that the Act, if it does not comprise the particular case, cannot be extended by construction: so that, if the present case be not specifically described, the duty is not imposed, and it is not competent to any Court to

presume upon the intention of the Legislature, and say that, because it must have been intended, it must therefore be considered that the duty was imposed.

In this case the residue of John Ramsden's estate was given for a limited interest to Mrs. Platt. A power of appointment was also given to her; and she was not the person to whom the property would have belonged in default of her appointment. Under these circumstances, if the power of appointment were general and absolute, the case would fall within the express provisions of the Act; and the question comes therefore to this, whether the power given in this case is not a general and absolute power within the true meaning of [280] the Act (36 G. 3, c. 52, s. 18); and after some hesitation, and contrary to my first impression, I have come to the conclusion that it is. Provision was made for the duties payable on legacies which were subject to powers if the appointees were named or described by the testator (the donor of the power), and the proportions only were left to be determined by the donee of the power: the appointees were charged as legatees of the testator; but if the appointees were not named or described by the testator, but left solely to the disposition or selection of the donee of the power, in that case the property upon execution of the power, i.e., upon doing the act whereby the property is disposed of, or the appointees selected, is charged as if it had been given to the donee of the power, after allowing for any duty before paid in respect thereof.

The limited interest first given, and the interest vested by means of the execution of the power of appointment disposing of the whole remaining interest, make together the whole interest in the property, and it is the entire property which, in such a case as this, is partly possessed, and, as to the rest, disposed of by the donee of the power; and, considering the meaning of the words "general and absolute" in their application to such a case, I do not think that the power can be considered as otherwise than general and absolute within the meaning of the Act, because it could only be executed by will, or because the donee was not permitted to execute it in favour of three families named. A power which might be executed in favour of anybody in the world, except the members of three families, appears to me to be for this purpose a general power; and as, among the objects of it, the power of disposition is ab-[281]-solute, I think that the power is within the meaning of the Act a general and absolute power, and consequently I am of opinion that, upon the death of Mrs. Platt, which was the time when the execution of the power by will took effect, a duty of 1 per cent. became due upon the residuary estate of John Ramsden, after allowing any duty previously paid in respect thereof.

My opinion is not founded upon the notion, that the residue of John Ramsden's estate had become the property of Mrs. Platt, but upon the notion that property, circumstanced as this was, is so chargeable by the Act.

The next question is, whether the residuary estate of John Ramsden, appointed by the will of Mrs. Platt, is chargeable with probate duty upon the probate of the will of Mrs. Platt; and I am of opinion that it is not. It was not the property of Mrs. Platt, and could not be recovered by her executors by virtue of the probate. It would be singular that the rule of the Court, which requires a probate merely as evidence, to shew that the instrument of appointment is a will, should have the effect of subjecting the property to duty as if it had been the property of the testator, which the Court does not consider it to be. The question depends on the construction of the Act, 55 G. 3, c. 184, the schedule to which states the amount of probate duty payable upon the estate and effects for or in respect of which the probate is granted; and it was argued that, because probate was required in order to shew that the property now in question was appointed by will, the probate was granted for and in respect of this property, and therefore subject to the duty: but the thirty-eighth section of the Act appears to me to shew that the Act only relates to the estate and effects of the deceased for or in respect of which the probate is granted, and as this was not the [282] property of the deceased, I am of opinion that no duty is payable in respect of it.

The last question relates to legacy duty payable on the same appointed by the will of Mrs. Platt. This question appears to me to involve the same difficulty which affects the first. The Act 36 G. 3, c. 52, s. 7 provides that any gift by will which shall by virtue of the will have effect out of the personal estate of the testatrix, or out of any personal estate which the testatrix has power to dispose of

as she shall think fit, shall be deemed a legacy. In this case the gifts by the will of Mrs. Platt are to take effect out of the personal estate of John Ramsden, which she had power to dispose of, and they are to be deemed legacies, unless the restrictions to which she was subject are to be held inconsistent with the words "as she shall think fit," according to the meaning which ought to be attributed to them in the Act. Upon the best consideration which I have been able to give the subject, it appears that, notwithstanding the restrictions imposed upon her, the testatrix had a power, of disposing of the property as she thought fit, within the meaning of the Act, and therefore upon this point also I concur with the opinions of the Judges of the Court of Exchequer.

Under the circumstances I think that I ought to confirm the certificate, and refer it to the Master to ascertain the amount of duty which is payable according to the certificate, with a stay of execution of the order, to allow the intended appeal to the House of Lords.

But Mr. Drake, though he acquiesces in the certificate so far as relates to the probate duty, has not prayed for a confirmation of that part of it. This may be done if Mr. Drake would amend his petition, and pray for con-[283]-firmation as to probate duty. And the Attorney-General only prays for a confirmation of that part of the report which is in his favour.

As to legacy duty, see *In re Ewin*, 1 Cro. & Jer. 151; *Logan v. Fairlie*, 2 S. & St. 284; *Hay v. Fairlie*, 1 Russ. 117; *Logan v. Fairlie*, 1 Myl. & Cr. 59; *The Attorney-General v. Jackson*, 8 Bli. 15, and 2 Cro. & Jer. 382, and 2 Tyrwh. 354; *Arnold v. Arnold*, 2 Myl. & Cr. 256; *The Attorney-General v. Forbes*, 2 Cl. & Fin. 48; *In re Coles*, 7 Mee. & Wels. 1; and as to probate duty, *Attorney-General v. Bouvens*, 4 Mee. & Wels. 171.

[283] TREZEVANT v. FRASER. Nov. 4, 1840.

An incumbrancer on a portion of an undivided fund in Court cannot obtain a stop order on it, without serving the other parties interested, with the petition for that purpose.

A party being entitled to an undivided share of a fund in Court, encumbered it, and then joined the assignee in a petition for the stop order.

The petition had not been served on the other parties to the suit.

Mr. Walker, in support of the petition.

THE MASTER OF THE ROLLS [Lord Langdale]. Here is a fund belonging to several persons, and one of such persons, in the absence of the others, comes and asks an order affecting it. I am of opinion that this cannot be done. [NOTE.—The practice has since been altered by the order of the 5th of April 1841.]

[284] BALLS v. MARGRAVE. Nov. 9, 10, 1840.

[For subsequent proceedings, see 3 Beav. 448; 4 Beav. 119.]

A bill for discovery, in aid of an action of covenant brought by the assignee of the lessor, stated that the lessor, at the time of granting the lease, was "seised or otherwise well entitled," &c. Held, that this was not a sufficient allegation that the lessor had the legal estate so as to shew the right of his assignee to sue at law on the covenant, and a demurrer on that ground was allowed.

The bill stated that Thomas Cheek was "seised or otherwise well entitled, to him and his heirs, for an estate of inheritance of or to the messuages, &c., thereafter mentioned, and that, being so seised or entitled," he by indenture, dated in 1794, demised them to Joseph Rowland for a term of ninety-nine years, at a rent of £26, and that Joseph Rowland, for himself, his executors, administrators, and assigns, covenanted to pay the rent.

That Cheek, having previously surrendered the property, which was copyhold, to

the use of his will, devised it to his grandchildren, who were admitted; that Joseph Hewes, one of the grandchildren, purchased the property, which was duly surrendered to him, and that, being surrendered to the use of his will, he devised the property to the Plaintiffs, who were duly admitted.

The bill stated that the lessee Rowland died intestate, and that his administratrix assigned the property to Thomas Margrave; and that his executor, the Defendant, had entered into possession under the lease; that there being a large arrear of rent due from the Defendant to the Plaintiffs, they had commenced an action at law for the recovery thereof, but the lease being in the Defendant's possession, and there being no counterpart, the Plaintiffs could not proceed therein without a discovery. The bill prayed a discovery, and the production of the lease.

[235] To this bill the Defendant demurred, on the ground that it was not by the said bill shewn, or by any sufficient certainty or precision alleged or averred that the said Thomas Cheek was, at the time of his so granting or purporting to grant the said indenture of lease, seised to him and his heirs for an estate of inheritance of or to the said messuages or tenements and hereditaments; and it therefore did not, with any certainty, appear, that any covenant, on the part of the lessee, contained in the said indenture of lease, would run with the land, so as, under the circumstances stated in the said bill, to enable the said Complainants to sue the Defendant on such covenant, but any such covenant would, on the contrary, be a covenant in gross.

Mr. Kindersley and Mr. Evans, in support of this demurrer. There is no sufficient allegation on the face of this bill, that the lessor, at the time of making the lease, had the legal estate, and if there be any doubt, "the Defendant is entitled to put that construction upon the statements in the bill which is most against the interest of the person making them;" *Vernon v. Vernon* (2 Myl. & Cr. 171). The Defendant is, therefore, entitled to say that the lessor was not seised, but "was otherwise well entitled, to him and his heirs;" and this allegation, contrasted with the previous statement, amounts to this, that he had a mere equitable estate; in which case the covenant did not run with the land so as to bind the assignee; for by the common law, the right to sue on a covenant did not pass to the assignee, and the stat. of 32 H. 8, c. 34, only enabled the assignee of a legal estate to sue on a covenant, where therefore the estate is equitable the benefit of the covenant does not pass to the assignee, as in the instance of a lease granted by a mortgagor; *Webb v. Russell* (3 Term. Rep. 393), [236] followed by *Whitton v. Peacock* (2 Bing. N. C. 411). If, then, the Plaintiff has no right to sue at law, he cannot be entitled to any discovery, in equity, in support of an action which cannot be maintained. It would be the same as if an assignee of a chose in action, not assignable at law, were to bring an action thereon, and then come for a discovery, which would prove nugatory.

It is stated in 1 Saunders's Reports, p. 233a. note, "That, in an action by an assignee of the reversion, he must set out the title of the lessor to the demised premises, that it may appear he had such an estate in the reversion as might be legally assigned to the Plaintiff. Clift's Ent. 213, p. 7. Lil. Ent. 132, 135." The Plaintiff, therefore, has not set out his title with sufficient clearness and precision, and it is quite sufficient to shew that the discovery is immaterial. Redesdale, p. 191.

They also referred to *Baring v. Nash* (1 Ves. & Bea. 551) and *Right dem. Jefferys v. Bucknell* (2 Barn. & Ad. 288).

Mr. Pemberton and Mr. J. H. Taylor, *contra*, in support of the bill. It is not necessary to state, upon the face of the bill, all the circumstances necessary to maintain the action at law. Here the allegation does not amount to a statement of an equitable title only, for the other statements in the bill of the several surrenders and admissions may be called in aid; and it is very improbable that these took place on an equitable estate. The property, too, is copyhold, to which the statement of seisin does not accurately apply, and seisin is [237] not necessary; it is sufficient if the lessor had the immediate reversion.

Mr. Kindersley, in reply. There is no suggestion that Cheek was ever admitted; and the allegation of seisin is not improper, except that it does not allege seisin according to the custom, &c.

THE MASTER OF THE ROLLS [Lord Langdale]. I confess I have seldom seen a demurrer which is less likely to be of any real benefit to the parties than this; but,

nevertheless, if it be founded upon principle, and can be sustained, it must undoubtedly be allowed.

The circumstances under which the demurrer in this case has been brought forward are these: an action of covenant has been brought, which could only be sustained upon the footing that the person granting the lease had a legal estate, and the Plaintiff has stated he was "seised or otherwise entitled." To this the Defendant alleges that, as the statement has been put in the alternative, seised or well entitled, he has a right to take it most against the pleader, and that it means "otherwise entitled," or that he had an equitable title only, in which case there would be no foundation for the action of covenant, and no use could then be made of the discovery.

The Plaintiffs, however, say this is only one of the expressions in the bill; and the simple rule that you are to take any expression most against the pleader, must not depend upon one detached expression, but upon the whole bill. I must, therefore, read this bill over, in order to see whether there are such controlling expressions in the bill as will alter the construction arising from the [288] former allegation. If there should be, then I think the rule which has been stated no longer applies. If, on the other hand, there are none, and I should be of opinion that the allegation is too uncertain, I must give the Plaintiff liberty to amend his bill, in order to set the matter right.

Nov. 10. THE MASTER OF THE ROLLS. I have read over the bill in this case, and I do not think that the subsequent allegations in the bill at all assist the uncertainty of the other statement. It appears to me, that though the objection is of a frivolous nature, yet the Court requires greater strictness than is to be found in this bill. I think, therefore, that I must allow this demurrer, giving the Plaintiff leave to amend; but, under the circumstances, I will not allow any costs of the demurrer.

[288] *HAWKE v. KEMP. Nov. 20, 1840.*

Where a Defendant admits by his answer the possession of documents, and a balance of money, it is irregular to move for the production of the former, and payment into Court of the latter, by two separate motions. They ought to be included in one. In this case the Court ordered the Plaintiff to pay the extra costs occasioned by this irregular proceeding.

The Defendant, in his answer, admitted to have in his hands certain deeds and papers, and a balance of the estate.

Mr. Addis now made two motions in this case, the first for the production of papers, the second for the payment of the money into Court.

[289] Mr. Follett, *contra*, did not object to the production of the papers, or to the payment of the money into Court, but he insisted that the Plaintiff had been guilty of vexation in making this application by two separate motions when one would have been sufficient; he therefore contended that the Plaintiff ought to bear the extra expenses which had been incurred thereby.

THE MASTER OF THE ROLLS [Lord Langdale] said, that to mark his disapprobation of this course of proceeding, he must insert in the order, to be made in this case, a direction, that in taxing the costs of the suit, the extra costs, incurred in consequence of these two motions, should be paid by the Plaintiff.

[289] *TARBUCK v. WOODCOCK. Dec. 4, 1840.*

The same solicitor put in and set down for hearing two pleas for want of parties for two several Defendants, and they were both allowed: the Plaintiff was ordered to pay the costs of one only of such pleas.

Two pleas for want of parties were put in, to the bill in this cause, by several Defendants, and which being set down, were allowed with costs.

Mr. Kindersley afterwards observed, that these two pleas had been filed and set down for argument by the solicitor, and he contended that the costs of one same

only ought to be allowed, as the several parties might have joined in one plea, and thus have saved the expenses.

Mr. Pemberton and Mr. B. Chapman, *contra*, contended that the course was regular, as the interests of the two parties were quite distinct.

[290] THE MASTER OF THE ROLLS [Lord Langdale]. I think that two such pleas ought not to have been filed by the same solicitor; I will allow the costs of one only.

[290] WOOD v. HARPUR. Dec. 4, 1840.

[See *Duke of Northumberland v. Todd*, 1878, 7 Ch. D. 777; *Bourke v. Davis*, 1889, 44 Ch. D. 126.]

Affidavits sworn before a Master Extraordinary, who was the clerk of the Plaintiff's attorney, rejected.

This was a motion to commit the Defendants for the breach of an injunction, and it was proposed to read certain affidavits, which were objected to, on the ground that they had been sworn before a Master Extraordinary of the Court, who acted as clerk to the Plaintiff's attorney.

Mr. Pemberton and Mr. Lee, for the Plaintiff.

Mr. Kindersley and Mr. Dixon, for the Defendants.

THE MASTER OF THE ROLLS [Lord Langdale] rejected the affidavits on the ground stated.

[290] CHOWICK v. DIMES. Nov. 20, Dec. 8, 1840.

A sole Plaintiff having died, the Court on the application of the Defendant, ordered that the administrator should revive, or that the bill should be dismissed without costs.

This was a suit to redeem a mortgage and judgments; and the sole Plaintiff having died, the Defendant moved that his administrator might revive the cause, or that the bill might be dismissed without costs.

[291] Mr. Bacon, for the motion, pressed upon the attention of the Court the hardship of allowing a suit to continue in Court, the effect of which, according to the doctrine of *lis pendens*, would prevent the parties dealing with their estate.

Mr. E. Montagu, *contra*.

Canham v. Vincent (8 Sim. 277), *Adamson v. Hull* (1 Sim. & St. 249), and *The Bishop of Winchester v. Paine* (11 Ves. 194), were cited.

THE MASTER OF THE ROLLS said that he would make enquiry as to the practice in such cases.

Dec. 8. THE MASTER OF THE ROLLS [Lord Langdale]. In this case the sole Plaintiff being dead, the Defendant moved that his administrator might revive the cause, or that the bill might be dismissed without costs.

As the administrator is at liberty to move at any time, and by doing so may give the effect of *lis pendens* to the whole continuance of the cause, and the uncertainty, whether he will do so or not, must be very inconvenient to the Defendant, the application appeared to me to be reasonable, and in conformity with the practice which the Court has adopted in similar cases; and I should have granted the application at the time, if I had not been informed that a like case had been under the consideration of the Vice-Chancellor, who had refused the motion. It appears that in *Canham v. Vincent*, which is the case referred to, the opinion of the Vice-Chancellor was not founded on any supposed want of authority in the Court, or on any supposed incon- [292]-venience likely to ensue from granting or refusing the application, but simply on the ground that no case was cited in which the application was granted after opposition.

I have made inquiries on the subject, and omitting those cases which have arisen in bankruptcy, which though strongly analogous, may be thought not strictly applicable, I find in *Jones v. Massey* (17th Dec. 1805; Reg. Lib. A. 1805, fo. 30) the two Plaintiffs were dead, and on affidavit of service of notice of motion by the Defen-

dants, the Bank of England, on the executor of the Plaintiff who died last, it was ordered that the bill might be revived in a fortnight, or that an injunction that had been granted might be dissolved, and the bill dismissed with costs; that in *Turner v. Cole* (28th March 1808; Reg. Lib. B. 1807, fo. 495) an injunction to stay proceedings at law had been obtained, and continued on the merits confessed in the answer, and on the Plaintiffs bringing deeds into Court and paying a sum of money into the bank; the sole Plaintiff being dead, the Defendant moved against the executrix that she should revive the cause in a fortnight, or that the injunction should be dissolved, and it was so ordered: the Defendant then revived his judgment at law and levied execution, after which a balance remained due to him, and thereupon he moved in the abated cause that the executrix of the deceased Plaintiff might either revive the suit in a limited time, or that the Accountant-General might transfer to the Defendant the fund which arose from the money paid into Court by the deceased Plaintiff, and also that the title-deeds deposited by the deceased Plaintiff might be delivered to the Defendant's clerk in Court for his use, and it was so ordered.

[293] In *Brown v. Warner* (4th of February 1809) (Reg. Lib. A. 1808, fol. 194; and cited 4 Madd. 171, and 2 Madd. Pr. 368, 1st edit.), the Plaintiff had obtained an injunction to restrain the Defendant from proceeding in an action to recover possession of a messuage, and the injunction had been continued on the merits. The sole Plaintiff then died, and his widow took possession of the messuage; it was not then known whether the deceased had made a will, and no letters of administration had been granted; under those circumstances, it was ordered that the representative of the late Plaintiff should exhibit a bill of revivor in a fortnight, or in default thereof that the bill should be dismissed with costs: and it was ordered that service of the order on the late Plaintiff's clerk in Court and on his solicitors and on the widow should be deemed good service.

These orders were made by Lord Eldon; and although it does not appear that in any of them, the representative of the deceased party appeared and resisted the motion, yet I cannot suppose that orders so special passed without consideration, or that they are such as would not have been made, if the representatives had appeared and stated no sufficient reasons against them; and although there might, as I conceive, have been some modification of the orders as to costs, if the representatives had appeared, there seems no reason to dispute the regularity of the orders in any other respect; and I apprehend that if these orders had been brought to the attention of the Vice-Chancellor, he would have decided the case *Canham v. Vincent* differently. The inconvenience would undoubtedly be very great to the Defendant, if it were left to the option of the administrator of a deceased sole Plaintiff, to keep the Defendant in a state of uncertainty as to the prosecution of the suit, for an indefinite period: whilst, on an application of this kind, the administrator [294] appearing, may ask for a reasonable time to make up his mind whether he will go on with the suit or not.

The cases which I have mentioned, were all of them cases in which injunctions had been granted, but it does not appear to me, that that is a circumstance which makes any real difference in the question; having regard to these cases, and to the analogous cases of defect by bankruptcy and abatement by the marriage of a *feme sole* Plaintiff, I am of opinion that this motion should be granted, unless it should appear, that in consequence of the whole interest of the deceased Plaintiff not being vested in his legal personal representative, some further notice is yet wanting.

NOTE.—The following are the cases on this subject:—

(1725) *Duke Chandos v. Talbot*, Sel. Ca. in Ch. 24. (1788, Oct. 29) *Hill v. Hoare*, 2 Cox, 50. (1809, Feb. 4) *Browne v. Warner*, Reg. Lib. A. 194, cited 4 Madd. 171, and Madd. Pr. ii. p. 368. (1811) *Randall v. Mumford*, 18 Ves. 424. Assignees. (1818) *Wheeler v. Malins*, 4 Madd. 171. (1820) *Porter v. Cox*, 5 Madd. 80. Assignees. (1823) *Adamson v. Hull*, 1 Sim. & St. 249; 1 Turn. & R. 258. (1825, July 16) *Bolton v. Bolton*, Reg. Lib. A. 1593; 2 Sim. & St. 371. (1826) *Sharp v. Hullett*, 2 Sim. & St. 496. (1831, June 22) *Troward v. Bingham*, 4 Sim. 483. (1834, Feb. 5) *Burnell v. Duke of Wellington*, 6 Sim. 461. (1838, June 15) *Canham v. Vincent*, 8 Sim. 277; *Holt v. Harcastle*, 3 Yo. & Col. 236. (1838); and see *Chichester v. Hunter*, post, and *Canham v. Vincent*, before the Vice-Chancellor of England, 23d February 1842,

in which, after considering the authorities, His Honor followed the decision in the last.

The following unreported cases relate to this subject:—

Johnson v. Horlock.—Upon motion this day (11th November 1708), made unto this Court by Mr. Moxon, being of the Defendant's counsel, it was alleged, that the said Plaintiff Elizabeth Johnson formerly exhibited her bill in this Court against the said Defendant, to which he put in his answer; and the said Elizabeth about a year since intermarried with one James Humphry, who had not thought fit to revive the suit; and, therefore, it was prayed, that the bill might stand dismissed out of this Court: whereupon, it was ordered, that the said Humphry do, within a week after notice hereof, procure this suit to be [295] revived, or in default thereof that the Plaintiff's bill should stand dismissed out of this Court, with costs, to be taxed by Sir Richard Holford, Knight, &c.

Reg. Lib. 1708, A. 134.

French v. Barber.—It appeared that after the answers had been filed, the Plaintiff became bankrupt, and that assignees had been appointed, "but had not stirred a step in the cause."

On motion by two of the Defendants made the 26th of June 1782, and on hearing counsel for the Plaintiff, it was ordered "that the assignees do file a supplemental bill, on or before the first day of next term, or that, in default thereof, the Plaintiff's bill as to the said Defendants Mary Bastin and Matthias Barber do stand dismissed out of this Court without costs."

Reg. Lib. 1781, A. 416.

Jones v. Massey.—Upon opening, &c., the 17th of December 1805, it was alleged that the Plaintiffs exhibited this bill and obtained an injunction against the Defendants, the Governor and Company of the Bank of England, to restrain them from permitting the Defendant Eyre Massey, or any person or persons, however authorised by him, to transfer the annuities in the bill mentioned, or to receive the interest and dividends thereof. That the said Defendants have put in their answer to the said bill. That the Plaintiffs are since dead, and the Plaintiff Michael Jones, having survived the Plaintiff Charles J. Morgan, by his will appointed John Jones sole executor thereof. That the said John Jones had not revived this suit; and therefore, it was prayed, that the Plaintiff's bill might be revived in a fortnight, or that in default thereof, the injunction issued against the said Defendants, the Governor and Company of the Bank of England, to restrain, &c., might be dissolved; and that the bill filed in this cause might stand dismissed out of this Court, with costs to be paid to the Defendants, the Governor and Company of the Bank of England; which, upon hearing an affidavit of notice of this motion to John Jones read, is ordered accordingly, and it is hereby referred to Mr. Harvey, one of the Masters, &c., to tax the said costs.

Reg. Lib. 1805, A. fo. 30.

Turner v. Cole.—Robert Turner filed his bill against Defendant for an account and an injunction to restrain an action at law. The common injunction had been obtained for want of answer; and the answer coming in, the injunction was, upon a motion to dissolve, continued, upon the Plaintiff leaving with his clerk in Court certain title-deeds, and paying into Court the sum of £200. The Plaintiff died, leaving Elizabeth Riley executrix; who not having revived the suit, the Defendant, on the 19th of May 1806, obtained an order, that Elizabeth Riley should revive within a fortnight, or, in default, that the injunction should stand dissolved. The suit not having been revived, the injunction [296]-tion became dissolved, "and the Defendant having revived his judgment in case, levied execution on the said late Plaintiff's effects; and the balance of the Defendant's demand under that judgment, after deducting the monies raised from the sale of the said late Plaintiff's effects, amounted to the sum of £486, 19s. 6d.; that the Defendant was advised that he was entitled to the custody of the title-deeds at present in the possession of the late Plaintiff's clerk in Court, on the ground that he had an equitable lien thereof, by way of further security, for the money he obtained judgment for in the action in case. Whereupon, and upon hearing the said order dated the 19th day of May 1806, and an affidavit of service of notice of this motion to the said Elizabeth Riley and to the

clerk in Court of the said late Plaintiff, and the Accountant-General's certificate read, his Lordship ordered, that the said Elizabeth Riley, the executrix of the said late Plaintiff Robert Turner, should, on or before the first day of Easter term next, file a bill of revivor against the Defendant in this cause, to revive this suit; or in default of such bill of revivor being filed, then the £349, 7s., 3 per cent. consolidated Bank annuities (upon which the £200 had been invested), standing in the name of the Accountant-General of this Court, and the sum of £39, 16s. 8d. cash in the Bank placed to the credit of this cause should be transferred and paid to the Defendant John Cole, in part satisfaction of the judgment in case, obtained by him against the said Defendant, and in the pleadings of this cause mentioned; and in case the said Elizabeth Riley should not file such bill of revivor as aforesaid, by the time aforesaid, it was further ordered that the title-deeds, deposited by the said late Plaintiff Robert Turner with his clerk in Court, should be delivered over from the said late Plaintiff's clerk in Court to the Defendant's clerk in Court for the said Defendant's use."

Reg. Lib. 1807, B. 495.

Browne v. Warner.—An injunction had been granted to restrain an action of ejectment; the Plaintiff died, and there appeared to be no representative. The widow, however, retained possession of premises, and paid no rent. It was, on the 4th of February 1809, ordered, that the representative of said late Plaintiff do, within a fortnight after notice hereof, exhibit a bill of revivor in order to revive this suit; or in default thereof that the injunction awarded in this cause should be dissolved, and that the Plaintiff's bill should stand dismissed out of this Court, with costs; and it was further ordered that service of this order on the late Plaintiff's clerk in Court, and on the late Plaintiff's solicitor, and on the widow of the Plaintiff, be deemed good service.

Reg. Lib. 1808, A. 104.

Bromley v. Gregory and Others.—The Plaintiff Bromley became bankrupt, and no further proceedings having been taken, it was moved that the Plaintiff Bromley might file a bill of revivor and supplement in this [297] cause within fourteen days after the date of this order; or in default thereof, that the bill filed in this cause might be dismissed as against the Defendant moving, which, upon hearing an affidavit of service of notice of this motion read, was ordered accordingly.

Reg. Lib. A. 1812, fo. 1527.

Mills v. Fry.—The bill was filed in 1812, and a receiver had been appointed; the answer was filed in 1813. No further steps had been taken, and the sole Plaintiff had become bankrupt. Upon motion and on hearing counsel for the Plaintiff, it was ordered "that the Plaintiff do within three weeks file a supplemental bill in this cause against the Defendant; or in default thereof, that the Plaintiff's bill do stand dismissed out of this Court for want of prosecution, with costs to be taxed by Mr. Thomson, one of the Masters of this Court."

Reg. Lib. 1816, B. 83.

Wilkinson v. Charlesworth.—Caroline Wilkinson, the sole Plaintiff, married Robert Malcolm on the 30th of December 1830; and no further proceedings having been taken in the cause, it was ordered by the Master of the Rolls on the petition of the Defendants, "that the Plaintiff, and Robert Malcolm her husband, do file a bill of revivor against the Defendants, on or before the first day of next Michaelmas term; or in default thereof, it was ordered (after hearing both parties), that the original bill should stand dismissed out of this Court without costs."

Reg. Lib. 1831, B. 2359.

[297] THE ATTORNEY-GENERAL v. NETHERCOAT. Nov. 25, Dec. 8, 1840.

An application for the re-taxation of a solicitor's bill should be by petition, stating particularly the grounds of complaint, and not by motion.

On taxation, charges disallowed for want of authority, and charges reduced by limiting to one of several Defendants his aliquot part of a joint charge, ought not to be computed in determining on whom the costs of taxation should fall, *semble*.

In this case Mr. Aspinall had obtained an order for the taxation of the bills of his solicitor, Mr. Howes. Upon the taxation, the bills were (under the peculiar circum-

stances stated in the judgment of the Court) reduced from £310, 16s. 2d. to £46, 1s., which, after deducting a sum already paid on account, left £6, 4s. 8d. due to the solicitor.

Mr. Aspinall then obtained the usual order of course for taxing the costs of this taxation, and for payment [298] thereof by the solicitor, on the ground that more than one-sixth had been taxed off.

Mr. Pemberton, on behalf of Mr. Howes, now moved to discharge the order for taxation of the costs of taxation, and for a re-taxation of the bills of costs.

Mr. James Russell, *contra*, objected that the application ought to be by petition and not by motion. He argued that the objections to the certificate ought to be specifically pointed out; that the Court would not entertain jurisdiction as to the *quantum* of costs allowed: *Attorney-General v. Brown* (1 Myl. & K. 567), *Alsop v. Lord Oxford* (Ib. 564: Seton Decrees, 335); and further, that the Court could not interfere until the certificate of the Master had been previously discharged. He also referred to *Muskett v. Hill* (3 Beav. 301).

Mr. Pemberton, in reply.

Dec. 8. THE MASTER OF THE ROLLS [Lord Langdale]. In this case a motion was made by Mr. Thomas Howes, a solicitor, to discharge an order, dated the 16th day of July 1840, for the taxation of costs occasioned by the taxation of Mr. Howes's bill under a former order, and for payment of such costs; and at the same time Mr. Howes moves that the Master may review his taxation.

The case seems to be, that Mr. Aspinall and seven other Defendants employed Mr. Howes as their solicitor in the cause; and that besides such employment on the behalf of the eight Defendants, Mr. Howes was employed as solicitor in some matters by Mr. Aspinall separately.

[299] Mr. Aspinall, desiring to discontinue the employment of Mr. Howes as his solicitor, on the 7th of September 1838 obtained the common order for the delivery of Mr. Howes's bill of fees and disbursements, claimed to be due to him in this cause and all other matters: for taxation of the bills: production of papers: and on payment of what, if anything, was due, for delivery up of all deeds, papers and writings belonging to Mr. Aspinall.

Pursuant to the order, Mr. Howes carried in three bills:—two of them for business done for Mr. Aspinall separately, and the third for business done for the eight Defendants, and purporting to be a charge against them.

No question is made respecting the proceedings on the two bills for business done by Mr. Howes for Mr. Aspinall separately.

But with respect to the third bill, it is said, that amongst the charges therein contained, were the costs of resisting a motion for a receiver; and it being alleged, and I presume, shewn to the satisfaction of the Master, that the resistance to the motion was not authorised by Aspinall, the charges made in respect thereof was not taxed, but wholly disallowed by the Master. By this disallowance, and by the sums taxed off other charges, the sum appearing due to the solicitor was very greatly reduced; and the Master, having divided this reduced sum into eight equal parts, charged Aspinall with only one of them; and after giving him credit for sums previously paid, what appeared to remain due to Howes was very small.

The certificate is dated the 11th of July 1840, and without stating any special circumstances, certifies, in substance, that the Master in taxing the bill (meaning [300] the three bills), amounting to £310, 16s. 2d., had reduced the same to £46, 1s., which, after deducting £39, 16s. 4d., admitted to have been paid, left the sum £6, 4s. 8d., which he found due to Howes in respect of the bill.

Upon this certificate, Mr. Aspinall obtained an order, as of course, dated the 16th of July 1840, for the taxation of the costs occasioned by the former taxation, and for payment thereof.

And now Mr. Howes makes his motion for a discharge of that order and a re-taxation of his bills.

Having regard to the certificate, I think that the order complained of is regular; and whilst the order and the certificate stand, I think I cannot regularly order a re-taxation of the bill, and that, on this form of proceeding, I cannot regularly refer it back to the Master to review his certificate. I must therefore refuse this application.

But if the facts be as I have understood them, it appears to me, that the certificate is not such, as, under the circumstances, ought to have been made. This is by no means the case of a bill of £310, 16s. 2d. reduced by taxation to £46, 1s., but a case, partly of reduction by disallowance of entire sums, objected to by Aspinall for want of authority, and partly of reduction, by limitation of the claim against one to his aliquot part, as if he were under no liability as to the remainder; and these are circumstances which ought to be considered.

If Mr. Howes be really aggrieved in this matter, I think that he has mistaken his mode of obtaining redress, and that he ought to have applied by petition, stating particularly the grounds of his complaint, and seeking to be relieved from the certificate.

[301] A case of *Muskett v. Hill* (see next case), resembling this in some of the circumstances, was brought before me in June last. In that case the special circumstances were stated in the certificate, but nevertheless the certificate itself appeared to me to be so expressed, as to make the order to tax the costs of taxation regular; and no application being made to be relieved from the certificate, the motion was therefore refused with costs.

Thinking the present application irregular, I must also refuse it with costs; but at the same time, seeing some reason to think that Mr. Howes may have a just ground of complaint, I refuse this motion, without prejudice to any other application which he may be advised to make, respecting the orders of the 7th of September 1838 and the 16th of July 1840, the taxation under the first order and the certificate of such taxation.

[301] *MUSKETT v. HILL. June 24, 1840.*

A solicitor was retained by A. B. and four other Defendants; A. B. having withdrawn his retainer, the solicitor delivered his bill against A. B., amounting to £19, 19s., which was referred for taxation; the Master, considering that A. B. was liable to one-fifth part only of several charges, struck off four-fifths thereof, and certified he had taxed the bill at £4, 10s. 6d. The client then obtained an order of course for payment by the solicitor of the costs of the taxation; a motion being made, on behalf of the solicitor, to discharge the latter order for irregularity, on the ground that more than one-sixth had not been struck off within the rule, but no application being made to be relieved from the certificate, which warranted the second order, the motion was, on that ground, refused with costs.

A solicitor was retained in this cause by Mr. Nicholls and four other Defendants. Mr. Nicholls having withdrawn his retainer, the solicitor delivered his bill of costs, amounting to £19, 19s. 2d. The principal items consisted of a charge of £13 for the office copy of the bill, and £5, 4s. 2d. for a close copy thereof.

[302] Mr. Nicholls obtained the usual order for the taxation of this bill, and the Master certified, that it appearing that certain items therein, amounting together to the sum of £19, 5s. 10d., concerned Mr. Nicholls jointly with four other Defendants, and that Mr. Nicholls's proportion thereof amounted to the sum of £3, 17s. 2d., and that the other items therein, amounting to the sum of 13s. 4d., related to Mr. Nicholls solely, he had taxed the bill at £4, 10s. 6d., which he found due to the solicitor.

Mr. Nicholls obtained an order of course, referring it back to the Master to tax Mr. Nicholls's costs of the taxation and of that application and incident thereto, and that the solicitor might pay such costs when taxed.

It was now moved on behalf of the solicitor, that the last order might be discharged for irregularity.

Mr. O. Anderson, for the motion, contended that there had not been a taxation off of more than one-sixth within the rule, so as to render the solicitor liable to pay the costs of the taxation; that there had been no taxation off of particular items, but the proportion to which the parties were liable had been settled by the Master, who had struck out such part as he considered other persons were liable to; that where items to which a party is not liable are struck out, such items are not taken into consideration in the computation of the one-sixth; *Rigby v. Edwards* (5 Mad. 20, and Beames on Costs, 301, 382), *Marshall v. Oxford* (5 Simons, 456). He also argued,

that the retainer being joint, the five Defendants were jointly liable for the whole, as some might be unable to pay.

Mr. Pemberton and Mr. Teed, *contra*, were not heard by

[303] THE MASTER OF THE ROLLS [Lord Langdale], who said, that notwithstanding the special circumstances in the case, the Master had certified that he had taxed a bill of £19, 19s. 2d. at £4, 10s. 6d., and no application being made to be relieved from that certificate, which warranted the order for taxing the costs of the taxation, the motion must be refused with costs.

[303] HOLMES v. THE CORPORATION OF ARUNDEL. Dec. 9, 22, 1840.

By taking proceedings to expunge matter reported by the Master to be impertinent, a party adopts the report altogether, and cannot afterwards, unless by the special leave of the Court, take exceptions to the report as to passages reported pertinent.

The Defendants' answer having been referred for impertinence, the Master, by his report dated the 6th of November, reported some of the passages complained of to be impertinent, but he disallowed the remaining exceptions.

The Plaintiff caused the report to be filed on the 11th of November, and on the 16th of the same month he took out a warrant to expunge the impertinent matter, which warrant was returnable on the 19th.

On the 17th of November the Defendants filed exceptions to the Master's report, which they set down on the following day, and they duly served the order. On the 19th the parties attended before the Master on the warrant to expunge, when the Defendants' exceptions to the report, and the order to set them down, were shown as cause against expunging, and which cause was allowed by the Master. (See 11th General Order, Ap. 1828, 2 Russ. App. 7, and 22d General Order, Dec. 1833, 1 Myl. & K. App. xi.)

[304] After this, and on the 25th of November, the Plaintiff filed exceptions to the Master's report, as to the exceptions disallowed by the Master. He obtained an order for setting them down, and gave notice thereof on the 27th.

It was now moved on behalf of the Defendants, that the Plaintiff's exceptions might be taken off the file for irregularity; and that the order for setting them down to be heard might be discharged.

Mr. Pemberton and Mr. Rogers, for the motion, contended, that the Plaintiff, having acted on the Master's report, by taking out the warrant to expunge, was not now in a situation to dispute its general accuracy; that he could not adopt it by expunging the matter reported impertinent, and at the same time reject it by taking exceptions thereto; they cited *Beavan v. Waterhouse* (2 Beavan, 58).

Mr. Wray, *contra*, for the Plaintiff, contended that the Plaintiff was right in the course he had adopted, and in his attempt to have the matter, reported by the Master impertinent, expunged; that he had not thereby in any way concurred in the finding of the Master on the other points; though it might have been different if the impertinent matter had been actually expunged; this the Plaintiff had been prevented doing, by the Defendants' exceptions to the Master's report, so that the record remained in its original state; in *Norway v. Rowe* (1 Mer. 135) it was held, that exception to a report of impertinence may be taken at any time until the impertinent matter has been expunged; *Evans v. Owen* (2 Myl. & K. 382) was cited.

Mr. Pemberton, in reply.

[305] Dec. 22. THE MASTER OF THE ROLLS [Lord Langdale]. It is clear from the cases, that the Defendants were at liberty to file their exceptions, notwithstanding the warrant taken out and served by the Plaintiff; but I think, that the Plaintiff, having taken out and served the warrant, was not afterwards at liberty to file exceptions, without leave of the Court. The service of the warrant to expunge was a claim to have the answer made conformable to the report, and further implied a claim to the costs of the proceeding to have the answer so altered; and this proceeding appears to me to be inconsistent with the claim to have the answer further altered. It is very probable that the Plaintiff, when he took out the warrant, supposed

that the Defendant would not except, and that if he had known that the Defendant meant to except, he would not have served the warrant, but instead thereof would have filed exceptions of his own, as he had a right to do; and it is possible, that there may have been circumstances which might have induced the Court to give the Plaintiff leave to except, notwithstanding the service of the warrant to expunge; but no leave having been obtained, I think, that after the service of the warrant to expunge, the Plaintiff was not at liberty to except to the same report. The cases of *Norway v. Rowe*, *David v. Williams* (1 Sim. 17), and *Evans v. Owen*, do not apply, because they all relate to the rights of parties, against whom the reports were made, and who had not, before the exception, adopted any proceeding of their own. This is a party seeking to avail himself of a report in his favour, though not to the extent he desired; and who, before taking the exceptions, had adopted a proceeding for obtaining the benefit to which the report entitled him.

This motion must therefore be granted.

[306] WEST v. SMITH. *In re* STEVENS AND OTHERS, Solicitors. Dec. 18, 22, 1840.

[For further proceedings, see 3 Beav. 492.]

An order intituled in a non-existing cause discharged for irregularity.

An order made upon petition on the merits cannot be discharged on motion, *semble*; but where the irregularity of an order, obtained on petition in open Court, consisted in its being intituled in a non-existing cause, the Court discharged it on motion.

An order had been obtained upon petition on behalf of Mrs. Maughan, for the taxation of her solicitor's bill. The petition was intituled in the above-mentioned cause and matter, and was duly served; the Respondents not having appeared, the order was taken upon an affidavit of service.

No such cause as *West v. Smith* existed in this Court, and though a bill in such a cause had been prepared, yet it had never been filed.

Mr. Pemberton, on behalf of the solicitors, now moved to discharge the order for irregularity on the ground that it was intituled in a non-existing cause.

Mr. Tennant, *contra*, contended, that the order having been obtained in open Court upon petition, could not be discharged on motion; *Bishop v. Willis* (2 Ves. sen. 113). That the order was intituled in the matter of the solicitors, and that this was sufficient to support it. (See *Eastwood v. Glenton*, 2 M. & K. 280; *Lees v. Nuttall*, 2 M. & K. 284.)

Mr. Pemberton, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. It is plainly irregular to intitle a petition in a cause which does not exist, and it appears beyond all question that such is the case here: but whether I can discharge the order on motion is a matter of practice which I will inquire into; the present [307] impression on my mind is, that I cannot on motion discharge an order made on petition upon merits. This order has however been made, on the suggestion that there is a cause bearing a particular title existing in Court, when the contrary appears; I will inquire whether this is an exception to the general rule.

Dec. 22. THE MASTER OF THE ROLLS. This was a motion to discharge an order made on petition.

The objection to the order was, that the order itself, and the petition, on which it was founded, were intituled in a cause which never existed.

The order appeared to me to be clearly irregular, but it was argued that it could not be discharged on motion, because it was made in Court, and no irregularity appeared upon the face of it. That no cause was existing appeared only by affidavit.

On inquiry into the practice, I am of opinion that such an order as this may be discharged on motion. The motion does not in any way seek to impugn the judgment of the Court; and the only material part of the affidavit shews, that the title of the petition involved a false suggestion. It is clear that if this false suggestion

had been known before the order had been pronounced, no order would have been made, and now that an error so material is known, the order must be discharged for irregularity on that ground alone, and without any consideration of merits. I find that in the matter of *The Dovenby Hospital* (1 Mylne & Craig, 279), the Lord Chancellor, after objection taken, discharged, on motion, an order [308] made in open Court upon petition, and this upon grounds which appear to me to make it proper to discharge this order on motion.

Discharge the order with costs.

[308] CHADWICK v. BROADWOOD. Nov. 9, 1840.

[S. C. 10 L. J. Ch. 242; 5 Jur. 359. See Real Property Limitation Act, 1874, 37 & 38 Vict. c. 57.]

Where property is under lease, adverse possession runs against the reversioner from the expiration of the lease, or from the time when the tenant pays rent to one claiming wrongfully to be entitled in immediate reversion.

A bill of discovery in aid of an action of ejectment, filed in 1840, stated that in 1776 A. B., being seised in fee, granted leases of the property which expired in 1825, and that the Plaintiff, as heir of A. B., was now entitled to the property, for the recovery of which he was about to bring an action of ejectment. The Defendant pleaded the Statute of Limitations (3 & 4 W. 4, c. 27), and averred that the Plaintiff had not been in possession or received rents for more than twenty years before the bill was filed: that the Defendant had entered into possession as purchaser in fee-simple in 1819, and had ever since remained in peaceable possession as tenant in fee. Held, that this plea could not, in law, be sustained; for there being no allegation that the rent had been paid to anyone wrongfully claiming to be entitled in reversion immediately expectant on the determination of the lease, the Plaintiff's right did not accrue until the expiration of the lease in 1825, or within twenty years from the filing of the bill.

This case came before the Court upon a plea to a bill of discovery, in aid of an action at law intended to be commenced by the Plaintiff.

The bill stated certain conveyances of December 1717 and July 1720, under which Sir Andrew Chadwick became seised in fee of certain premises in Broad Street, St. James's; that by indenture of lease, which was supposed to bear date the 2d day of June 1776, he demised a specified part of the property to F. Johnstone for sixty years, at a rent of £40 a year; and that he "executed divers other leases in writing, of such of the same premises respectively as were not comprized in the lease of the 2d June 1766, at and under divers yearly rents, each such rent exceeding 40s. by the year, and for long terms of years, commensurate or nearly commensurate with the number of years, which, at the respective dates of such other leases, was then to come in [309] the said term of sixty years granted by the lease of the 2d of June 1766; or at least the term of years, granted by such other leases respectively, were granted in such manner as that they would respectively expire at or about the time when the term of sixty years, granted by the lease of 2d of June 1766, would expire, or within one or two years prior or subsequent to that time."

That the Plaintiff was unable to set forth with precision the date of such indenture of lease, supposed to bear date the 2d of June 1766, or the dates of the other leases granted by the said Sir Andrew Chadwick, or the terms of years for which such other leases were granted, or the rents thereby respectively reserved; or the particular dimensions, boundaries, &c., of the pieces or parcels of ground thereinbefore described, as comprized in the indentures of bargain and sale and release of the 31st of December 1717 and the 22d of July 1720 respectively, or in the leases respectively, or of the messuages or tenements and buildings thereon, by reason of the Plaintiff not having in his possession or power the thereinbefore-mentioned leases, or any of them, or any counterparts or counterpart thereof."

The bill stated, that Sir Andrew Chadwick died in March 1768, intestate and without issue; and it then proceeded to state the pedigree of the Plaintiff, and to

shew that he was the heir at law of Sir Andrew Chadwick; and stated, "That the said term of sixty years expired on the 24th of June 1825, or about that time; and that the other terms of years, granted by said Sir Andrew Chadwick as aforesaid, respectively expired at some time or times within two years, either prior or subsequent to the 24th of June 1825."

It also stated that the property had become vested in the Defendants for the residue of the said term; and [310] that the term having expired, the Plaintiff was seised and entitled thereto in fee, as the heir at law of Sir Andrew Chadwick. The bill further stated that the Plaintiff was about to bring an action of ejectment against the Defendants to recover possession, but that he was unable to proceed without a discovery. It charged that the Defendants had the leases and other documents in their possession, and prayed a discovery.

To this bill the Defendant pleaded the Statute of Limitations of the 3 & 4 W. 4, c. 27, whereby, after setting forth the second, third, seventeenth, and twenty-fourth sections of the statute, (1) the Defendant by his plea [311] averred as follows; that the Complainant or any person under whom he claims, or any other person or persons for his or their or any of their use; or in trust for him or them or any of them, was not, nor were within twenty years next before the filing of the said Complainant's bill, in the possession, or in the receipt of the rents or other profits of the brewhouse, messuages, tenements, lands, grounds, and hereditaments, or other the premises in

(1) The second section of this Act is as follows:—"And be it further enacted, that after the 31st day of December 1833, no person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same."

The third section enacts, "That in the construction of this Act the right to make an entry or distress, or bring an action to recover any land or rent, shall be deemed to have first accrued at such time as hereinafter is mentioned; (that is to say) when the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall, while entitled thereto, have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received;" (this section, after providing for the case of a person claiming under a deceased person, and of one claiming under an instrument unaccompanied by possession, proceeds) "and when the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land, or the receipt of such rent in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession."

The ninth section enacts, "that when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, by virtue of a lease in writing, by which a rent amounting to the yearly sum of 20s. or upwards shall be reserved, and the rent reserved by such lease shall have been received by some person wrongfully claiming to be entitled to such land or rent in reversion, immediately expectant on the determination of such lease, and no payment in respect of the rent reserved by such lease shall afterwards have been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent, subject to such lease, or of the person through whom he claims, to make an entry or distress, or to bring an action after the determination of such lease shall be deemed to have first accrued at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming as aforesaid; and no such right shall be deemed to have first accrued upon the determination of such lease to the person rightfully entitled."

the said bill mentioned, or any of them, or any part thereof; and that no rent for or in respect of the said premises or any of them, or any part thereof, had at any time since the year 1815, or within twenty years next before the filing of the said bill, been paid to the said Complainant, or to any other person or persons for his use or benefit; and that if the said Complainant ever had any right to make any entry or distress in or upon, or to bring an action for the said [312] premises or any of them, or any part thereof, the same right accrued more than twenty years before the time of filing of his said bill; and that the said Defendant was not at any time, within upwards of ten years before the filing of his said bill, under any of the disabilities mentioned and described in the said Act of Parliament. And the plea averred, that, in the year 1815, Defendants Henry Broadwood and one James Goding entered into possession of all the said premises, except the houses in the said bill mentioned and described as No. 46 in Broad Street, and Nos. 13 and 14 in New Street respectively; and that in the year 1817 they entered into possession of that part of the said premises in the said bill described as the house No. 46 in Broad Street; and that in the month of April 1819 they entered into possession of the remaining part of the said premises in the said bill described as the houses numbered respectively 13 and 14 in New Street; and that when they so entered into the possession of the said premises respectively at the times aforesaid, they entered into the possession as the purchasers of the fee-simple and inheritance thereof respectively; and that from the respective times aforesaid to the month of January 1836, when Defendant Henry Broadwood became entitled to the entirety of the said premises, and was left in the possession thereof, and until he was so left in such possession, the said James Goding and Defendant H. Broadwood were in the continual peaceable and uninterrupted possession and enjoyment of the said premises as tenants thereof in fee-simple; and that in the month of January 1836 the possession of the entirety of the said premises was given by the said James Goding to Defendant Henry Broadwood, who entered upon the same as tenant in fee-simple thereof, and he hath ever since been, by himself and his tenants, in the continual, peaceable and uninterrupted possession and enjoyment thereof; and that since [313] that time he hath agreed to grant a lease of all the said premises to a trustee for all Defendants as partners in trade, and that all the Defendants are in the occupation of the said premises under such agreement. And Defendants, therefore, pleaded the said Act of Parliament, and such possession and enjoyment as aforesaid, and the matters aforesaid to the said bill, and humbly prayed the judgment of the Court whether they ought to make any answer to the said bill.

Mr. Girdlestone and Mr. Teed, in support of the plea, contended that there had been a clear adverse possession for more than twenty years; and notwithstanding the alleged leases, and any legal remedy the Plaintiff might have, still that he was not entitled to any assistance in equity; *Cholmondeley v. Clinton* (1 Turn. & R. 107). Secondly, that this case was brought within the third section of the Act pleaded, and that the right of the Plaintiff, and of those through whom he claimed, accrued, at the time at which rent had been last received by them, which was more than twenty years before the filing of the bill. That if the existence of the alleged lease brought the case within the ninth section, then time began to run when rent ceased to be paid to the party claiming in fee. They argued also, that the plea was right in form, in stating the particular facts on which the Defendants meant to rely as constituting the adverse possession; *Hardman v. Ellames* (2 Myl. & K. 732): and they referred also to *Crouch v. Hickin* (1 Keen, 385).

Mr. Pemberton and Mr. Bird, *contrâ*. The statute of the 3 & 4 W. 4, c. 27 (sect. 24) does not apply to bills of discovery; but, even if this were a bill [314] for relief, the circumstances pleaded would not be a defence. Before the statute, an action of ejectment could not be brought after twenty years' adverse possession; but if there were an outstanding lease, ejectment could not be brought by the landlord until its expiration, and from that time, therefore, adverse possession began. As the mere non-payment of rent would not entitle the landlord to re-enter, so it would not create an adverse possession. Lord Eldon, it seems, in *Cholmondeley v. Clinton* says, that Lord Redeadales entertained some doubts as to the accuracy of the decisions at law on the point; but however that may be, the Legislature, by the ninth section of the Act referred to, has adopted the principle laid down by the Courts, and has expressly

provided for the case of property being on lease; it is enacted, that in such a case, the right to bring an action to recover possession shall be deemed to have accrued, at the time when the rent shall be paid to a person wrongfully claiming the land in reversion, expectant on the determination of the lease. The lease in the present case expired in 1825, and the bill was filed in 1840, and within the twenty years. The plea nowhere states that the rent was ever paid to any person claiming adversely, quite the contrary, it avers that no rent at all has been paid; the case, therefore, does not come within the statute, and independently of the statute, the mere non-payment of rent by a tenant can never create an adverse possession.

They argued, secondly, that the plea did not bring the case to one single point, as it ought, but was multifarious as raising many issues:

And, thirdly, that it ought to be supported by an answer denying the possession of documents tending to prove the allegations in the bill, and to disprove the plea.

[315] Mr. Girdlestone, in reply.

Nov. 9. THE MASTER OF THE ROLLS [Lord Langdale]. The Plaintiff, in this case, alleges himself to be the heir at law of Sir A. Chadwick, and he states that the property which he claims was subject to leases which expired in the year 1825, when his right to possession accrued; and that he is about to commence an action of ejectment, in aid of which he files this bill for a discovery. The Defendants plead the late Statute of Limitations, and aver that they have had adverse possession of the property for more than twenty years before the bill was filed; and the plea has been argued, as if it were a mere question, whether there had been adverse possession against a person, who, supposing he had the right, was entitled to proceed to recover the possession. Now, whether that were so or not, depends on the real, or, on the present occasion, the assumed, existence of the leases alleged in the bill. If there were no such leases, or if, from the frame of these pleadings, the leases ought not in any way to be taken into consideration; then, for anything that appears to the contrary, the Plaintiff might have proceeded to recover possession at any time since 1801; but if such leases are to be assumed to have existed as they are stated in the bill, then the Plaintiff's right to possession did not commence till the year 1825, and, in such case, he could not by any means have recovered possession before that time. This bill does not make such distinct allegations as might be desired; but taking the bill and the plea together, I am of opinion that, on the present occasion, I must assume that the leases were in existence, and consequently, that the Plaintiff's right to recover did not accrue until the year 1825, unless there are other circumstances in the plea which ought to determine [316] the matter in another way. What the Defendants allege is, that they purchased about the year 1815, 1816, or 1817, and having purchased, they entered into possession as tenants in fee, as owners of the fee and inheritance. What does the statute say in that respect? When is the right to recover possession of land, subject to a lease, to be considered as having accrued? Not from the time when any person dealing with the leases or dealing with those who are entitled to the leases, gets possession, and claims to be entitled in fee, but from the time when the person claiming under a lease pays rent to a party claiming wrongfully in reversion immediately expectant on such lease; for then the adverse title of the person who receives the rent under such circumstances is first really brought into operation against the party who claims on the expiration of the lease. We come then to the simple question on this plea (though very many others have been argued), whether the facts which are alleged on this plea, are such as to bring the case within the protection of the statute. The Defendants say, that they have paid no rent; that they entered into possession in the year 1815, 1816, and 1817, as persons entitled in fee; but they do not state that which the statute requires, namely, when the rent was first paid to a party claiming adversely, which is the time at which the right is to be deemed to have accrued. I think, therefore, the plea cannot be sustained.

Being of that opinion, I do not enter into the other points, it being unnecessary so to do.

On overruling a plea liberty given the Defendant to plead *de novo*, and to the Plaintiff to amend his bill.

Mr. Girdlestone applied to amend the plea, or to plead *de novo*.

Mr. Pemberton, *contrà*, contended that this was contrary to the usual practice; he cited 2 Dan. Pr. 231.

[317] THE MASTER OF THE ROLLS gave liberty to the Plaintiff to amend his bill, and to the Defendant to plead *de novo*.

NOTE.—An appeal was presented to the Lord Chancellor as to the liberty to plead *de novo*, but, after argument, the decision on that point was affirmed.

[317] HOPE v. HOPE. Dec. 3, 8, 1840.

[S. C. 10 L. J. Ch. 70; 4 Jur. 1124.]

An application for an order to examine a witness *de bene esse*, on the ground that he is the only witness to a material fact, ought to be made upon notice, and not *ex parte*.

The affidavit in support of such an application ought to shew the facts on which it is proposed to examine the witness.

An affidavit in support of such an application on belief only, that the witness is the sole witness to a particular fact, is not sufficient: it ought to state the reasons for such belief.

This was a motion to discharge an *ex parte* order, made on the application of the Plaintiff, whereby it was ordered "that the Petitioner should be at liberty to examine Mr. Bram Hertz as a witness for the Petitioner in this cause *de bene esse*, saving all just exceptions. And it was further ordered that notice of the order should be given to the Defendant Adrian John Hope, or a copy thereof be left at his dwelling-house or usual place of abode, with his servant, agent, or person residing there, six days before the said witness should be examined. And notice of the order was to be given to the other Defendants forthwith."

This order was obtained upon petition, supported by the affidavit of the Plaintiff's solicitor, who stated "That this cause had been instituted for the administration of the estate and effects of Henry Phillip Hope, Esq., deceased, the testator in the pleadings named, and particularly for trying the validity of a certain indenture or deed of gift bearing date the 9th of April 1838, made between the said Henry P. Hope, of the one part; the Plaintiff Alexander James Beresford Hope, of the other part; whereby H. P. Hope assigned, &c., unto [318] Alexander J. B. Hope, certain diamonds, precious stones, jewels, gems, and minerals, contained, on the said 9th day of April 1838, in a certain mahogany cabinet in the said deed mentioned and described; and that he had been informed and verily believed that Bram Hertz was a person of skill and knowledge in diamonds, precious stones, jewels, gems, and minerals: that the said Bram Hertz was intimately acquainted with the said testator for ten years previously to his death, and was employed and consulted by him with reference to the collection of diamonds and precious stones formed by him; that the said Bram Hertz made and arranged, under the immediate direction of the said testator, a catalogue descriptive of the diamonds, precious stones, jewels, gems, and minerals contained in the said cabinet mentioned and described in the said deed of gift. That the said Bram Hertz knew what diamonds, precious stones, jewels, gems, and minerals were in the said cabinet on the said 9th day of April 1838: that it was essentially necessary to the case of the said Alexander J. B. Hope to shew what diamonds and precious stones were in the said cabinet on such day, and to specify and identify such of the diamonds, precious stones, jewels, gems, and minerals then in the possession of the Defendants, the executors of the said testator in England, as were contained in the said cabinet on such day, and to shew the intention and views of the said testator in executing the said deed of gift of the 9th of April 1838; and that to the best of the knowledge, information, and belief of deponent, the said Bram Hertz was the only person who could depose to the several matters before mentioned, as essentially necessary to the case of the said Alexander J. B. Hope, and that such matters lay in the knowledge of the said Bram Hertz only."

[319] Mr. Turner and Mr. John Baily, on the part of the Defendant Henry

Thomas Hope, and Mr. Pemberton and Mr. Gardner, in the same interest, now moved to discharge this order. They argued, that the Court never permitted an examination of a witness *de bene esse*, unless in cases of absolute necessity; and had always shewn great jealousy of such an application, as a witness would stand pledged to re swear what he had sworn in his examination *de bene esse*; *Bellamy v. Jones* (8 Ves. 31). They contended that the order was irregular on several grounds: First, that it had been obtained *ex parte*, whereas it ought to have been applied for upon notice to the Defendants, in order to enable them to contest the truth of the allegations on which the order was founded; *Shelley v. —* (13 Ves. 56), *Pearson v. Ward* (1 Cox, 177), *Bellamy v. Jones* (8 Ves. 31), where the application had been made on notice. Secondly, that the affidavit, which was the foundation for the order, did not shew with sufficient certainty, as it ought, that Hertz was the sole witness of the facts as to which it was proposed to examine him; *Bellamy v. Jones* (8 Ves. 31); the affidavit merely stating, that "to the best of the knowledge, information, and belief" of the deponent, Hertz was the only person who could depose to the several matters. That the facts, on which such belief was grounded, ought to have been stated in the affidavit; for, as the case stood on this affidavit, it did not appear that the deponent had any knowledge or information on the subject. In *Rowe v. —* (13 Ves. 261), a motion was made to examine witnesses *de bene esse* "upon the affidavit of the agent, that he was informed by the witness that he could prove the particular fact, and believed he was the only person who could prove [320] it;" but Lord Erskine would not grant the order on an affidavit "not shewing the ground of the agent's belief that no other person could prove it." This affidavit ought also to explain how it happened that Hertz was the sole witness; *Parsons v. Ward* (1 Newl. Pr. 451). In *Pearson v. Ward* (1 Cox, 178) the Court "thought the affidavit did not go far enough, inasmuch as it was thereby only sworn generally that the Plaintiff had no other witness to support her demand, and did not specify in what particular manner his testimony affected the case, or that he was the husband's book-keeper, &c.; and if the Defendant insisted on the insufficiency of the affidavit, would make no order until a fuller affidavit should be made." Thirdly, that the affidavit did not sufficiently define the facts as to which it was proposed to examine the witness; according to the affidavit, the witness was to be examined as to "the intention and views of the testator," which was far too general, and did not enable the Defendants to cross-examine him as to the points on which he was to be examined.

Fourthly, that the order for the examination of the witness was too extensive, being for his examination generally, and not to those points exclusively as to which, as was alleged, he was the sole witness. If such an order could be supported, then when a person was a sole witness as to one fact, he would be allowed to prove *de bene esse* any number of other facts which many other individuals were capable of proving, and as to which, therefore, no pressing necessity existed for an examination otherwise than in the ordinary way. *Frere v. Green* (19 Ves. 319) was also referred to.

[321] Mr. Tinney and Mr. W. H. Clark, *contra*, contended that in case of a single witness, it was a motion of course to examine him *de bene esse*; that the practice was so stated by Sir John Leach in *Tomkins v. Harrison* (6 Mad. 315), and was so understood in the profession (2 Dan. Pr. 546; 2 Mad. Pr. 250), and was so stated in *M'Kenna v. Everitt* (2 Beavan, 188). That the fact of Hertz being the sole witness, was sufficiently proved by the affidavit of the solicitor, and that it must necessarily be on belief only, as the solicitor could have no personal knowledge on the subject; and that the affidavit in *M'Kenna v. Everitt* was on knowledge and belief only. That the facts on which he was to be examined were sufficiently defined, and were limited to the case made by the bill, and that the Defendants would have the same facility for cross-examining the witness as if he were examined in the ordinary way; and, lastly, that all orders of this description were in the form of the present, viz., to examine generally, saving just exceptions.

Mr. Turner, in reply.

THE MASTER OF THE ROLLS said he would not decide this case before he had had an opportunity of enquiring into the practice; but that he should not consider himself bound by anything which had fallen from him in *M'Kenna v. Everitt* on a point which had not been brought to his attention.

Dec. 8. THE MASTER OF THE ROLLS [Lord Langdale]. This was a motion to

discharge for irregularity an order obtained *ex parte* for the examination *de bene esse* [322] of a person alleged to be the sole witness of certain facts which the Plaintiff desires to prove in the cause.

Several objections are stated, first, that the order ought to have been made upon notice; secondly, that the affidavit does not sufficiently shew that the person proposed to be examined is the sole witness; thirdly, that the affidavit does not sufficiently define the facts upon which it is proposed to examine the witness; and, fourthly, that leave is given to examine the witness generally, and not merely upon the facts of which he is stated to be the sole witness.

It appears that in *Hankin v. Middleditch* (2 Bro. C. C. 640), Lord Thurlow made such an order *ex parte*, on an affidavit that the proposed witness was, as one James White was informed and believed, the only witness who could speak to the facts and circumstances to which he was to be interrogated; and for several years past the practice, as I am informed, has been, to pass such orders as of course both in the Registrar's Office and in the office of the Secretary at the Rolls; and the practice was so understood by Sir John Leach in *Tomkins v. Harrison* (6 Mad. 315), and was so stated by me in *M'Kenna v. Everitt* (2 Beav. 188), in consequence of information, which is correct, that such orders had frequently been made *ex parte*; but notwithstanding the practice which has thus prevailed, the case of *Hankin v. Middleditch* is the only reported case in which the order has been granted upon an *ex parte* application; and besides the reported cases of *Shirley v. Earl Ferrers* (3 P. W. 77) and *Pearson v. Ward* (2 Dick. 648), there are several unreported cases in which the applica-[323]-tion has been made on notice; and no case has been found in which the question whether the order should be made on an *ex parte* application has been raised and decided. Under these circumstances, I have thought myself at liberty to consider whether the order ought to be made *ex parte*; and considering the nature of the order, and that, in the case of a sole witness in good health, the order is not required suddenly, as may be the case when a witness is very old, or in a dangerous state of health, or under orders to leave the kingdom, whilst, on the other hand, the affidavit may state circumstances, of the sufficiency of which to warrant the order, the Court ought to judge, and for that purpose to have the assistance of the parties interested to oppose, I think that the application should be made on notice; and this is a sufficient reason for discharging the order. I ought, however, to add, that even if the order could have been sustained as an *ex parte* order, the affidavit does not appear to me to be sufficient, either to shew what the facts are upon which it is proposed to examine the witness, or that he is the sole witness of such facts; and I concur with Lord Erskine in *Rowe v. —* (13 Ves. 261), that the reasons for the belief ought to be stated.

The Plaintiff may now move, upon notice, to examine the same proposed witness *de bene esse*, and it may then be necessary to consider whether the leave to examine should be general.

The order is discharged; but considering the practice which has for a long time prevailed to grant such orders *ex parte*, I think that it must be discharged without costs.

The following authorities on the subject are placed in chronological order:—(1730, Michaelmas), *Shirley v. Earl Ferrers*, 3 P. [324] W. 77, on notice; (1785, February), *Pearson v. Ward*, 2 Dick. 648, on notice; (1787, July 15), *Rochard v. Bosanquet*, on notice, but foreign commission; (1788, January 19), *Bridges v. Hatch*, on notice; (1788, November 28), *Jenkins v. Tucks*, on notice; (1789, July 14), *Hankin v. Middleditch*, 2 Bro. C. C. 640, without notice; (1792, December 17), *Cholmondeley v. Oxford*, 4 Bro. C. C. 157, on notice, two witnesses; (1814, January 20), *Gilbert v. Boyds*, on notice; (1814, February 12), *Watson v. Fosbrooke*, on notice; (1838, September 17), *Burton v. Blakemore*.

[324] HALES v. DARELL. Nov. 10, 1840.

[S. C. 10 L. J. Ch. 10. Cf. *In re Huish*, 1889, 43 Ch. D. 260.]

Annuities of £900 and £500 respectively, bequeathed by a testator to his two sisters, held not to be a satisfaction of annuities of £300 each granted in his lifetime, by him to them for valuable consideration.

E. H., for valuable consideration, granted to his two sisters annuities of £300 a year each, during their lives, payable in January, April, July, and October. By his will he gave his widow an annuity in lieu of the annual sum payable to her under her marriage settlement, and of dower; and he directed his debts to be paid, and bequeathed to his sisters respectively, annuities of £900 and £500 each for their separate use, payable on the usual quarterly days of payment. Held, that the annuities of £300 each were not satisfied by the annuities given by the will, and that the sisters were therefore entitled to both annuities.

Whether parol evidence of declarations of the testator, is admissible in such a case, to prove his intention, *quære*.

By indentures of lease and release, dated the 29th and 30th of March 1814, the release being made between Sir Edward Hales Bart., of the first part, Barbara de Jouchere widow (a sister of Sir Edward Hales) of the second part, and John Raphael of the third part; in consideration of £3000, Sir Edward Hales conveyed certain hereditaments to Raphael to the intent that Barbara de Jouchere might receive thereout an annuity of £300 per annum during her life by equal quarterly payments, on the 16th day of January, the 16th day of April, the 16th of July, and the 16th of October in every year, together with a proportionate part of the said yearly rent, up to the day of her decease, without any deduction; with powers of distress and entry in case of non-payment; and subject thereto to the use of Raphael, [325] upon certain trusts to secure the annuity; and Sir Edward Hales thereby also covenanted to pay the annuity.

By another indenture of the 13th of June 1814, and made between Sir Edward Hales, of the first part, Charles Bernard de Morlaincourt and Mary his wife (another sister of Sir Edward Hales), of the second part, Edward Darell of the third part, and the Honorable Philip Roper of the fourth part; Sir Edward Hales for the valuable consideration therein mentioned, and in consideration of natural love and affection, granted to Darell during the life of Mary de Morlaincourt, in trust for her separate use, an annuity of £300 per annum, by four equal quarterly payments, on the 6th of April, the 6th of July, the 11th of October, and the 6th of January, in each year; and after her decease, he granted an annuity of £150 to Charles Bernard de Morlaincourt during his life; with powers of distress and entry, in case of non-payment; and by the same indenture, Sir Edward Hales conveyed certain hereditaments to a trustee to secure these annuities; and also covenanted to pay them, and to convey certain estates to their issue. And Charles Bernard de Morlaincourt and his wife assigned to Sir Edward Hales all their claims to certain monies charged on the estates of Sir Edward Hales, in favour of Mary de Morlaincourt and her children; and C. B. de Morlaincourt also covenanted for the execution of similar assignments by their children.

Sir Edward Hales, by his will, dated the 2d of May 1826, devised his freehold estates to trustees, to the intent that his wife might receive during her life, in lieu of any annual sum payable to her under the marriage settlement and of her dower, an annual sum of £1500. He then created a trust for payment of his debts, and [326] devised his estates to trustees, upon trust, to pay an annuity of £900 unto his sister Barbara de Jouchere, for her life, and to pay an annuity of £500 to his sister Mary de Morlaincourt, for her life, and to pay other annuities. And he directed, that each of the annuities given by his will should be paid by four equal quarterly payments, on the four most usual days of payment in the year; the first of such payments to be made on such of the said quarterly days of payment as should first happen after his decease; and he also directed that the said yearly sums limited to Lady Hales,

Barbara de Jouchere, and Mary de Morlaincourt, should be paid to them respectively for their separate uses.

Sir Edward Hales, the testator, died in March 1829. The Master, upon a reference made to him, certified that the annuities of £300 each granted to Madame Jouchere and Madame de Morlaincourt were not satisfied by the bequests of the two annuities of £900 and £500 respectively given by his will.

The Master in the course of the enquiry had admitted the evidence of Lady Hales, and of the gentleman who had prepared the testator's will, to shew that it was the testator's intention that the bequests should be in addition to the annuities previously granted by him to his sisters for valuable consideration.

The accuracy of the conclusion of the Master, and the admissibility of the above parol evidence was contested on behalf of the infant Plaintiff, who was entitled to the estates subject to the charges; and the questions now came on for argument upon the petitions of the infant and Lady Hales.

Mr. Stuart, Mr. George Turner, and Mr. Calvert, for the infant Plaintiff.

[327] Mr. Kindersley, Mr. G. Richards, and Mr. Prescott White, for the annuitants.

Mr. Pemberton, for the widow.

The following cases were cited on the principal point. *Fowler v. Fowler* (3 P. Wms. 353), *Garthshore v. Chalie* (10 Ves. 1), *Wathen v. Smith* (4 Mad. 325), *Graham v. Graham* (1 Ves. sen. 262), *Barret v. Beckford* (1 Ves. sen. 519), *Lee v. Cox* (3 Atk. 419), *Richman v. Morgan* (2 Bro. C. C. 394), *Jesson v. Jesson* (2 Vern. 256), *Goodfellow v. Burchett* (2 Vern. 298), *Blois v. Blois* (2 Vent. 347), *Jeacock v. Falkener* (1 Bro. C. C. 295), *Goldsmid v. Goldsmid* (1 Swanst. p. 219), *Devese v. Pontel* (1 Cox, 188), *Blavly v. Widmors* (1 P. Wms. 324), *Pierpoint v. Lord Cheney* (1 P. Wms. 488), *Adams v. Lavender* (1 M'Cl. & Y. 41; Roper on Legacies, ch. 17), *Matheros v. Matheros* (2 Ves. sen. 635), *Hinchcliffe v. Hinchcliffe* (3 Ves. 516), *Atkinson v. Webb* (Prec. Ch. 236, and 2 Vern. 478), *Chancey's case* (1 P. Wms. 408), *Richardson v. Greese* (3 Atk. 65), *Lee v. D'Aranda* (1 Ves. sen. 1, and 3 Atk. 419), *Haynes v. Mico* (1 Bro. C. C. 139), *Brown v. Dawson* (2 Vern. 498); and the following cases on the evidence, *The King v. The Inhabitants of Wrangle* (2 Ad. & E. 514), *Smith v. Young* (1 Camp. 439), *Vincent v. Cole* (Moo. & Mal. 257), *Hurst v. Beach* (5 Mad. 360), *Weall v. Rice* (2 Russ. & Myl. 251), *Wallace v. Pomfret* (11 Ves. 542; 1 Ph. on Ev. 488, and see Wigram on Extrinsic Evidence).

[328] Nov. 16. THE MASTER OF THE ROLLS [Lord Langdale]. In this case, Sir Edward Hales, the testator in the cause, granted annuities of £300 each to his two sisters Madame de Jouchere and Madame de Morlaincourt, for their respective lives; and afterwards, by his will, gave to his sister Madame de Jouchere an annuity of £900 for her life, and to his sister Madame de Morlaincourt an annuity of £500 for life.

By his will he also gave an annuity of £1500 a year to his wife, for her life; and in the progress of the cause, it having become desirable to ascertain whether the annuity to the widow could be safely paid, it was referred, on the 30th of July 1839, to the Master, to inquire whether there were any and what charges affecting the estates devised by the will prior to the widow's annuity; and some further inquiries being authorized by a subsequent order of the 7th of March 1840, the Master, on the 13th of March 1840, reported that the charges, affecting the devised estates prior to the widow's annuity, were, amongst other things, the annuities of £300 each, granted by the testator to his sisters Madame de Jouchere and Madame de Morlaincourt.

The confirmation of this report was opposed by the infant Plaintiff, who presented a petition, praying for a declaration that the annuities of £900 and £500, given to the testator's sisters by his will, were given in satisfaction of the annuities of £300 each, which he had granted to them in his lifetime; and it being alleged that the circumstances had not been fully investigated, it was, on the 3d of April 1840, referred back to the Master to inquire further as to the two annuities of £300 each, and the two annuities of £900 and £500, and to state the result of his inquiry, with his opinion thereon, to the Court.

[329] Under this order he has made the inquiry directed, and on the 23d of July 1840 certified, that by indentures of the 29th and 30th days of March 1814, an annuity of £300 per annum was granted to Madame de Jouchere; and by an indenture of the 13th of June 1814, an annuity of £300 was granted to Madame de

Morlaineourt; and he has stated his opinion that those annuities were not satisfied by the bequests contained in the will of the annuities of £900 and £500; but that the two annuities of £300 continued to be subsisting charges on the estates of the testator, subjected to the payment thereof, notwithstanding the bequests of the annuities given by the will.

In conducting the inquiry, the Master received parol evidence of the declaration made by the testator, which was tendered in evidence, for the purpose of shewing that the testator intended the annuities given by his will to be in addition to the annuities previously granted; and the petition now presented on behalf of the infant Plaintiff objects to the reception of some parts of the evidence which the Master has admitted, and objects to the conclusion to which the Master has arrived.

The consideration of the parol evidence objected to, is not material, if a just conclusion can be arrived at upon the grants of annuity and the will alone; or upon the grants and will, together with the evidence which is not objected to.

The deeds of the 29th and 30th of March 1814, referred to by the Master, were made for valuable consideration; and convey certain estates to a trustee, to the use and intent that Madame de Jouchere might, out of the premises, receive and take for her life an annuity of £300, to be paid quarterly, on the 16th days of Ja-[330]-nuary, April, July, and October, with a proportionate part up to the day of her death; and subject thereto, to the use of the trustee, in trust for better securing the same, with usual powers for that purpose; and, in the deed, the testator covenanted to pay the annuity.

The deed, of the 13th June 1814, was made in consideration of an assignment and certain covenants; and also purports to be made in consideration of the love and affection which the testator had and bore to his sister Madame de Morlaineourt. It is a grant to Mr. Darell, during the life of Madame de Morlaineourt, of a rent charge of £300, issuing out of, and charged on, certain estates, and to be received by Mr. Darell, in trust for the separate use of Madame de Morlaineourt, and to be paid on the 6th days of April, July, October, and January in every year, with a proportionate part up to the day of her death. The estates were then conveyed to a trustee for securing the payment of the annuity, and the testator covenanted for payment thereof.

In the argument, it was urged for the Plaintiff, that these deeds ought to be considered only as covenants, which, at least as to payments to be made after the testator's death, were merely executory. I need not observe, that the deeds, although containing covenants, are not of the character thus imputed to them. All that could be done by the testator for securing future payments was done.

The testator, being under the obligations imposed upon him, and his estates being thus charged by these deeds, executed as they were for valuable consideration, made his will, dated the 2d May 1826. He thereby, as is stated on both sides, made provision for the payment of all his debts, and devised his estates to trustees. As [331] to his freehold estates, to the intent that his wife might receive during her life, in lieu of any annual sum payable to her under the settlement, and of her dower, an annual sum of £1500; and subject thereto, and to the trusts for securing the payment of that annuity, upon trust to pay an annuity of £900 to his sister Madame de Jouchere, for her life; and to pay an annuity of £500 to his sister, Madame de Morlaineourt, for her life; and then to pay other annuities; and he directed the annuities given by his will to be paid quarterly on the usual quarter days, and that the annuities, payable to his sisters, should be for their separate use. Subject to the charges, the estates were to be limited to the son of Madame de Morlaineourt, with remainders, under which the Plaintiff is now entitled.

For the Plaintiff it is argued, that the covenants in the deeds were executory and have been performed, and more than performed by the gifts contained in the will.

A covenant to grant, or to secure an annuity, may be performed by provisions purporting to be a gift in a will; but having regard to the contents of the deeds, whereby the annuities of £300 each were granted and secured, I am of opinion that the question here is, not whether the covenants into which the testator had entered have been performed by his will, but whether the obligations into which he had entered, and the charges to which he had subjected his estates, were intended to be, and ought to be, deemed satisfied by the provisions contained in the will.

The question, therefore, appears to me to be a question of satisfaction; and although there are, unfortunately, inconsistent authorities which seem applicable to this subject, it sufficiently appears that, *prima facie*, the testator must be taken to have intended bounty; and that gifts, even more than equivalent in beneficial interest to satisfy the obligations, are not to be deemed satisfaction if there are circumstances, even slight circumstances, which lead to a different conclusion. Now here, the testator has directed the payment of all his debts, and amongst his debts are the annuities secured by the deeds. In his will, intending the annuity given to his wife to be in lieu of other annual payments to which she might be entitled, he has expressly said so; but he has used no such expression with reference to either of the annuities secured to his sisters. Again, the annuities secured by the deeds appear, by the Master's report, to be the first charges on the estates comprised in the deeds, but the annuities given by the will are subject to prior charges on the testator's estates; the times of payment are not the same, and the charges are of different natures; and, under such circumstances, it appears to me, independently of any parol evidence, that the annuities given by the will cannot be taken as a satisfaction of the annuities secured by the deeds.

Much greater doubt than there is in this case would, I think, be removed by the evidence, which is not objected to; but having formed my opinion upon the instruments themselves, it is unnecessary to consider the questions raised upon the admissibility and effect of the parol evidence.

The petition of the Plaintiff must be dismissed. Upon the other petition, confirm the Master's report, and let the Master inquire what is due in respect of the annuities of £300 each, and also in respect of the annuities of £900 and £500 respectively, and state the amount thereof in his general report.

[333] WEYMOUTH v. LAMBERT. Nov. 19, 1840.

Substituted service of a *subpoena* to appear ordered in a creditor's suit on one, who, acting as the attorney of the executor and general devisee and legatee resident in India, had obtained administration here, and had entered into receipt of the rents of the real estate.

By his will, dated in September 1828, the testator devised and bequeathed unto William Lambert, of Allahabad, in the East Indies, all his real and personal estate, and appointed him executor.

The testator died in November 1838. The executor, who resided in India, sent to his son, who was resident in England, a letter of attorney to enable him to procure letters of administration, and to receive all monies and give receipts.

In April 1839 administration was granted to the son, who took upon himself the receipts and administration of the personal estates of the testator; and on behalf of his father, entered into and was in the receipt of the rents and profits of the real estates, devised by the will of the testator.

This was a creditor's suit against the father and son, its object being to obtain payment of the testator's debts out of his real and personal estate. William Lambert was still resident in the East Indies, and his son was resident in this country. The son having appeared, it was now moved that the service of a *subpoena* on the son might be good service on the father.

Mr. Pemberton and Mr. Dixon, for the motion. Mr. Kindersley, *contra*, contended that there were no cases in which service on one had been held to be good service on another, except where a party living abroad [334] was suing at law, and the Defendant at law applied for protection in equity; in which case, the Court had ordered service on the attorney of the Plaintiff at law to be good service. That with respect to the personal estate the son, who was administrator, represented the personal estates to all intents and purposes; and, as regarded the real estate, the *subpoena* might be served under the recent statute of 2 W. 4, c. 33.

Mr. Pemberton, in reply, relied on *Kinder v. Forbes* (2 Beavan, 503), and 1 Dan. Pr. 268, and the cases there cited. He stated that the statute referred to had proved ineffectual in practice.

THE MASTER OF THE ROLLS said, that perhaps the statutes might, on consideration, be found sufficient for the Plaintiff's purpose; he however considered the Plaintiff entitled to the order asked, which must be made, unless the Plaintiff should mention the case again. (See *Hobhouse v. Courtney*, V.-C. July 7, 1841.)

[334] HYDE v. WRENCH. Dec. 8, 1840.

[S. C. 4 Jur. 1106. See *Stevenson v. M'Lean*, 1880, 5 Q. B. D. 350.]

The Defendant on the 6th of June offered in writing to sell his farm for £1000; but the Plaintiff offered £950, which the Defendant on the 27th of June, after consideration, refused to accept. On the 29th the Plaintiff, by letter agreed to give £1000, but there appeared to be no assent on the part of the Defendant, though there had been no withdrawal of the first offer. Held, that there was no binding contract within the Statute of Frauds.

This case came on upon general demurrer to a bill for specific performance, which stated to the effect following:—

[335] The Defendant being desirous of disposing of an estate, offered, by his agent, to sell it to the Plaintiff for £1200, which the Plaintiff, by his agent, declined; and on the 6th of June the Defendant wrote to his agent as follows:—"I have to notice the refusal of your friend to give me £1200 for my farm; I will only make one more offer, which I shall not alter from; that is, £1000 lodged in the bank until Michaelmas, when the title shall be made clear of expenses, land tax, &c. I expect a reply by return, as I have another application." This letter was forwarded to the Plaintiff's agent, who immediately called on the Defendant; and, previously to accepting the offer, offered to give the Defendant £950 for the purchase of the farm, but the Defendant wished to have a few days to consider.

On the 11th of June the Defendant wrote to the Plaintiff's agent as follows:—"I have written to my tenant for an answer to certain enquiries, and, the instant I receive his reply, will communicate with you, and endeavour to conclude the prospective purchase of my farm; I assure you I am not treating with any other person about said purchase."

The Defendant afterwards promised he would give an answer about accepting the £950 for the purchase on the 26th of June; and on the 27th he wrote to the Plaintiff's agent, stating he was sorry he could not feel disposed to accept his offer for his farm at Luddenham at present.

This letter being received on the 29th of June, the Plaintiff's agent on that day wrote to the Defendant as follows:—"I beg to acknowledge the receipt of your letter of the 27th instant, informing me that you are not disposed to accept the sum of £950 for your farm at [336] Luddenham. This being the case, I at once agree to the terms on which you offered the farm, viz., £1000 through your tenant Mr. Kent, by your letter of the 6th instant. I shall be obliged by your instructing your solicitor to communicate with me without delay, as to the title, for the reason which I mentioned to you."

The bill stated, that the Defendant "returned a verbal answer to the last-mentioned letter, to the effect, he would see his solicitor thereon;" and it charged that the Defendant's offer for sale had not been withdrawn previous to its acceptance.

To this bill, filed by the alleged purchaser for a specific performance, the Defendant filed a general demurrer.

Mr. Kindersley and Mr. Keene, in support of the demurrer. To constitute a valid agreement there must be a simple acceptance of the terms proposed. *Holland v. Eyre* (2 Sim. & St. 194). The Plaintiff, instead of accepting the alleged proposal for sale for £1000 on the 6th of June rejected it, and made a counter proposal; this put an end to the Defendant's offer, and left the proposal of the Plaintiff alone under discussion; that has never been accepted, and the Plaintiff could not, without the concurrence of the Defendant, revive the Defendant's original proposal.

Mr. Pemberton and Mr. Freeling, *contra*. So long as the offer of the Defendant subsisted, it was competent to the Plaintiff to accept it; the bill charges that the

Defendant's offer had not been withdrawn previous to its acceptance by the Plaintiff; there, therefore, exists a valid subsisting contract. *Kennedy v. Lee* (3 Mer. 454), *Jackson v. King* (2 Bing. 270), were cited.

[337] THE MASTER OF THE ROLLS [Lord Langdale]. Under the circumstances stated in this bill, I think there exists no valid binding contract between the parties for the purchase of the property. The Defendant offered to sell it for £1000, and if that had been at once unconditionally accepted, there would undoubtedly have been a perfect binding contract; instead of that, the Plaintiff made an offer of his own, to purchase the property for £950, and he thereby rejected the offer previously made by the Defendant. I think that it was not afterwards competent for him to revive the proposal of the Defendant, by tendering an acceptance of it; and that, therefore, there exists no obligation of any sort between the parties; the demurrer must be allowed.

[337] PEARSE v. BROOK. Nov. 9, 1840.

Pending a reference of affidavits for impertinence, they cannot be used. The Court, however, will in such a case put the parties under terms, so as to meet the justice of the case.

This was a petition to discharge an order for taxation. Affidavits, which had been made in opposition to the application, had been referred for impertinence, and no report had yet been obtained.

Mr. Pemberton, for the Petitioner, observed that these affidavits could not be used by the Respondent; and he therefore proposed that the petition should stand over, on the Respondent's undertaking that all proceedings on the taxation should be stayed in the meantime.

Mr. Girdlestone and Mr. Terrell declined giving any undertaking, and insisted that the affidavits might be used notwithstanding the objection for impertinence, otherwise the mere referring a Respondent's evidence [338] for impertinence would operate as an injunction until the Master's report could be obtained.

THE MASTER OF THE ROLLS [Lord Langdale] said, that affidavits, while under reference for impertinence, could not be used in Court; that the Respondents must therefore either proceed without them, or give the undertaking, in which case the Petitioner would be put on terms to get the Master's report in a week. This he thought would meet the justice of the case.

[338] *In re SHERWOOD*. Nov. 4, 1840.

[S. C. 10 L. J. Ch. 2; 4 Jur. 982.]

A solicitor, who is trustee, is not entitled to charge for his professional services, which must be assumed to have been rendered in his character of trustee; but under a contract properly entered into, he may be entitled to his professional charges.

This petition prayed for the taxation of the bill of costs of Robert Slee, a solicitor; and that in the taxation the Master might be directed to disallow all costs as solicitor, for business done by Robert Slee in his character of trustee under a deed of the 23d of May 1839.

It appeared from the affidavits made in the matter, that there being some dispute between John H. Short and Edward Richardson Slee (the brother of Robert Slee), as to whether Edward Richardson Slee was a purchaser or mortgagee of one-seventh of a reversionary sum of money standing in the name of trustees in the funds, which had, however, lately fallen into possession; and the deed of the 23d of May 1839 was in consequence executed. It was made between William Howard Short of the first part, Edward Richardson Slee of the second part, and Robert Slee of the third part; and thereby the property was assigned to Robert Slee upon trust, in the first place, to deduct and retain to [339] himself and themselves all costs, charges, and expenses

incurred or paid by him or them in getting in, receiving, suing for, and recovering the said monies and premises, stocks, funds, and securities or otherwise, in or about the execution of the trusts thereby created; then to pay Edward R. Slee £200 which had been lent by him to W. H. Short; and to divide the remainder between William H. Short and Edward R. Slee; and the deed contained a proviso as follows:—

“And lastly, that he, the said Robert Slee shall; and he is hereby authorized and empowered to retain and receive, by and out of the monies and premises which shall or may come into his hands, under or by virtue of the trust hereby in him reposed, his usual professional costs and charges which may arise or be incurred in carrying into execution the trusts of these presents, or in prosecuting or defending any suit or suite or otherwise that may happen, as if he had not been the trustee of these presents, but had been employed and retained by them, the said William Howard Short or Edward Richardson Slee, their executors, administrators, or assigns, as their attorney or solicitor in the matters of the trusts hereby created.”

This deed was settled by counsel on behalf of Short.

A suit has been instituted in this Court, in respect of the property, which has been compromised, and in respect of which, Robert Slee the trustee incurred some costs.

On the 5th of September 1839 Robert Slee received the amount of the one-seventh share of the trust fund, and he prepared a release to the original trustees thereof, which was executed.

[340] Robert Slee (the solicitor and trustee), delivered to the Petitioner Sherwood, who was the legal personal representative of Short, three bills of costs, amounting to £12, 1s. 8d., £25, 9s., and £6, 5s. respectively; the first being the costs of the release to the trustees, the second the costs in the suit, and the third for the costs of a release which it was agreed should be executed by the Petitioner Sherwood to Robert Slee. Robert Slee, with the assent of the Petitioner, retained these sums, and paid over to the Petitioner his share of residue of the amount received, and on the 17th of September the Petitioner Sherwood executed to Robert Slee a general release of all claims, &c. The release had been approved of by a solicitor who acted in the matter on behalf of the Petitioner.

In July 1840 Sherwood presented this petition, alleging that Robert Slee, the trustee, being a solicitor, was not entitled to make any professional charges against his *cestui que trust*, and alleging that the above bills contained many excessive and improper charges; and it enumerated four charges of £4, 10s., 6s. 8d., 10s., and 5s., which it alleged ought to be disallowed, or partly disallowed. The Petitioner prayed a reference to the Master to tax the bills, with a direction to disallow all costs and charges for business done by Robert Slee, in his character of trustee.

Mr. Edward Younge, in support of the petition, relied on *New v. Jones* (9 Bythwood, 337), and *Moore v. Froud* (3 Myl. & Cr. 45.)

Mr. Randall, *contrâ*, relied on the special contract; the settlement of accounts; and the release deliberately executed by the Petitioner with the assistance of a professional adviser.

[341] THE MASTER OF THE ROLLS [Lord Langdale]. This is a petition for the taxation of the bill of costs of a solicitor which had been paid, on the ground, first, that the solicitor being a trustee, is not entitled to charge for professional business; and, secondly, that there are overcharges. As to the first, there is no doubt whatever as to the law on the subject:—A solicitor, who is a trustee, is not entitled to charge for professional services which must be assumed to have been rendered in his character of trustee, unless there be some special contract authorising him to make the charge, but under a deed or contract properly entered into and expressed, he may be entitled to his professional charges as a solicitor, though he act as a trustee. In several cases of wills, and amongst them that of Lord Thurlow, a solicitor has been authorised to make his professional charges. In *Moore v. Froud* it was considered clear from the form of the instruments, that the professional costs of the solicitor were not comprised in the costs to be allowed; but in the present case there is a special contract, and there is no allegation that it was obtained by fraud or any improper means; there are, therefore, no grounds for granting this part of the petition.

With respect to the other ground of complaint, it seems that this bill of costs was not delivered until after the time when the relation of trustee and *cestui que trust* has

been brought to a close, otherwise it might have been open to greater question. It did not end there, for on the 5th of September a release was prepared on the behalf of the gentleman who now complains, and which was executed with the advice of his solicitor twelve days after the draft had been submitted; this settlement ought not to be opened unless there are errors to a considerable amount, or, as it has been said in some cases, [342] unless the overcharges be such as to amount to evidence of fraud. [His Lordship here referred to the bill of costs, in which there were several charges of about 6s. 8d. each, which he considered manifestly wrong, and proceeded.] Though there are some charges which I consider ought not to be allowed, there is no considerable error. Ought I after the parties have had a fair opportunity of examining the bills before the execution of the release, to open this matter? I think I ought not, and therefore the petition must be dismissed.

[342] STEPHENSON v. DOWSON. Dec. 7, 8, 13, 1840.

[S. C. 10 L. J. Ch. 93; 4 Jur. 1152.]

A testator bequeathed to A. B. all his ships and money due to him at the time of his decease: Held, that freight, earned by a ship under a charter-party executed after the date of the will and in respect of a voyage not completed until after the testator's death, did not pass to A. B. either as "money due," or as incident to the ship. Testator bequeathed the dividends, &c., of all stocks he should be entitled to at the time of his decease, in the public funds. He had £10,000 consols at his death, Held, that this was a specific bequest of that sum.

Two questions arose in this cause, which were discussed upon exceptions to the report of the Master; first, whether the freight passed to the legatee of a ship; and, secondly, whether upon the terms of the will, a sum of consols was a specific or general bequest.

The testator being the owner, amongst others, of a ship called the "Borodino," by his will dated the 29th of March 1822, directed all his just debts, funeral, and testamentary expenses to be, in the first place, fully paid and satisfied by his executors thereafter named, as soon after his decease as conveniently might be: and he bequeathed to his son John Row, "all his ships and shares of ships and money which at the time of his decease should be due and owing to him from Govern-[343]-ment, or from any person or persons whomsoever, to and for his own use and benefit absolutely; and he gave and bequeathed unto his said son John Row, for and during his life, the use and wearing of all his household furniture and plate; and he also gave and bequeathed to his said son John Row and his assigns, for and during his life, for his and their use and benefit, all the dividends, interest, and annual proceeds which should accrue due and become payable after his decease, for and in respect of all such stock and property as he should have or be entitled to at the time of his decease, in the Government or public funds or securities; and he devised unto and to the use of his said son John Row and his assigns for his life, all his real estate, and after the decease of his said son, he devised and bequeathed his real estate and his furniture, plate, and stock and property in the Government or public funds or securities upon certain trusts, for the benefit of the children of his said son. But in case his said son should die without having issue, then the testator devised and bequeathed his said real and personal estate upon certain trusts for the benefit of the Plaintiff.

The will contained no bequest of the residue of the testator's estate. John Row and the Defendant Dowson were the executors of his will.

After this, and on the 29th of July 1822, the testator executed a charter-party of the ship the "Borodino," to Messrs. Sheddon in consideration of certain freight to be paid when the voyage was completed. The ship proceeded on her voyage to St. John's, New Brunswick, and was engaged therein at the time of the death of the testator.

The testator died in September 1822, and in January 1823 the voyage of "Borodino" was completed, and the [344] freight then payable amounted to £827.

The first question, under these circumstances, was whether this sum passed to John Row the legatee of the ship, or formed part of the testator's general estate.

The Master having considered this sum of £827 a specific legacy, the question now came before the Court on exceptions to his report.

Mr. Pemberton and Mr. Purvis, for the Plaintiff, contended, that the £827 did not pass to John Row, either as incident to the ship "*Borodino*," or as money which at the time of the decease of the testator was due and owing to him; for the bequest of the ship could not carry the freight which was not earned at the death, and which the legatee of the ship was not in a condition to recover. That even supposing the executor to have assented to the legacy of the ship, the legatee had no means of recovering the freight; for there being a charter-party, the lien of the owner became lost by the special contract; *Cornell v. Simpson* (16 Ves. 275), *Schack v. Anthony* (1 M. & S. 573). The legatee even after the executors' assent could not avail himself of the benefit of the covenant in the charter-party; *Splidt v. Bowles* (10 East, 279).

That the bequest of a ship subject to charter-party, was like a gift of a reversion subject to a lease; the charterer had a species of ownership which prevented the legatee taking possession until the expiration of the charter-party; *Trinity House v. Clark* (4 M. & S. 288); and that in the case of *Kerwill v. Bishop* (2 Cr. & J. 529) and *Dean v. McGhie* (4 Bing. 45), relied on by the other side, there was no charter-party, and [345] possession had been taken by the mortgagee. They argued, secondly, that the money payable for freight, did not become due and payable till the voyage had been completed, which happened after the death of the testator; and that this sum could not therefore pass as money due to the testator at the time of his decease; and that at all events, the legatee was not entitled to the proceeds of the voyage without defraying the expenses in respect of the ship, for which the testator's executors were liable, and adopting all the liabilities under the charter-party.

Mr. Kindersley and Mr. Lewis, *contra*. The amount of the freight passed to the legatee, John Row, as incident to the property of the ship; *Case v. Davidson* (5 M. & S. 79). In *Morrison v. Parsons* (2 Taunt. 407) it was held, that "If the owner of a ship, having chartered her for a voyage, assigns her before the voyage, though he afterwards assign the charter-party to another, if she earns freight, the assignee of the ship is entitled to the freight, as incident to the ship. But he cannot sue on the charter-party otherwise than in the name of the assignor."

A gross sum became payable for freight after the death of the testator, and, like the rent of a house or the dividends on stock, the whole passed to the legatee. The case of *Splidt v. Bowles* merely decided that the assignee of a ship could not sue in his own name on the charter-party entered into by his assignor; that did not, however, determine the equitable right; the assignor, on being indemnified, would have been bound to have allowed the assignee to sue in his name.

If John Row is not entitled to the £827, as incident to the ship, he is entitled thereto as a debt due at the [346] testator's decease; they cited, on this point, *Carr v. Carr* (1 Mer. 541).

THE MASTER OF THE ROLLS said, that the case was certainly not free from difficulty; but that he was of opinion, that the amount payable for freight was not a debt due to the testator at the time of his death, for no debt accrued until the service which the testator had contracted to perform had been completed, and which did not happen till after his death.

That it had been argued, that the prospect or expectation of a debt to arise from the use of the ship under the charter-party, was to be considered annexed and incident to the ship; and though it had been decided that, under certain circumstances, freight would pass to a mortgagee in possession, and to the vendee of a ship, and though his Lordship thought the freight might be the subject of a specific bequest, yet that this was not the question here; the real point being, whether, under a will, not mentioning freight at all, freight, which became due after the testator's death, passed to the legatee of the ship. That, here, the ship was subject to a contract made after the date of the will, and which contract it was the duty of the executor to see performed, and for the performance of which the testator's estate was liable; and, under these circumstances, he could not suppose that the testator intended that the freight, which was to be earned at the expense of his estate, should pass to the legatee.

That, upon the best consideration that he could give to the case, he thought that

the freight of the ship did not appear to be so incident or so annexed to the [347] ship, in this case, as to pass to the legatee as part of his specific legacy.

The second question was as follows:—There was standing in the bank books, in the name of the testator at the time of his decease, a sum of £10,600, 19s. 3d. consols; and the question was, whether the sum passed as a specific legacy under the bequest contained in the testator's will, of "all the dividends, interest, and proceeds which should accrue due and become payable after his (the testator's) decease, for and in respect of all such stock and property that he should have or be entitled to at the time of his decease, in the Government or public funds or securities."

The Master considered it a specific legacy, and exceptions were taken to his report.

Mr. Kindersley and Mr. Lewis, in support of the exceptions, argued that this was a general and not a specific legacy; for it was not a gift of any particular stock which the testator had at the time of making his will, but of the stock which he might happen to have at his death. That it, therefore, wanted the quality necessary for constituting a specific legacy, viz., a capability of being adeemed. They insisted that the case of *Parrott v. Worsfold* (1 J. & W. 594) was precisely in point: there a testator reciting that he had £1500 5 per cents., gave it to A., and then gave to B. all other his stocks that he might be possessed of at his death. The latter bequest was held not specific: and Sir Thomas Plumer, in giving judgment, said, "The deficiency of the residuary estate to satisfy the debts, which gives rise to the question whether the gift of the residue of the stock is specific [348] or not. Now the words are in their nature general, comprehending not only the stock that he had at the time of making his will, but all that he might subsequently acquire; if he had sold out and bought more, that would have been included. But has it ever been decided that such words would constitute a specific legacy? The ordinary criterion of a specific bequest is, that it is liable to ademption; that if the thing bequeathed is once gone, it is lost to the legatee. That criterion fails here; for it would equally pass stock acquired afterwards. Can it be said that a will made now, can contain a specific bequest of what may be bought hereafter; of what does not now exist? In a certain sense, it may be said that legacies of this kind are specific; as, a legacy of all the testator's cattle, or all his personal property at his death; but it is not specific unless you can fix on the individual thing given. But here it is general; the testator did not mean it to be confined to the stock he had at the time; he meant this daughter to be more largely provided for."

Mr. Pemberton and Mr. Purvis, *contra*, contended that this legacy was a specific legacy. That the possibility of ademption was not an accurate test of a legacy being specific; for in many instances bequests of property which the testator might possess at his death had been held specific; thus, a bequest of all the testator's furniture, plate, or property at a particular house or place at the testator's death, had repeatedly been held specific; so a gift of all the horses which a testator might have in his stable at his death. *Fontaine v. Tyler* (9 Price, 98). That the quality necessary to constitute a specific legacy was, that it should be separated from the testator's other property; and that the instance of the ship, which had [349] been discussed in this very case upon the former exceptions, was decisive of this question. On this point *Sibley v. Perry* (7 Ves. 528), *Simmons v. Vallance* (4 Bro. C. C. 345), *Bromsdon v. Winter* (Ambler, 57), and *Williams on Executors*, 744, were cited.

THE MASTER OF THE ROLLS [Lord Langdale]. This bequest has been found by the Master to be a specific bequest, and his finding is objected to because the testator refers to such stock as he might have at his death, and not to that which he had at the date of his will. It was said, in argument, that there could not be a specific legacy of anything which the testator had not at the date of his will. I am of opinion that the proposition cannot be maintained: for a specific legacy is something distinguished from the rest of the testator's estate; and it is sufficient if it can be specified and distinguished from the rest of the testator's estate at the time of his decease. The question whether a legacy is specific implies the question of ademption, or, at least, very much so; but I think it has never been laid down, that there can be no such thing as a specific legacy, in a case in which the testator himself sufficiently specifies and distinguishes it from the rest of his property at the time of his own death. There are certainly continued instances of specific things of

that nature being given; and in which, I believe, no doubt has ever existed of their being specific, as the case put by Chief Baron Richards (*Fontaine v. Tyler*, 9 Price, 98) of a bequest of the horses which the testator had in his stable at the time of his death: the common case of a bequest of all the plate which should be at a certain house at the time of the testator's death; or a library or collection of books [350] which the testator should have in a particular room: or of all the testator's wearing apparel and things of that sort. (See the cases 1 Roper on Legacies, 215, 216.) These cases seem directly in point. The particular quality which constitutes their specific nature, being this, that they are things which the testator has clearly distinguished and separated from the rest of his estate at the time of his death. I am therefore of opinion that this is a specific legacy.

[350] BECKE v. WHITWORTH. Nov. 12, 1840.

Under the 12th Order (1828), the Master has authority to enlarge the time for making his report more than once; and a second enlargement, made after the expiration of the fortnight, but before the expiration of the time limited by the first certificate, is regular.

On the 7th day of July 1840 the Defendant's answer was referred for impertinence upon exceptions taken thereto by the Plaintiff.

By the 12th General Order (1828) (Ord. Can. 8), where any order is made referring any pleading for impertinence, &c., it is to be considered as abandoned, unless the Master's report be procured within a fortnight, "or unless the Master shall within the fortnight certify that a further time, to be stated in his certificate, is necessary in order to enable him to make a satisfactory report."

The fortnight, in this case, would have expired on the 21st of July, but previous thereto, on the 20th of July, the Master certified that a week's further time was necessary to enable him to make a satisfactory report.

[351] On the 27th of July 1840 the Master again certified that a fortnight's further time was necessary to enable him to make a satisfactory report.

On the 8th of August the Master was attended by counsel for the parties, when it was objected he had no jurisdiction to enlarge the time twice. He, however, overruled the objection, and certified that the answer was impertinent.

It was now moved on behalf of the Defendant, that the certificate of the 8th of August, and if necessary the certificate of the 27th of July, might be discharged and taken off the file.

Mr. Loftus Wigram, in support of the motion. By the 12th Order, the Master has jurisdiction to enlarge the time for making his report but once, and by the 12th Order the exceptions are to be considered as abandoned if the report be not obtained within the further time stated. Having once enlarged the time, the Master had no further power to enlarge it, for it had been now decided that the Master has no jurisdiction to dispense with or relax the General Orders of the Court; *Smith v. Webster* (3 Myl. & Cr. 244), *Lloyd v. Wait* (4 Myl. & Cr. 257). At any rate, by the express terms of the order, the Master has only the power of certifying "within the fortnight." If any other construction were put upon the 12th Order, the Master might indefinitely postpone deciding the question, and the inconvenience which this General Order was intended to remedy would be continued.

Mr. Pemberton and Mr. Stinton, *contra*, contended, first, that it was too late to object to the certificate of [352] the 27th of July, after the Master had made his report, and had certified that the answer was impertinent; and that the Defendant had by his conduct therefore waived the objection.

Secondly, that the Master had not exceeded his power by making a second certificate to extend the time; this was the opinion of the Court in the case of *Davis v. Franklin* (2 Beavan, 369). They also cited *Burrell v. Nicholson* (6 Sim. 212), and *Millbank v. Stevens* (8 Sim. 160).

Mr. Loftus Wigram, in reply.

THE MASTER OF THE ROLLS [Lord Langdale] said, that the objection as to jurisdiction having been raised before the Master, and having been overruled by

him, the Defendant could not now be considered as having waived it, and it was therefore competent for him now to raise it; but upon the construction of the 12th Order his Lordship considered that the Master had authority to make the second order: he therefore refused the motion with costs.

[353] *FELLOWES v. DEERE. Nov. 20, Dec. 23, 1840.*

Liberty being given to amend, the bill was amended by striking out the names of several Co-plaintiffs, and suing by one on behalf, &c., of the others. Held, irregular: but the Court allowed the amendment to stand, security being given for costs. Plaintiffs ordered to give security for the costs, allowed to deposit money instead of giving such security, and a reference made to Master to approve of a proper sum.

Liberty being given to the Plaintiffs to amend their bill with costs, an amendment was made, whereby the names of thirty Co-plaintiffs were struck out, and the remaining Plaintiff was made to sue on behalf of himself and all other the parties to a certain agreement, mentioned in the pleadings, except the Defendant.

Mr. Grove now moved that the amended bill might be taken off the file with costs of suit, on the ground that the amendment was unwarranted by the order.

Mr. Wray, *contrâ*.

THE MASTER OF THE ROLLS [Lord Langdale]. It is clear what ought to be done in this motion; the Plaintiffs obtained liberty to amend their bill, and in doing so they have struck out some of their own names; by which means the persons, who, before the amendment, were liable to the payment of the costs of the suit, have rendered themselves free. This proceeding was clearly irregular, but if leave had been asked to amend in this form, it would have been granted upon terms. As the irregularity complained of is such as may be repaired, I think that no other order should be made, except that security should be given for the costs of the suit. There seems no other way of setting the matter right.

Dec. 23. Mr. Wray moved for liberty to pay £120 into Court, instead of giving security for costs, in order to save the [354] expense of giving a bond. He stated that the usual amount for which security for costs was given being £100, the sum proposed (£120) would cover the expense of making the deposit, and of taking the money out of Court again.

Mr. Grove, *contrâ*. This is not the case of security being given for costs by a party out of the jurisdiction, which, by the General Orders, is limited to £100, but of a security for all the costs already incurred in the suit; it does not, therefore, appear that the £120 would be sufficient. He cited *Witts v. Campbell* (12 Ves. 492).

THE MASTER OF THE ROLLS [Lord Langdale]. The only question is as to the amount to be paid into Court, for it can never be contended that security for costs is better than the money itself. If the parties cannot agree on the amount, it must be referred to the Master to approve of a proper sum to be paid into Court as a security for the costs; that sum must be paid into Court, and carried to the credit of the cause to an account of costs.

[355] *HENLEY v. STONE. Dec. 4, 1840.*

[For subsequent proceedings, see 4 Beav. 386.]

A bill for redemption cannot be sustained by a party having a partial interest in the equity of redemption, in the absence of the other parties interested in it.

A person partially interested in an estate, may maintain a suit to set aside a conveyance of such interest fraudulently obtained from him, without making the other persons interested in the estate parties.

A person having a partial interest in a real estate which was subject to a mortgage alleging that such partial interest had been fraudulently acquired from him by the Defendant, who had also got from the mortgagee an assignment of the mortgaged

interest, filed a bill for relief in respect of the fraud, and for a redemption. Held, that all the persons interested in the equity of redemption were necessary parties to the suit.

The bill stated that Thomas Grayling, being possessed of an estate which was subject to a mortgage for the sum of £200, devised it to Rye and Marchant upon trust, to permit Mary Middleditch to enjoy it for life, with remainder to the use of the Plaintiff in fee.

That Stone under a power of attorney fraudulently obtained, collusively sold and conveyed the property to Mrs. Thurley. That Mrs. Thurley paid off the mortgage of £200, and had it assigned to a trustee for her. The bill prayed that the power of attorney, and the conveyance by Stone might be declared fraudulent, and that on payment of the £200 and interest, the property might be reconveyed to the Plaintiff.

Marchant, the surviving trustee, was not made a party to this bill.

The Defendant put in a plea to the whole bill, setting forth the will of the testator, whereby it appeared, that the first trust of the real estate was to raise a sum of £150, and pay it to the executors or administrators of John Grayling Richardson. It averred, that this sum had not been raised or satisfied, and pleaded that the Plaintiff had not made Marchant, in whom the legal estate subject to the mortgage was vested, or any per-[356]-sonal representatives of J. G. Richardson parties to the bill.

Mr. Pemberton and Mr. James Russell, in support of the plea.

Mr. Kinderley and Mr. Mylne, *contra*.

THE MASTER OF THE ROLLS [Lord Langdale]. The plea in substance is this, that the trustees of a charge on the estate anterior to the interest claimed by the Plaintiff, and the persons beneficially entitled to that charge are not parties to this bill. If this had been a bill merely for relief in respect of the particular fraud imputed to the Defendant, I conceive it clear, that the other persons would not be necessary parties; but the bill is not so confined; the property was vested in a mortgagee, who was prevailed on to assign it to a trustee for the benefit of Mrs. Thurley; and the Plaintiff, not content with asking relief with respect of the interest which she says was fraudulently dealt with by the Defendant, asks also an assignment of the mortgaged interest from Mrs. Thurley; so that this bill, besides being for relief in respect of a fraud, is also a bill for obtaining an assignment of the mortgaged premises, on payment of the money due, and which I cannot distinguish from a bill for the redemption of the mortgage. If this be a bill for redemption, we are to consider whether the other persons are necessary parties, and whether this suit can go on in their absence? It is said, that no harm can result from one of several persons interested in the equity of redemption, being allowed to redeem in the absence of the others. I cannot say I am satisfied of that, but I am warranted in saying, that a compulsory bill for redemption cannot be maintained in this Court by a party [357] having a partial interest in the equity of redemption, in the absence of the other parties interested therein; and no authority for such a proceeding has been produced. It is contended, that the alleged fraud makes this case an exception to the rule, but in the argument of pleas and demurrers, allegations of fraud are only assumed for the purpose of arguing the question raised by the plea or demurrer; it can never be assumed, that the party has in fact been guilty of a fraud which is merely charged, for when it comes to the proof it may ultimately turn out to be without any foundation; I cannot therefore say that the particular charges of fraud, contained in this bill, are to be brought into consideration in determining the question, whether, in point of law, this plea can be sustained. Considering this to be a bill partly for redemption, the plea must be allowed, with liberty to amend.

[357] ORD v. WHITE. Dec. 16, 17, 1840.

The assignee of a *chose en action*, the assignment of which is available only in equity, takes subject to all the equities which subsist against the assignor.

On shewing cause against dissolving the common injunction, affidavits are admissible to prove facts alleged by the bill, but which are neither admitted nor denied by the answer. *Semble*.

This cause came before the Court on a motion to dissolve the common injunction, obtained for want of answer, the Plaintiff having undertaken to shew cause on the merits.

So far as appeared from the admitted statements, the facts of the case were as follows:—On the 19th of August 1825 the Plaintiff executed a bond to Mr. Attenborough for securing the repayment of a sum of £3000, and contemporaneously he executed a deed for keeping up a policy of assurance on his life.

[358] By a deed of the 19th of November 1830, made between the executors of Attenborough of the first part; the Plaintiff of the second part; and Mr. Shuttleworth, the solicitor of the Plaintiff, of the third part; after reciting that the sum of £3000 was still due, and that the Plaintiff had applied to and requested Shuttleworth to pay off the same, the executors of Attenborough, in consideration of £3000 expressed to be paid to them by Shuttleworth, assigned to him the bond and policy, and the Plaintiff thereby covenanted with Shuttleworth to pay the £3000, and interest and the premiums.

The execution of this deed was attested by two witnesses, described as clerks of Mr. Shuttleworth.

On the 1st of June 1835 Shuttleworth assigned this bond and policy to Dawson, as a collateral security for a sum of £3000, which he also secured by a mortgage of his real property, and by a policy for £1000; the bond, policy, and deed were thereupon delivered over to Dawson.

In February 1840 Dawson's solicitor gave notice, by letter, to the Plaintiff of this assignment, in answer to which the Plaintiff's solicitor wrote to say that the bond had been paid off many years ago.

In August 1839 Shuttleworth had mortgaged some other property not comprised in the deed of 1835 to the Defendants Messrs. White and Borrett, to secure the repayment of £2500; and in September Shuttleworth mortgaged the whole of his real property to the Defendants Messrs. White and Borrett, for securing moneys not exceeding £2000. These securities being inadequate, Shuttleworth assigned to the Defendants Messrs. White and Borrett the policy for £1000, previously assigned to Dawson, as [359] a further security for the sums of £2500 and £2000, which were due to them.

Messrs. White and Borrett, having notice from Dawson that the Plaintiff alleged that the bond had been paid, negotiated with Dawson for a transfer of his securities; and on the 23d of May 1840, in consideration of £2800, Dawson assigned to Messrs. White and Borrett the bond and policy for £3000, and the mortgage securities.

In June 1840 Messrs. White and Borrett sold the property comprised in the deed of June 1835 for £2027, which, after payment of the expenses amounting to about £50, they retained in discharge of their debt.

The Defendants, Messrs. White and Borrett also received a sum of £1000 in respect of the policy assigned to them. They afterwards commenced an action at law against the Plaintiff upon the bond, in the name of Attenborough, to recover the amount, and in which they recovered judgment pending this suit.

The Plaintiff Ord filed this bill, alleging that between the month of May 1828 and July 1829, he had furnished Shuttleworth and his partners, who were his solicitors, with moneys amounting to £3188, for the purpose of being applied in payment of the amount due on the bond to Attenborough. That it was paid, and that the bond ought to have been, and that Shuttleworth had informed him that it had been, cancelled. That he had no recollection of having executed the deed of November 1830, which, he alleged, must have been executed four or five years after the date, as the witnesses who represented themselves to be the clerks [360] of Shuttleworth were not in his service until many years after the date of that deed.

The Plaintiff prayed a declaration that the assignment of August 1839 of Shuttleworth to Dawson might be declared fraudulent and void; that it might, together with the bond and policy, be delivered up, and for an injunction to restrain the action at law.

The Plaintiff obtained the common injunction for want of answer. The Defendants, Messrs. White and Borrett, put in their answer, whereupon they moved to dissolve the injunction, and against which the Plaintiff now shewed cause.

The Defendants, by their answer, disavowed any knowledge of any fraud, and

stated that they did not know whether the Plaintiff had employed Shuttleworth & Co. as his solicitors, or whether he had made the payments stated in the bill; but they said that the deed of November 1830 appeared to be executed by the Plaintiff, and that there was nothing in it to excite suspicion: and that a receipt for £3000, as paid to Attenborough by Shuttleworth appeared indorsed thereon; they alleged, that the Plaintiff, being a party to and executing the deed of November 1830, enabled Shuttleworth to deal with it as a genuine and *bona fide* deed and assignment of the bond and policy; but they said they did not know, &c., and they neither admitted nor denied the allegation as to the attesting witnesses to the deed of November 1830; they, however, admitted that before completing their arrangements with Dawson, they had notice that the Plaintiff disputed his liability on the bond; but they alleged that Dawson had no notice at the time of advancing the £3000, and that, therefore, they were entitled to protect themselves by Dawson's [361] want of notice. There were other facts of which they were ignorant, and which they neither admitted nor denied.

Affidavits were made on behalf of the Plaintiff by the two attesting witnesses of the deed of November 1830 (being the assignment from Attenborough to Shuttleworth, in which they were represented as being the clerks of Shuttleworth) to shew that they entered the service of Shuttleworth, the one in April 1834, and the other in January 1835. An affidavit was also made by the Plaintiff, which it was proposed to read as to facts and circumstances alleged by the bill, but of which the Defendants, by their answer, professed themselves ignorant, and which they neither admitted nor denied.

Mr. Pemberton and Mr. Bird, in support of the injunction.

To support the injunction, it is not necessary that the Court should find a case which would entitle the Plaintiff to relief at all events. It is quite sufficient, if the Court finds upon the pleadings and upon the evidence, a case which makes the transaction a proper subject of investigation in a Court of Equity, *Glascott v Lang* (3 Mylne & Cr. 455); and, though, "if there be a legal debt and only some equitable circumstances upon which the injunction is sought, the Court will not allow the debtor to retain the money in his own hands;" yet where the question is, whether there is a debt at all, the Court will continue the injunction without obliging the Plaintiff to bring the money into Court; *The Earl of Milltown v. Stewart* (18). An assignee of a bond, or other chose in action not assignable at law, takes sub-[362]ject to all the equities subsisting between the obligor and obligee; *Hamill v. Stokes* (4 Price, 161), *Coles v. Jones* (2 Vern. 692), *Priddy v. Rose* (3 Mer. 86). And if the bond has been paid, a purchaser even without notice cannot avail himself of it; *Turton v. Benson* (1 P. Wms. 495), where it was said, "Supposing a man should assign over a satisfied bond as a security for a just debt, the assignee could not set up this bond in equity, which, being satisfied before, could receive no new force from the assignment. That it was incumbent on anyone who took an assignment of a bond, to be informed by the obligor concerning the *quantum* due upon such bond, which, if he neglected to do, it was his own fault, and he should not take advantage of his own *laches*."

Shuttleworth was subject to all the equities between the Plaintiff and Attenborough, and in addition, to those to which, as solicitor to the Plaintiff, he had rendered himself liable. In the next place Dawson and the Defendants, taking but a chose in action, are liable to all the previous equities; the Defendants also, who had notice of the Plaintiff's disputing the debt, were bound to make proper inquiries and obtain the concurrence of the obligor of the bond, and they cannot shelter themselves either by the want of notice in Dawson or by their own wilful ignorance. The Defendants have received from the sale of the estates and from the policy, nearly sufficient to discharge the debt.

If the affidavits be admitted, the whole of the allegations in the bill would be proved; and by the practice of the Court, they are admissible to prove circumstances neither admitted nor denied by the answer. In *Addis v. [363] Campbell* (1 Beavan, 258), affidavits were admitted, to this extent, on a motion for the production of papers; so in *Farrer v. Hutchinson* (3 Younge & Coll. 706), affidavits were admitted to the same extent on a motion to pay money into Court. The rule is, that affidavits cannot be used to contradict the answer; but allegations, which the

answer neither admits nor denies, or which are not noticed by the answer, may be proved by affidavit, *Morgan v. Goode* (3 Mer. 10), *Jefferys v. Smith* (1 Jac. & W. 298).

There is, therefore, enough of doubt and suspicion in this case to induce the Court to continue the injunction, and that without putting the Plaintiff upon any terms.

Mr. Kindersley and Mr. G. Turner, *contra*, contended that even if the bond had been really paid, still the Defendants would be entitled to recover; for the Plaintiff, by executing the deed of November 1830, had thereby recognized the existence of the debt, and, by concurring in its assignment, had precluded himself from disputing it, they insisted nevertheless, that there was no evidence whatever of its having been paid, except the affidavit of the Plaintiff, which was inadmissible in evidence.

That this was not the case of assignees of a chose in action, for the obligor joined in the original assignment: nor was the bond in its nature available only in equity, for at law the Defendant had a right to sue in the name of the obligee, and a Court of law would set aside a release executed by the obligee to defeat the assignee. *Legh v. Legh* (1 Bos. & P. 447), *Spicer v. Todd* (2 C. & Jer. 165), *White* [364]-*head v. Hughes* (2 Cr. & M. 318), *Emery v. Mucklow* (10 Bing. 23). That the payments, if made, must have been made to Shuttleworth generally, on account of a general balance; and that if paid in discharge of the bond it would have been a defence at law, instead of which defence the Plaintiff had pleaded *non est factum*. Dawson clearly had no notice, and an assignee with notice may avail himself of the want of notice in his assignor.

That the affidavits were inadmissible on the present occasion, and were admissible only to verify documents, *Taggart v. Hewlett* (1 Mer. 499); the rule was expressly laid down by Lord Eldon in *Barrett v. Tickell* (Jacob, 157), he says, "I do not recollect that the exception to the rule as to affidavits has been carried further than this; that if deeds or letters be stated in the bill, and the Defendant says he does not know whether the statement is correct or not, then you may verify them by affidavit; but as to facts and circumstances which the Defendants do not know of, if you cannot have the benefit of them from the Defendants' consciences, you cannot have the benefit of them at all, except so far as you may be able to prove them at the trial." At all events, as the Defendants have a legal right, the injunction ought only to be continued on the terms of the Plaintiff bringing the money into Court.

Mr. Pemberton, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. In this case the question is, whether an injunction obtained to restrain an action at law, shall or shall not be continued on the merits now disclosed to the Court.

[365] The Plaintiff is the obligor of a bond for £3000, executed on the 19th of August 1825, to Mr. Attenborough to secure the sum of £3000. The Defendants Messrs. White and Borrett are the persons who hold the bond as assignees from the executors of Dawson, who was the assignee of the bond from Shuttleworth, who was the assignee of the bond from the executors of Attenborough, the obligee. The contest is therefore between the obligor, and the assignee several times removed, and the Plaintiff prays to be relieved from the bond, on the allegation that it has been fully satisfied by him, and afterwards dealt with in fraud of his rights. He alleges that the bond being executed in 1825, he caused payments in satisfaction of the bond to be made, from May 1828 to July 1829; and that in July 1829 the final sum was paid which ultimately closed the account of the bond. The statement of the Defendants is, that they know nothing of these matters, but they allege that they have now in their possession a deed dated the 19th of November 1830, purporting to have been executed by the executors of Attenborough the original obligee, by the Plaintiff and by Shuttleworth, by which it is recited that the amount of the bond was paid to the executors of Attenborough by Shuttleworth, and contains a covenant on the part of the Plaintiff to pay the amount of the bond to Shuttleworth and other covenants; this they say is a recognition of the money being due on the bond at the time of the date of the deed; and they state also that there was nothing to excite the least suspicion of its validity, and, therefore, they insist they ought not to be prevented prosecuting their proceedings at law.

I have always understood that the assignee of a chose in action, assigned by an instrument which is available [366] only in equity, must take subject to all equities

which subsist as against the assignor. Shuttleworth, the first assignee, being subject to the previous equities, assigned the bond to Dawson, who, being an assignee of a chose in action, took it subject to all the equities existing as against Shuttleworth. At the same time, however, he took other securities, namely, a mortgage of freeholds and an assignment of a policy of assurance. All these transactions took place without any intervention or knowledge on the part of Messrs. White and Borrett; but, in the year 1839, the transactions between Messrs. White and Borrett occurred; Shuttleworth, being considerably indebted to them, executed certain securities dated in August, September, and November 1839: and it was about this time that they seem to have become acquainted with the transaction between Shuttleworth and Dawson; for it appears that Shuttleworth having become bankrupt in December 1839, inquiries were made by Capron, the solicitor of the representatives of Dawson, as to the transactions between the Plaintiff and Shuttleworth, and the result was, that a statement was made by the solicitor of the Plaintiff that he disputed the validity of the bond, and the right of any person to claim payment, on the ground that the bond had long since been satisfied by him.

This information was communicated to Messrs. White and Borrett, before they had acquired any interest in the bond. Their own securities being defective, they were anxious to improve them by obtaining a transfer of Dawson's securities; which they had a right to do, so far as it was consistent with the rights of the other parties. They had notice that the claim on the bond was disputed by the Plaintiff, but they were advised that they might obtain a right to stand in the place of Dawson, who had [367] no notice whatever, and so obtain the benefit of the security. They accordingly obtain an assignment of the bond, &c., for the purpose of making good the deficiency on their other securities; it appears they have realised large sums of money from the real property mortgaged to Dawson, and which the Plaintiffs insist ought to be applied in satisfaction of their claim as assignees of Dawson. The question then is, whether, under these circumstances, the injunction ought to be continued; I am of opinion on these facts, that there is so much doubt, that it must be continued.

It is not necessary to decide the question as to the admissibility of the affidavits, but the point having been argued, I think it right to state my present opinion; which is, that where facts of this nature, essential to the Plaintiff's case, are alleged in the bill, and the Defendant, by his answer, says he knows nothing respecting them, and neither admits nor denies them, it is competent to the Plaintiff to prove them by affidavit. I should submit with the greatest respect to what Lord Eldon said in *Barrett v. Tickell*, if I could see that his attention had been called to the former cases in which he is reported to have expressed a contrary opinion. It is not however necessary to decide the point in this case, but I state the present inclination of my opinion, in order that parties may be aware of the impression which they will have to remove from my mind in cases similarly situated. If the affidavits were to be received in the present case, there could be no doubt of the propriety of continuing the injunction.

Another point discussed was as to proceedings of Courts of law in such matters, but the very circumstance that an action can only be brought in the name of [368] Attenborough, shews plainly that the Defendants have not got an effectual legal assignment.

The injunction, therefore, must be continued; the question remains whether I should impose any terms on the Plaintiff; and considering the circumstances and the amount of the money already realised on the collateral security, I think I ought not to order the money to be paid into Court; but if the Defendants have been prevented entering up their judgment or registering it, they ought to have the opportunity of doing so.

[368] BIEDERMAN v. SEYMOUR. Nov. 19, 1840; Jan. 16, 1841.

[S. C. 10 L. J. Ch. 177.]

Where real estates are devised to the heir, although for certain purposes he takes by descent; yet, as between him and the devisees of other parts of the testator's

estates, the estates devised to the former are not to be applied in payment of the debts in priority to the estates devised to the latter.

Though the creditors of a testator have a right to resort to the estate devised to the heir, in priority to the other devised estates, yet the heir is entitled to contribution from the other devisees, to the extent to which his estate may be exhausted by debts.

The testator in this case, who died prior to the 3 & 4 W. 4, c. 106, had devised certain real estates to his heir at law, subject to the payment of an annuity of £50 to the testator's sister during her life, and after her death to the payment of £1000 to her two children. He also devised other real estates to other persons. There being a deficiency of personal assets, the question was, whether the estates devised to the heir, which in law would be considered as descended, should be first resorted to, in exoneration of the estates devised to the other persons.

[369] Mr. Pemberton and Mr. Cankrien, for the other devisees. The devise to the heir is absolutely void. He takes by descent (Dyer, 124, pl. 38, 1; Hargrave Co. Lit. 12 b. note), and cannot elect to take by devise (*Preston v. Holmes*, Styles, 148); the descended estates must, therefore, be applied in payment of the debts before the devised estates. *Hurmoord v. Oglander* (8 Ves. 124), *Davies v. Topp* (1 Bro. C. C. 524). The descended estates would be first liable in a Court of law, and there is no reason for altering the rule in a Court of Equity. They referred to *Scott v. Scott* (1 Eden, 458; and Ambler, 383; and to Seton on Decrees, 98; and Ram on Assets, 374).

Mr. Dixon, for the heir at law. The heir takes by descent, only for certain purposes, and not to the extent of charging him with the testator's debts in exoneration of the other devisees. The question is one of intention, and the testator has expressed his intention of bounty in favour of his heir, as much as in favour of the other devisees. The order in which assets are to be applied, is a mere regulation of equity, and the reason that descended estates are first applied, is to give effect to the testator's intention of bounty in favour of his devisees; but where the rule would defeat the expressed intention in favour of the heir, it has no longer any application. He cited *Nottingham v. Jennings* (1 P. Williams, 23), *Chaplin v. Chaplin* (3 P. Williams, 367, note a.), and *Bailey v. Ekins* (7 Ves. 323).

Jan. 16, 1841. THE MASTER OF THE ROLLS [Lord Langdale]. In this case the question reserved was, whether the real estate which the testator devised to his heir at law, [370] is to be taken as real assets, for payment of debts, in priority to real estates, by the same will devised to other persons.

The devise to the heir is made subject to the payment of an annuity of £50 to the testator's sister during her life, and after her death to the payment of £1000 to her two children.

Notwithstanding the devise, and notwithstanding the charges, the heir takes by descent, *Chaplin v. Leroux* (5 M. & S. 14; and see Fearn's Posthumous Works, 229). For the purpose of making him take otherwise than by descent, the devise is said to be void; and it is argued for the Defendants that the devise is void for all purposes: that no intention can be applied to it: that the attempted devise must be treated as a mere nullity, and the estate therein comprised be considered merely as descended estates, and therefore as assets to be applied for the payment of debts, in priority to estates effectually devised.

By whatever may be the origin of the rule, which gives to the heir by descent, that which the testator has intended to devise; whether the rule be derived from the supposed application of a principle that a man shall not have by gift that which is his own without gift, as some have supposed; or whether the rule be adopted for the benefit of third persons, as of the lord for the preservation of tenure, or of creditors for the payment of their debts; or simply, as Mr. Justice Bayley said in *Chaplin v. Leroux*, because it is convenient that the property should be assets in the hands of the heir; there seems to be no reason, why, as against the heir, the rule should be extended further than the principle requires.

[371] It cannot be said of estates expressed to be devised to the heir, as of estates not mentioned in the will, that they are "quite out of the scope of the testator's intention, perfectly beside and independent of it" (2 Bro. C. C. 262); it is indeed

clear that an estate which the testator says he devised to the heir, is within the testator's intention, and meant to be a benefit to the heir. There is nothing illegal in that intention, and if the rule be founded on the regard due to third persons, as creditors or otherwise, there seems no reason for its application between the heir and other objects of the testator's bounty; and if the effect of the devise, be to procure for the heir a contribution from the other devised estates towards payment of debts, which would otherwise have had to be borne by descended estates alone, it cannot be said that the heir obtains by gift something which was his own, without gift.

Courts of Justice ought to carry into effect the intentions of testators as far as they can consistently with the rules of law; and in this case, although the rule of law makes the devised estates assets in the hands of the heir, and the creditors may, therefore, resort to this estate in priority to others, and without being embarrassed with the necessity of seeking contribution from other devisees; yet, as it appears by the expressions which the testator has used, to have been his intention that the devisee, who is heir, should partake of his bounty as well as other devisees, there seems to be no reason why, without prejudice to the claims of creditors or others, the heir should not enjoy the like benefit which is given to other devisees; or why those who claim under the will, and do not appear to be more [372] objects of the testator's bounty, should be permitted to defeat the expressed intention in favour of the heir.

I do not think that the testator's intention can be excluded from the consideration of this question. The intention is not to prevail against the rule of law for the benefit of third persons. A testator cannot, as against creditors, exempt his personal estate from payment of his debts, or prevent his real estates from being assets, by devising them to his heir; but we may collect from his will an intention, that, as amongst those claiming under the will, the personal estate, or any portion of the real estate, shall be exonerated; and if there be an equal intention to give to devisees named, and the gift must be encroached upon by the liability of the subjects of them to pay debts, I think the doctrine that the heir, who is devisee, shall take by descent, does not afford a sufficient reason for saying, that the burden of the debts should not be borne rateably by the devisees, although one of them is heir; and I am of opinion that although the creditors have a right to resort to the estate devised to the heir, in priority to the other devised estates, yet that the heir will be entitled to contribution from the other devisees to the extent in which his estate may be exhausted by debts.

NOTE.—Since the 3 & 4 W. 4, c. 106, s. 3, the heir would not take by descent.

[373] WILLSON v. LEONARD. Dec. 5, 7, 9, 1840.

Assignee of leaseholds accepting the benefit of an assignment, Held, in equity, liable to the covenants on his part contained in the assignment, though he did not execute it.

Testator charged his real estate with his debts, Held, that the real estate was subject to damages, accrued after his death, under an equitable liability to indemnify.

Devisee not bound by the amount of a claim substantiated against the executors in an action at law to which he was not a party.

By indenture of lease dated the 7th of April 1818, Thomas Parkinson demised certain property to George Mordaunt from the 25th of March 1818, for the term of sixteen years wanting seven days, at a rent of £115, and Mordaunt thereby, for himself, his heirs, executors, administrators, and assigns, covenanted with Parkinson to pay the rent and certain taxes, to keep in repair during the term, and to deliver up possession at the end thereof.

Mordaunt retained possession till 1821, in which year, by an indenture dated the 28th of April 1821, he assigned the property to the Plaintiff Willson, for the remainder of the term, and the Plaintiff thereby covenanted for himself, &c., during the continuance of the lease, to perform the covenants in the original lease, and to indemnify Mordaunt.

On the 9th of April 1823 the Plaintiff entered into a written contract with Adam Chadwick, whereby the Plaintiff agreed to assign to Chadwick the above lease, "subject to the specifications in the said lease;" and Chadwick "agreed to take the said house and premises upon the said terms." In pursuance of this agreement the Plaintiff afterwards executed an assignment of the lease, subject to the rent and covenants, and thereby Chadwick purported to covenant with the Plaintiff to pay the rent and perform the covenants of the lease, and to indemnify the Plaintiff therefrom. This assignment was indorsed on the original lease, and was executed by the Plaintiff alone, and was delivered over to [374] Chadwick. Chadwick took possession under the contract, but he never executed the assignment.

In October 1824 Chadwick assigned the leasehold property to Surtees, subject to the rents and covenants. Surtees entered into possession, but neglected, during the term, to pay the rent and perform the covenants. The lease expired in 1834, at which time the rent was in arrear, the premises were dilapidated, and possession was afterwards held over by Surtees.

In consequence of the default of Surtees, Parkinson the lessor commenced several actions against Mordaunt his lessee, both before and after the expiration of the lease, and in which he obtained judgment for damages and costs.

The representatives of Mordaunt sued Willson at law for the recovery of the amount of the damages and costs incurred by Mordaunt and his representatives, in the several actions brought against them by Parkinson; and they ultimately obtained judgment against Willson for £830, 5s., for which sum he gave them a security on his property.

Chadwick died in January 1833, having, by his will, executed so as to pass real estate, "ordered his debts, funeral charges, and testamentary expenses in all things to be paid." And he appointed Leonard and others executors, and devised his real estate for the benefit of several persons who were Defendants to this cause. Chadwick, in his lifetime, and his representatives after his death, had notice given them of the proceedings on the several actions at law, but failed to indemnify the Plaintiff Willson in respect of these actions. The Plaintiff brought an action against the executors of Chadwick for [375] the recovery of the damages and costs they sustained. In this action the Defendants pleaded several false pleas; but they afterwards withdrew them all, except that of *plene administravit*, and ultimately judgment *quando, &c.*, was obtained against them, and damages were assessed before the sheriff at £1245, and £152, 17s. costs. A considerable portion of the sum of £1245 was composed of the costs both of the Plaintiffs and Defendant in the several preceding actions. Though the devisee was not a party to the action, his solicitor attended before the sheriff to watch the proceedings.

The Plaintiff then filed this bill against the executors of Chadwick and the devisees of his real estates to obtain payment out of his personal estate, and in case of a deficiency, out of his real estate, which the testator had by his will charged with his debts.

Mr. Pemberton, Mr. Girdlestone, and Mr. L. Wigram, for the Plaintiff. The principal defence relied on by the Defendants is this, that as Chadwick, the testator, did not execute the assignment, he was not liable on the covenants in the lease, or to indemnify the Plaintiff; but the answer is obvious, he accepted an assignment of the premises, took possession under that assignment, and afterwards assigned over the term itself, taking an indemnity. Having thus taken the benefit of the conveyance to himself, he is subject to the covenants, although he never executed the deed. But even under a mere contract for the assignment of a term, whether from the original lessee or a *mesne* assignee, the purchaser must covenant for indemnity against payment of rent and performance of covenants; *Staines v. Morris* (1 Ves. & B. 8).

[376] The amount of the damages and costs recovered against the Plaintiff, and of the costs of defending the action, is the proper measure of the damages occasioned to the Plaintiff; *Neale v. Wyllie* (3 Barn. & Cr. 533); and the testator Chadwick having charged his real estate with his debts, that estate is liable for the amount of the Plaintiff's demand, which has been ascertained before a jury in the presence of the devisees.

Sir C. Wetherell and Mr. Craig, for Dr. Chadwick the devisee of the real estate.

Though the testator Chadwick agreed to take, "subject to the specifications in the said lease," and was liable during his possession; yet he was not liable to the covenant to indemnify contained in an indenture which he never executed. He accepted the conveyance under the contract, but refused to execute the indemnity. By his will the testator directed his debts to be paid: this, it must be admitted, in equity, would amount to a charge on his real estates of his debts existing at his death; but the claim now made, did not constitute a debt at the death of the testator; *Farley v. Briant* (3 Ad. & El. 839); it was a mere contingent equitable liability; the real estate is not liable, at least, for the portion accruing after the testator's death.

The claim against the devisee for the costs both of the Plaintiffs and Defendants of the several actions at law cannot be sustained; because the costs cannot be considered as "specifications in the said lease," and because it was the duty of the several parties, if they had no defence to the several actions, to have paid the amount; they had no right to permit the actions to proceed, [377] and then charge the aggregate of all the costs against the real estate of Chadwick. With regard to the present Plaintiff, he ought, originally, to have filed his bill in this Court, and not to have proceeded at law, after he had been informed of the state of the assets. The judgment obtained against the executors, though binding as against them, is not conclusive against the devisees, who were no parties to the action.

They also argued, that the superior landlord, by receiving rent from the last assignee, had accepted him as his tenant, and that there had been such *laches* on the part of the Plaintiff as to deprive him of his remedy; for if he had brought his action against the testator in his lifetime, the latter would have had an opportunity of prosecuting his remedy over against Surtees, and which might then have been made effectual.

Mr. Kindersley and Mr. Keene, for the executors.

Mr. Pemberton, in reply.

Dec. 7. THE MASTER OF THE ROLLS [Lord Langdale]. This, in principle and in substance, appears to me to be by no means a difficult case. The circumstances between these parties are these:—In the year 1818 Mordaunt became the lessee of the property in question for a term of years. He assigned that term in April 1821 to Willson, and in April 1823 Willson agreed to assign it to Chadwick. All the assignments previously made contained a covenant on the part of the assignee to perform the covenants and indemnify his assignor; but when it came to the transaction between [378] Willson the Plaintiff, and Mr. Chadwick, there was, in the first instance, an agreement, by which it was provided that Chadwick should take the lease subject to the specifications contained in the lease; and afterwards an instrument was executed which purported to be an indenture or assignment to Chadwick, and purported to contain a covenant on the part of Chadwick to precisely the same effect as the covenants contained in the former assignments. This instrument was executed by Willson alone, and not by Chadwick. In this state of things, Chadwick, having signed the agreement but not having executed the assignment, took possession of the property, and it cannot be doubted that he took possession of this property by means of that assignment. Whatever might be his liability at law, he became, in this Court at least, bound to perform the covenants in the assignment. This is not all: having for some time retained possession of this property, his only title to possession being under the assignment, he disposed of it to a person of the name of Surtees, and he took from Surtees a covenant, to indemnify him against the non-performance of the covenants. Having done this, he delivered possession to Surtees, who for some time afterwards paid the rent; whether to the superior landlord, or to whom he paid it, does not distinctly appear. It has been suggested in the ingenious argument that has been used, that he might have paid the rent under such circumstances and in such a manner as would have made Surtees alone responsible; but any facts warranting such a suggestion have not been stated to me with any distinctness.

The matter seems to have gone on without difficulty between any of the parties down to the year 1831; when the rent being in arrear, claims were made on behalf of the lessor against the lessee, by the lessee against [379] his assignee, and so on. They made a regular succession of claims till they came to Mr. Chadwick, who, by his assignment, had put into possession the very person who had made the default.

Mr. Chadwick declined to give any sort of answer to the application, and took no notice whatever of it. Various attempts were made to induce him to come to some arrangement, by which the expense of legal proceedings might be avoided; but he does not seem to have thought proper to assist in that respect: he neither denied nor admitted his liability, but left the parties to take such steps as they thought fit. The consequence was, that an action was brought by Parkinson, the lessor, against Mordaunt, his lessee, which was commenced in November 1831, and upon that a judgment was recovered. Mr. Chadwick died in January 1833, and this matter not being settled, Mr. Mordaunt, being under the liability to pay the amount recovered against him, commenced, in November 1833, an action against Willson, his assignee. Mr. Mordaunt died, and another action was brought by the executors of Mordaunt against Mr. Willson, in which they recovered; and a succession of actions, making in all seven actions, were brought, the last being brought by the present Plaintiff against the executors of Mr. Chadwick.

In the course of these proceedings various applications were made to the executors of Mr. Chadwick, and the only answer that could be got from them was, that they had nothing to do with the matter, except that upon one occasion they stated and gave notice that they had no assets. It would appear from the evidence produced by the Plaintiff, that from time to time during these proceedings, the solicitor who acted for the executors, communicated the claims which were [380] made against them to the devisees, and that the devisees did not think fit in any way to interfere. It became therefore absolutely necessary that these claims should be investigated in a legal course. It was very easy for Mr. Chadwick to say, "You ought to have paid the demand made against you at once. You had nothing to do but put your hand in your pocket and pay the rent in arrear." True, they would have had nothing but that to do at one period, provided Mr. Chadwick had said, "if you do so I will perform my duty hereafter;" but instead of that Mr. Chadwick rendered them no assistance whatever, put them at arm's length, and left them liable to actions without any protection at all.

The action proceeded against the executors, and the sum ultimately recovered was £1245 for principal money, and £152, 17s. for costs; and that sum was found to be due on a writ of inquiry, which, it is said, was attended by the solicitor of Dr. Chadwick the devisee, on his behalf. With respect to that point, I cannot perfectly satisfy myself without reading the depositions, which I will do before I determine that part of the case. The question is, whether there is any liability on the real estate? I am clearly of opinion, that under the circumstances of the case, there is; and whether the debt be legal or equitable, or whether it be only a contingent debt as to a portion of it, and an absolute debt as to another portion of it, it seems to me a clear proposition that there is a demand against the assets, and that the real property of Mr. Chadwick, which he has by his will constituted assets for the payment of his debts, is liable. As to the breaches of covenant in his lifetime, there was clearly a debt incurred; whether a legal or an equitable debt, I must say does not appear to me important. After his death a further liability [381] arose under the covenants; and it appears to me immaterial, whether such liability was legal or equitable, for it was a liability under a covenant, which, whether legally violated or equitably violated, this Court, in the administration of the assets, would see satisfied. Whether those debts were absolute debts at the time of his death, or only contingent debts, it seems to me that the Court must apply the assets in satisfying them.

I am, therefore, of opinion, that the loss incurred by the non-performance of the covenants by Mr. Surtees, the assignee of Mr. Chadwick, is a loss which, when the amount of it is ascertained, is a charge on his real assets.

With respect to the amount of the debt, I have some doubt, whether Dr. Chadwick, though he has conducted himself in the manner I have stated, ought to be held bound, in this Court, by the proceedings which have taken place for the purpose of ascertaining the amount; I mean to reserve that question, and to look carefully through the evidence as to the course he has pursued, for the purpose of determining that point. The effect of determining that he is not bound by the finding will be, that an enquiry will be necessary, in which the amount will have to be investigated. If it appears that the amount has been substantiated against the executors without

any fraud or collusion, the amount will then be the same as before, and the expense of the enquiry will fall on Dr. Chadwick; at the same time it is his right to have the thing strictly investigated, and to say he is not bound to submit to that which is not legally found to be due from him. If he thinks fit to be at the expense of an enquiry, he has a right to it, and it must [382] be directed if the circumstances of the case render it necessary. He is also entitled to have the account of the personal estate taken; but after the evidence given, it does surprise me to be told he now denies the state of the assets. No doubt he has a right to have the account investigated; and if he can protect the real estate by a discovery of personal estate in the hands of the executors which they have not duly accounted for, he will in such case have the benefit of that enquiry. If, on the other hand, the account turns out as the executors state it to be, Dr. Chadwick will have to bear the expense of the enquiry.

Dec. 9. THE MASTER OF THE ROLLS. I have read over these papers in *Willam v. Leonard*, with a view to the only question I had reserved. It certainly appears to me that there is abundant evidence of the costs and expenses having been incurred; but the evidence is derived from the proceedings in certain causes to which Dr. Chadwick, the devisee, was not a party; and they consist in part of bills of costs which have not been taxed, and with respect to the rest, it seems to be a question, whether the evidence in the action in which the executors alone were Defendants can be used against the devisee. I am not aware of any authority on that point; and if there be none, then (notwithstanding the satisfactory evidence that these costs, charges, and expenses have been incurred) I am not prepared to say that Dr. Chadwick is not entitled to have an inquiry in that respect.

I have also read the statements as to the assets, and I do not think he admits that the personal assets have [383] been exhausted. The Plaintiff must have a declaration that he is entitled to be indemnified his costs, damages, and expenses out of the estate of Chadwick, the testator; and it must be referred to the Master to ascertain what costs, damages, and expenses have been incurred; and Dr. Chadwick not thinking fit now to admit that the personal assets are exhausted, and it being alleged by the executors that he has released and indemnified them, I think the first inquiry will be, whether he has indemnified them. If he has not, the account of the personal estate must be taken; but if he has, then the Master must proceed to take an account of the real estate, with consequential directions for raising the amount.

[383] WHITTAKER AND ANOTHER v. HOWE. Jan. 13, 18, 1841.

[Questioned, *Tallis v. Tallis*, 1852, 16 Jur. 746 (n.). See *Rousillon v. Rousillon*, 1880, 14 Ch. D. 368; *Davies v. Davies*, 1887, 36 Ch. D. 366; *Nordenfelt v. Maxim Nordenfelt Company* [1894], A. C. 545, 563. Cf. *Dubowski v. Goldstein* [1896], 1 Q. B. 478; *Underwood v. Barker* [1899], 1 Ch. 300; *Haynes v. Dolman* [1899], 2 Ch. 13.]

An agreement by a solicitor, for valuable consideration, not to practise as solicitor in any part of Great Britain for twenty years, held valid.

Injunction granted to restrain a solicitor, who had sold his business on those terms, from practising in any part of Great Britain, and from endeavouring to induce any persons who were clients of the former and present firm, to cease to employ the latter as their attorneys or solicitors.

The Plaintiffs in this case moved for an injunction to restrain the Defendant from detaining and keeping possession of or destroying certain documents; and also to restrain him from practising or carrying on the business of an attorney and solicitor. The circumstances which gave rise to the suit and motion were as follows:—

In the year 1831 the Plaintiff Mr. Whittaker, being about to procure himself to be admitted an attorney and solicitor, and to form a partnership with the Co-plaintiff, [384] Mr. Tatham, desired to purchase the business which was then carried on by the Defendant Mr. Howe and by his then partner Mr. Heptinstall; and for these

purposes an agreement, dated the 4th of August 1831, was made and executed between and by the Plaintiffs, and Howe & Heptinstall; whereby it was agreed, that Whittaker, upon his admission in Michaelmas term then next, should become a partner with Howe & Heptinstall for two years, and should give £5000 for the partnership, and as the consideration for the absolute purchase of all their interest in the business during and after the expiration of the term of two years. And Howe & Heptinstall agreed to put Whittaker into possession of all the profits of the business from the time that the £5000 should be secured as therein mentioned; but they were nevertheless to continue in business as the co-partners of Whittaker for two years from such time; and were during such two years to attend at the chambers wherein the business should be carried on; and it was agreed that Howe & Heptinstall should carry on, and in all things aid and assist Whittaker in carrying on the same, as they had been accustomed to do (Whittaker or Whittaker and Tatham, finding the necessary capital). And that Howe & Heptinstall should also respectively use their utmost endeavours to retain their then present clients, and secure the possession of the said business, as the same had been and was carried on by them, to Whittaker, during the term of two years and after the expiration thereof: and further *that neither of them, Howe and Heptinstall, should afterwards practise as solicitors or attorneys in any part of Great Britain for the space of twenty years without the consent of Whittaker.* And it was also agreed, that the Plaintiff Tatham should, from the admission of Whittaker as attorney, become a co-partner with Whittaker for nine years, and receive a fixed portion of the profits; and "that all books and [385] accounts which had been theretofore kept in respect of the said business, should be kept at the chambers where the business should be carried on, with liberty for any of the parties to the agreement, or their representatives, to have access thereto."

Mr. Whittaker secured the payment of the £5000 as required on the 7th of November 1831; and he became admitted as an attorney and solicitor. The agreement was acted upon, and the business carried on under the firm of Howe, Heptinstall, & Whittaker.

The money was actually paid in the month of June 1832, and Mr. Howe received £3000 as his share of it.

During the progress of the two years, at the end of which Messrs. Howe and Heptinstall were to retire, Mr. Whittaker began to apprehend that even after the expiration of two years it might be very important to him to have the advantage of being assisted by the greater experience and the established character of Mr. Howe; and in May 1833 he wrote a letter to Mr. Howe, thereby, very earnestly, requesting him to continue his assistance in the business after the end of the two years. After some treaty, Mr. Howe agreed to do so, in consideration of his receiving £500 a year as a remuneration, which was some time afterwards increased to £700 a year.

Mr. Heptinstall retired from the business altogether at the end of two years. Mr. Howe continued to act under the new arrangement, under which a question arose, whether he was a partner with Whittaker & Tatham. This question did not appear to have arisen out of any dispute as to the emoluments of the business, but seemed rather to be one of liability and feeling, and particularly whether the Defendant stood, in relation to [386] Messrs. Whittaker & Tatham, in the capacity of clerk or in some superior station.

On the 12th of August 1840 the Defendant sent to the Plaintiff Whittaker a letter, stating, amongst other things, "that all intercourse in the nature of partnership and otherwise must cease at the expiration of the nine years from whence he entered partnership:" which occurred on the 7th of November 1840.

In August 1840 the dispute as to the partnership still continued. Mr. Howe insisted upon its being dissolved. Mr. Whittaker thought there was no partnership to dissolve; but at last they agreed to sign and publish a notice of dissolution of the partnership; and at the same time Mr. Howe signed an acknowledgment, that Mr. Whittaker's signature of the notice of dissolution, should not prejudice any question between them as to a partnership having actually subsisted.

About the same time, the name of the firm painted on the door of the chambers was altered, and the name of Howe, being separated from its former connection with the others, was painted on the door separately from them.

On the 25th of December 1840, in the absence, and without the knowledge of Whittaker & Tatham, Mr. Howe removed a great many books, deeds, documents, and papers from the chambers in Lincoln's Inn, where the business was carried on, to his own chambers, amongst which were some of those included in the articles of August 1831, and others belonging to the clients of the partnership.

Mr. Howe took chambers in the neighbourhood, for the purpose and with the intention of carrying on business as an attorney and solicitor, and, as was stated by [387] the Plaintiffs' affidavit, he threatened and intended to solicit the clients of Plaintiffs' partnership, and to induce, or endeavour to induce, such clients to take away their business from the Plaintiffs' firm, and to employ him, the Defendant, in respect of their business; and he intended to make use of the documents and papers, which were so as aforesaid surreptitiously obtained by him from the chambers of said partnership, for the purpose of furthering his said designs, and of preventing the Plaintiffs from transacting the business of their said clients, and of otherwise embarrassing the Plaintiffs in the conduct of such business. It was also alleged by the Plaintiffs, that the Defendant intended to practise in the name of a third person in such manner as to evade his agreement.

The Plaintiffs thereupon filed their bill, and now moved for an injunction "to restrain the Defendant Howe from detaining and keeping possession of the books, &c., from the chambers occupied by the Plaintiffs," and from permitting the same to remain away from the office of the Plaintiffs, &c.: and "from practising or in any manner carrying on business as a solicitor or attorney in any part of Great Britain," &c.; and to restrain him from soliciting the clients of the late firm of Howe & Heptinstall, to transfer their business from the Plaintiffs to any other solicitor or attorney, or to cease to employ them; and from acting as the solicitor or attorney of any such clients.

Mr. Pemberton, Mr. Romilly, and Mr. Freeling, in support of the motion, contended, that as the Defendant was clearly acting in contravention of the agreement, for which he had received a large consideration, the Court would endeavour to prevent him; and that whatever doubt might exist as to the jurisdiction to grant an in-[388]-junction directing a restoration of the papers, yet that there was ample authority for the proposition, that the Court could effect it by an injunction in a negative form; *Robinson v. Lord Byron* (1 B. C. C. 588), *Lane v. Newdigate* (10 Ves. 192), and *Rankin v. Huskisson* (4 Simons, 13), where the Defendants were restrained "from permitting such part of the buildings as had been already erected on the garden or plot of ground mentioned in the pleadings, from remaining thereon;" and *Spencer v. The London and Birmingham Railway Company* (8 Simons, 193), and *Taylor v. Davis* (1)

Mr. G. Turner, and Mr. Bacon, *contra*, consented to deliver up all the papers except those which the owners had given the Defendant notice not to part with. They contended, however, that the agreement not to practise as attorney in any part of Great Britain for twenty years, was void at law; *secondly*, that it was such an agreement as a Court of Equity would not specifically perform; and, *thirdly*, that if, in any case, a Court of Equity could direct a specific performance, yet, that under the particular circumstances of this case, it would decline so to do. On the first point, they argued that the agreement being generally in restraint of trade in Great Britain, was void, as contrary to public policy: *Mitchel v. Reynolds* (1 P. Williams, 181), *Homer v. Ashford* (3 Bing. 322), *Horner v. Graves* (7 Bing. 735; and see *Hitchcock v. Coker*, 6 Ad. & Ellis, 438; and *Archer v. Marsh*, *ib.* 959); that it was clearly contrary to the public interest to [389] permit an individual to disable himself by contract from earning his livelihood, whereby he would be doomed to live in idleness, and his labour be lost to the State. In such a case the Plaintiffs had no right of suit or action; *Thomson v. Thomson* (7 Ves. 470). On the second point, that if not strictly void at law, still a Court of Equity would not enforce the agreement, as it was unreasonable, and "publicly detrimental;" *Hanington v. Du-Chatel* (1 Bro. C. C. 125); and that this

(1) *Taylor v. Davis*. Rolls, November 1834, where a partner had abstracted a partnership book from the counting-house of the firm, contrary to an express covenant contained in the deed of partnership, Sir C. C. Peppys, Master of the Rolls granted an injunction restraining him from continuing to violate the covenant; and this was continued by Lord Langdale; at the hearing of the cause, on the 28th of February 1838.

Court would give such a contract no encouragement; *Prosser v. Edmonds* (1 Younge & C. 481); and, thirdly, that the Plaintiffs had waived the agreement by permitting Howe to practise on his own account.

Mr. Pemberton, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. With respect to that part of the motion which applies to the deeds and papers, I shall, on the faith that Mr. Howe will carry into effect the intention which has been declared on his part by his counsel, reserve any order I have to make on this occasion; an opportunity will thus be given of making some communication in the meantime. Finding it necessary therefore to reserve the order I may have to make on that part of the case, I think it would be better not to make any order whatever at present. I will, however, state my present opinion as far as it is now formed, and will take an opportunity in the meantime of considering the nature of the injunction which I ought to grant.

I confess there is something in all contracts of this nature of which I have entertained some doubt. Where clients rely on the professional skill and knowledge of [390] the individual they have long employed, I have some doubt as to the policy of sanctioning the purchase of their recommendation of the clients to other persons. These doubts have not originated with myself, because I recollect very well their being long dwelt upon, and commented on by Lord Eldon, not only in the case of a solicitor and his clients, but in the cases of medical men and their patients. I perfectly recollect a case in which the professional practice of one physician had been sold to another, wherein the policy of permitting such arrangements was the subject of great discussion and consideration. It is not, however, for me to act upon any doubts I may entertain of that nature, because agreements of this description have been too often sanctioned to be now questioned. [After referring to the painful circumstances of this case, his Lordship said] I think, notwithstanding the able argument in this case, that there must to some extent be an injunction against the Defendant with regard to the practice which it seems he now intends to carry on; but as some time must elapse before a final judgment can be pronounced on this motion, I will in the meanwhile read over the affidavits and refer to the authorities, and I will consider the extent of the injunction which must be granted. I trust, that in the meantime Mr. Howe will act *bonâ fide* in accordance with the instructions he has given his counsel with respect to the papers.

Jan. 18. Affidavits being now produced as to the delivery up of the papers, &c.,

THE MASTER OF THE ROLLS said. In order that I may make an order applicable to the papers and boxes under the present state of circumstances, I think it will be necessary to examine minutely the additional [391] affidavit now produced; and perhaps it may be necessary for the Plaintiffs to afford some explanation thereon. In the meantime, I think it my duty to do all that the jurisdiction of the Court enables me to do to protect these Plaintiffs; and I will proceed to state my opinion as to the injunction I must pronounce.

The motion is for an injunction to restrain the Defendant from detaining and keeping possession of, or destroying certain documents, and also to restrain him from practising or carrying on business as an attorney and solicitor. [His Lordship stated the agreement between the parties, and the circumstances under which it was entered into, and the subsequent arrangement between the Plaintiffs and the Defendant Mr. Howe, and proceeded.] Mr. Howe continued to act under the new arrangement; and a question arose whether, under that arrangement, he was a partner with Whittaker & Tatham, or not. That he was subject to the liabilities of a partner as between the firm and other parties appears to me evident from the use which was made of his name, and the nature of his employment. Whether he was to be called a partner as between himself and Whittaker & Tatham is not very material; because, if a partner, he was to have the fixed sum of £500 and afterwards £700 a year, as and for his share of profits; and if not a partner, he was to receive the same sum as a remuneration for his services. Nominally, at least, he was a partner, and with that name he was employed as the assistant and adviser of the Plaintiffs, and not in any inferior capacity.

In August 1840 the dispute as to the partnership continued. Mr. Howe then insisted on its being dissolved; Whittaker thought there was no partnership to dissolve; but at last they agreed to sign, and did sign and publish a notice of

dissolution of the partnership, but at [392] the same time Mr. Howe signed an acknowledgment that Whittaker's signature of the notice of dissolution should not prejudice any question between them as to a partnership having actually subsisted between them. About the same time the name of the firm, painted on the door of the chambers, was altered, and the name of Mr. Howe being separated from its former connexion with the others was painted on the door separately from them.

In all this I confess that I see nothing in the conduct of Mr. Howe which the Plaintiffs are entitled to complain of; it was optional with him whether he would permit his name to continue in the firm or not, or whether he would or not continue to give his personal aid in carrying on the business. He might put an end to his separate agreement for that purpose when he pleased.

But upon a careful perusal of the affidavits, I find nothing upon which I can safely conclude, or from which it appears probable, that Mr. Whittaker had in any way released Mr. Howe from the obligations into which he had entered on the 4th of August 1831: for additional consideration Mr. Howe was to render additional aid in carrying on the business; but the duty for which the former consideration was actually paid was not altered. If Mr. Howe thought that he was at liberty to practise for himself notwithstanding that agreement, I think that he has not shewn any sufficient grounds for that opinion, and that whatever his own view might be, it is not justified by the facts which he has stated; neither does it appear to me to be shewn by the evidence now before me, that after August 1840 he so acted for himself as solicitor as to acquire a right to do so by the acquiescence and consent of Whittaker. Nevertheless, on the 25th of December, in the absence and without the knowledge of Whittaker & Tatham, [393] Mr. Howe removed a great many documents from the chambers where the partnership business was carried on to chambers of his own, where he now insists he has a right to carry on business for himself; and his defence is, that the agreement he entered into is void, or if not void, that it is such as this Court cannot specifically perform; and therefore he, with the consideration in his pocket, has a right to act in violation of the contract for which the consideration was given.

With respect to the validity of the agreement, it is not now made a question whether attorneys and solicitors can lawfully agree to secure their clients to the attorneys and solicitors who succeed them in business. In *Candler v. Candler* (Jac. 231), Lord Eldon, referring to *Bunn v. Guy* (4 East, 190), said, "I doubted whether professional men could be recommended, not for skill and knowledge in the profession, but for a sum of money paid and advanced. I knew that this would rip up many transactions, and I was happy that the Court of King's Bench was of a different opinion, though I never could entirely reconcile myself to their doctrine." But the agreement as to this being undisputed, it is alleged to be void as being in restraint of the exercise of trade or profession. In the cases which have occurred I have not observed any distinction taken between trade and professions; but the distinction between different sorts of trades or professions has been taken, and appears to be material.

In this case a valuable consideration being given, the question is, whether the restraint intended to be imposed on Mr. Howe is reasonable. The words of Chief Justice Tindal in *Horner v. Graves* (7 Bing. 743) may be safely adopted. "We do not see how a better test can be [394] applied to the question whether this is or not a reasonable restraint of trade, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party [requires] can be of no benefit to either; it can only be oppressive, and if oppressive, it is in the eye of the law unreasonable. Whatever is injurious to the interests of the public is void on the grounds of public policy."

Now, whatever may be the talents, knowledge, and experience of Mr. Howe, and I am disposed to rate them highly, I cannot say that in my opinion the public interest will be in any way interfered with or affected by his not being allowed to practise as an attorney and solicitor in Great Britain for twenty years without the consent of Mr. Whittaker.

The question therefore is, whether the restraint ought to be considered as reason-

able in this particular case. The business is that of an attorney and solicitor, which, to a large extent, may be carried on by correspondence or by agents, and as to which it has already been decided, that a restraint of practice within a distance of 150 miles was not an unreasonable restraint. It was decided in the case of the surgeon dentist, where the occupation required the personal presence of the practiser and the patient at the same place, that a restraint of practice within a distance of 100 miles was an unreasonable restraint.

Agreeing with the Court of Common Pleas, that in such cases "no certain precise boundary can be laid down within which the restraint would be reasonable, and beyond which excessive;" having regard to the [396] nature of the profession, to the limitation of time, and to the decision that a distance of 150 miles does not describe an unreasonable boundary, I must say, as Lord Kenyon said in *Davis v. Mason* (5 Term. Rep. 118), "I do not see that the limits are necessarily unreasonable, nor do I know how to draw the line."

At present, therefore, I cannot come to the conclusion that this agreement is void; and I do not think that this Court can refuse to grant an injunction to restrain the violation of a contract or covenant, because there may be some part of the agreement which the Court could not compel the Defendant specifically to perform.

In the progress of the cause it may become necessary to consider further the points which have been raised; but at present I am of opinion, that the right claimed by Mr. Howe to act in violation of the contract for which he has received the consideration is, to say the least, so far doubtful that he ought not to be permitted to take the law into his own hands, and carry on his business at his own pleasure, and without regard to the severe injury which he may do to the Plaintiffs.

Restrain him from practising as an attorney or solicitor in any part of Great Britain, either in his own name or in the name of any other person, and from endeavouring to induce any persons who were the clients of Howe & Heptinstal, or of Howe, Whittaker & Tatham, to cease or abstain from employing Whittaker & Tatham as their attorneys or solicitors.

NOTE.—An injunction was afterwards granted as to the deeds and papers, but which has not yet been drawn up.

[396] THE ATTORNEY-GENERAL V. STRUTT. Nov. 14, 1840.

[S. C. 10 L. J. Ch. 24.]

An information made claim, on behalf of a charity, to a farm, out of which a fixed annual rent charge had for many years been paid. The Defendant admitted the right to the rent charge, but contended that he represented parties who were purchasers of the farm for valuable consideration, without notice. He admitted he had in his possession title-deeds which made out his own title, but did not make out or evidence the title of the charity. Held, that the Defendant was not bound to produce them.

The information stated, that Richard Tweedy, by his will dated in 1574, "gave all his lands and tenements called Prentices, in Stow Maries, in the county of Essex, with his lease and term of years in the same," to three trustees and their heirs, for the endowment of four almshouses for four poor inhabitants of Stock and Boreham.

That the farm was in the occupation of the Defendant, who claimed it under the will of his father, who purchased it in 1788; and that the Defendant paid an annual sum of £13, 12s. as a rent charge issuing thereout. The information insisted that the charity was entitled to the whole income of the property, amounting to about £66 a year. It charged that the Defendant had in his possession deeds, &c., whereby or wherefrom the title of the charity would appear, or which contained recitals relating to the charity.

The Defendant stated that his father had purchased the Prentices with other property in 1787, "subject to a rent charge of £13, 12s. per annum to the poor of Stock Boreham, and subject to a quit rent of 5s. 1d. per annum to the manor of

North Farnbridge; and that his father had no notice of the will of Richard Tweedy, or the alleged rights of the charity.

He set forth the title-deeds under which he claimed, commencing in 1606, in one of which, dated in 1718, the property was conveyed, "one annual rent or charge of £13, 12s., payable half-yearly, by equal portions, to [397] the several parishes of Stock and Boreham, in the county of Essex aforesaid, being so much theretofore to them given by Richard Tweedy, Esq., long since deceased, and charged and chargeable in and upon the said premises only excepted." The Defendant relied on being a purchaser for valuable consideration, without notice, and on the Statute of Limitations, and insisted that the charity was legally entitled to the rent charge only.

He admitted that he had in his possession certain title-deeds, relating to the premises in question in this cause, and to other premises; but he said that these title-deeds constituted the title of the parties claiming the premises under the will of his father John Strutt, and did not constitute, make out, or evidence the alleged title of the charity.

A motion was now made for the production of the papers, &c.: the discussion turned on the liability of the Defendant, under these circumstances, to produce the title-deeds.

Mr. Pemberton and Mr. Blunt, in support of the motion, contended, that the Attorney-General was entitled to the production of the title-deeds, in order to see whether there was any admission therein of the title of the charity to the property in question; and that as the charity was mentioned in one of them, the Defendant, and those through whom he claimed, must be taken to have had notice of the rights of the charity; in which case the Attorney-General was clearly entitled to see them.

That, as the lands out of which the rent charge was issuing, had been intermixed with others, the Attorney-General was entitled to the production of the title-deeds, [398] in order to determine the particular lands out of which the rent charge was issuing.

Mr. Kindersley and Mr. James Russell, *contra*. The title of the charity, to the rent charge is admitted, and it has always been paid; but the title to the land is altogether denied. The Attorney-General, therefore, has no right to the production of the deeds which prove the title of the Defendant only, and not that of the Plaintiff; *Adams v. Fisher* (2 Keen, 754, and 3 Myl. & Cr. 526).

The case of confusion of boundaries is not made by the information, and cannot now be insisted on.

Mr. Pemberton, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. The documents other than the title-deeds must be produced. As to the title-deeds, the question is, whether, in the present state of the record, and having regard to the claim made by the information, the Attorney-General has now a right to the production of them. In the course of these proceedings it may be very important to have them produced; but I am of opinion that the record is not at present in such a state that I can compel their production.

The claim made by the Attorney-General is simply for the recovery of the land. The Defendant says he is in the situation of a purchaser for valuable consideration without notice. In the reference to the rent charge, to which the charity is admitted to be entitled, there is nothing to connect it with the origin of the charity; and the Defendant may therefore be right in saying [399] that the deeds relate solely to his own title, and not to that of the charity. In the present state of the record, I cannot order the production of the title-deeds.

[399] WELLS v. GIBBS. Dec. 10, 11, 1840.

[S. C. 10 L. J. Ch. 97; 4 Jur. 1176.]

Whether an order to pay money into Court to the credit of a cause is an order within the meaning of the 1 & 2 Vict. c. 110, s. 18; and if so, whether a taking under an attachment for contempt would, under the sixteenth section, invalidate a charge obtained under the thirteenth section.

This Court has no jurisdiction to order the Master of the Common Pleas to vacate a memorandum entered under the 1 & 2 Vict. c. 110, of an order of this Court.

By an interlocutory order made in this cause on the 11th of June 1840, the Defendant was ordered, within a month from that time, to pay into the bank, with the privy of the Accountant-General of this Court, to the credit of this cause, the sum of £1404, 2s.

On the 3d of July 1840 the Plaintiffs, by their solicitor, caused a memorandum or minute of this order to be left with the senior Master of the Court of Common Pleas, pursuant to the statute of the 1 & 2 Vict. c. 110, s. 19.

The Defendant having made default in payment of the money into Court, was, in November 1840, taken into custody by the serjeant-at-arms, and was afterwards turned over to the Fleet.

It was now moved, on his behalf, that the orders and warrant under which he was imprisoned might be discharged, and that the Defendant might be discharged; and also that the entry or registry made by the senior Master of the Court of Common Pleas at Westminster, of the order of the 11th day of June, in pursuance or pretended pursuance of the 1 & 2 Vict., might be cancelled or vacated for irregularity, and as not being authorised [400] by, or within the scope and meaning of, the said Act of Parliament; or otherwise, that the Plaintiffs might be deemed, and taken, and be accordingly declared to have relinquished all right and title, to the benefit of such (if any) charge or security as they might have obtained or be entitled to, under the powers of the said Act of Parliament, by means or in respect of the order of the 11th day of June last; and that the Plaintiffs might forfeit and be declared to have forfeited the same accordingly. And that in either case satisfaction might (if necessary) be entered on the entry or registry of such last-mentioned order, or of the memorandum or minute thereof.(1)

(1) By the thirteenth section of the 1 & 2 Vict. c. 110, it is enacted that a judgment entered up in any of Her Majesty's Superior Courts at Westminster should operate as a charge upon all lands, &c., to which such person shall be entitled, and the judgment creditor is to have the same remedies in a Court of Equity as if the debtor had agreed to charge the hereditaments therewith, but the creditor is not to be entitled to proceed in equity to obtain the benefit of such charge until the expiration of a year.

The sixteenth section enacts, "That if any judgment creditor, who, under the powers of this Act, shall have obtained any charge, or be entitled to the benefit of any security whatsoever, shall afterwards, and before the property so charged or secured shall have been converted into money or realised, and the produce thereof applied towards payment of the judgment debt, cause the person of the judgment debtor to be taken or charged in execution upon such judgment, then and in such case such judgment creditor shall be deemed and taken to have relinquished all right and title to the benefit of such charge or security, and shall forfeit the same accordingly."

The eighteenth section enacts, "That all decrees and orders of Courts of Equity, and all rules of Courts of Common Law, and all orders of the Lord Chancellor or of the Court of Review in matters of bankruptcy, and all orders of the Lord Chancellor in matters of lunacy, whereby any sum of money, or any costs, charges, or expenses, shall be payable to any person, shall have the effect of judgments in the Superior Courts of Common Law, and the persons to whom any such monies, or costs, charges, or expenses, shall be payable, shall be deemed judgment creditors within the meaning of this Act; and all powers hereby given to the Judges of the Superior Courts of Common Law with respect to matters depending in the same Courts, shall and may be exercised by Courts of Equity with respect to matters therein depending, and by the Lord Chancellor and the Court of Review in matters of bankruptcy, and by the Lord Chancellor in matters of lunacy; and all remedies hereby given to judgment creditors in like manner given to persons to whom any monies, or costs, charges, or expenses, are by such orders or rules respectively directed to be paid."

The nineteenth section enacts, "That no judgment of any of the said Superior Courts, nor any decree or order in any Court of Equity, nor any rule of a Court of Common Law, nor any order in bankruptcy or lunacy, shall by virtue of this Act affect

[401] Mr. Kindersley and Mr. Evans, in support of the motion. The interlocutory order of the 11th of June to pay money *into Court*, with the privy of the Accountant-General, *to the credit of the cause*, is not within the eighteenth section of the 1 & 2 Vict. c. 110, which refers only to any sum of money "*payable to any person*." This is made evident from the words which follow in the same section; for the order is to have the effect of a judgment, and "the persons to whom such money, [402] &c., shall be payable shall be deemed judgment creditors." Who, then, in this case can be deemed the judgment creditors? The Court, or the bank, or the Accountant-General? It is evident that the Act contemplated only such an order as decided the right to the money, and not an interlocutory order in a cause, in which neither the right nor liability is adjudicated on, and which is made simply for the purpose of security until the hearing of the cause. If, then, the case is not within the eighteenth section, the Plaintiff had no right to enter a memorandum with the Master of the Common Pleas: it forms a cloud over his title, and makes his property unmarketable. The memorandum entered by virtue of the proceeding in this Court ought, therefore, to be removed. If, however, the order comes within the Act, and is to have the effect of a judgment "in the Superior Courts of Common Law" under the eighteenth section, then, by leaving the memorandum under the nineteenth section, the Plaintiffs obtained a charge on the land, and thereby made their election to proceed against the Defendant's property, and were estopped by the common law from afterwards proceeding against the Defendant's person (3 Bac. Abr. 393); or, in another view of the case, the Plaintiffs having obtained the charge, must, under the sixteenth section, be deemed to have relinquished it by subsequently arresting the Defendant: in the former case the arrest was irregular; in the latter, the charge has been avoided. It would be most unjust to keep a party in prison for the non-payment of money which, by reason of the charge created on his estate for the same debt, he is rendered unable to raise out of his property.

Mr. Pemberton and Mr. Hallett, *contrâ*. The case is within the eighteenth section. The order is in the [403] most usual form in equity to pay into Court to the credit of the cause, for the benefit of the claimants. It is the same as if money were directed to be paid into a banker's to the credit of a particular person's account. However, it is quite unnecessary to decide the point on this occasion.

As to ordering the discharge of the Defendant (a trustee who has applied the trust fund to his own use), there is nothing in the Act or in the previous practice to warrant it. The Act says, that by taking the person of the debtor in execution, the previous charge on the land shall be relinquished and forfeited; be it so, but there is nothing to authorise the discharge of the Defendant. The Defendant, however, has never been taken in execution; the process against him is for his contempt of the Court, and differs widely from the process in the Common Law Courts: the distinction has been clearly established in the recent Irish case of *Miller v. Knox* (4 Bing. N.C. 574). Contempt in equity is a criminal proceeding, and for centuries the practice in equity has been, to enforce the payment of a debt or the performance of a duty, compulsorily both against the property and the person at the same time. The Act referred to does not abridge the Plaintiff's rights; though popularly regarded as an Act for the abolition of imprisonment for debt, it is merely to abolish arrest on mere process, with certain qualifications: its object is to give a creditor a more extensive remedy against the property of his debtor, and not to limit it.

any lands, tenements, or hereditaments as to purchasers, mortgagees, or creditors, unless and until a memorandum or minute, containing the name, and the usual or last known place of abode, and the title, trade, or profession of the person whose estate is intended to be affected thereby, and the Court and the title of the cause or matter in which such judgment, decree, order, or rule shall have been obtained or made, and the date of such judgment, decree, order, or rule, and the account of the debt, damages, costs, or monies thereby recovered or ordered to be paid, shall be left with the senior Master of the Court of Common Pleas at Westminster, who shall forthwith enter the same particulars in a book in alphabetical order, by the name of the person whose estate is intended to be affected by such judgment, decree, order, or rule; and such officer shall be entitled for any such entry to the sum of 5s.; and all persons shall be at liberty to search the same book on payment of the sum of 1s.

As to vacating the memorandum, this Court has no authority so to do. If the charge is void by the statute, it is a mere nullity, and there is no necessity for this Court to declare it so, for it cannot affect the Defendant's title; a purchaser could not, on that account, [404] object to perform his contract to purchase it. (Sugden's Vendors, 648, 8th ed.) A party might as well apply to take a fine or recovery from the records of the Common Pleas, or to cancel the registration of a deed or judgment affecting property in the county of Middlesex.

Mr. Kindersley, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. This is certainly a very singular application. I am asked to vacate the memorandum which has been entered with the senior Master of the Common Pleas, on the ground, first, that it is not within the scope of the Act of Parliament referred to; and, secondly, that if it should be considered within the Act, then that the subsequent proceedings worked a forfeiture of the charge of the property of the Defendant; and it is then asked, if the Court should decline to vacate the memorandum, that the Defendant may be discharged. It is admitted that all the proceedings of contempt in this Court have been perfectly regular: there was an order for the payment of money duly executed, and the Defendant, without any irregularity, has been lodged in prison for his disobedience of that order; and I am asked to discharge these regular proceedings, so as to deprive the Plaintiff of the means which the law allows him of enforcing obedience to the order of the Court; and that, too, on the ground that he has done something which he is either not entitled to, or ought not to avail himself of. I feel some satisfaction that it is not incumbent on me to determine whether such orders of this Court are or are not within the view of this Act of Parliament, because I have no authority to interfere in the way in which I am asked. If the officer of the Common Pleas has improperly entered this me-[405]-morandum, what control have I over him? I am of opinion that I have no authority to make an order on him, and that my only jurisdiction would be through the parties to the cause.

If the case were within the Act, then comes the question whether there has been such a proceeding as ought to work a forfeiture of the charge; and if there has, then arises the question whether I can declare a forfeiture on this occasion and in this manner.

The first question would lead to an investigation of the practice of this Court. The Act says, a party having obtained a charge on the debtor's property, shall be deemed to have relinquished it, if he charges the person of the Defendant in execution; and the question which arises is, whether the process of contempt, or a caption under an attachment, &c., issuing out of this Court, is a taking within the Act. It certainly is not the same thing as a taking under a *ca. sa.* at law; nor is this Court bound by the decisions of Courts of law, which in some cases prohibit a party proceeding against the property and person at the same time. In the earliest cases, where after a decree had been pronounced, and a Defendant had been taken under process of contempt for his disobedience in not performing the decree, it became a matter of consideration whether the Court was justified in granting a sequestration, or whether there could be, what might be called, execution against the person and property at the same time. I find that in very early cases it was a matter of great consideration, and the Lord Chancellor, having the assistance of one of the Common Law Judges, determined that a sequestration against a person in prison for disobedience of the same order was valid; *Hide v. Pettit* (1 Ch. Ca. 91). [406] The two concurrent processes have, therefore, at all times existed in this Court, and they exist at this moment; and there can be no doubt that if in this case the Defendant were to remain in prison and neglect to pay in the money, a sequestration would go against his estate.

I am relieved from the necessity of deciding, whether, by the construction of this Act, a caption under an attachment is to be considered a caption in execution, for I do not consider that, under the present circumstances, and on this motion, I am in a situation to make such a declaration. Even if I had jurisdiction over the officer of the Common Pleas, I must be satisfied that what is asked is necessary to be done: that the Act of Parliament is defective, and that I have some jurisdiction to supply the deficiency. The Act says that the charge shall be deemed forfeited; what more can possibly be done? I am asked by a Defendant who refuses to perform his duty

to relieve his estate from some supposed cloud. If it is to be removed, it must be done in another place, and under another jurisdiction.

This is not the case of a Defendant who is desirous of obtaining time to enable him to perform his duty: if it were, I should certainly interfere, and I would not allow any oppressive conduct on the part of the Plaintiffs, if I saw that the party was willing and desirous of performing that which the Court had ordered him to do. Here, on the contrary, is a case of a party obstinately neglecting and refusing to obey the order which this Court has made upon him, and this is the person who asks me to do that which belongs to another jurisdiction, and must be done, if at all, by another proceeding. I must refuse this application with costs. If the Defendant offered some security which the Plaintiff ought [407] to accept, I should consider it my duty to exercise such jurisdiction as I have to relieve the Defendant. Cases have occurred where a party has given satisfactory assurance of his intention to perform his duty, and in which the Court has interfered to enable him to accomplish it, by putting the other side on terms.

NOTE.—See *Gibbs v. Pike*, 9 Dowling, Pr. Ca. 731, in which it was held that the above order was not within the Act.

[407] HOLMES v. THE CORPORATION OF ARUNDEL. Jan. 11, 1841.

The Court, to prevent delay, will advance for an early hearing exceptions to the Master's report on a reference for impertinence.

The Master in this case, to whom the matter had been referred, had allowed some exceptions for impertinence taken to the answer of the Defendant.

The Defendant took exceptions to the Master's report.

Mr. Wray applied to have the latter exceptions advanced for an early hearing.

THE MASTER OF THE ROLLS [Lord Langdale], after observing that the Court was in the habit of advancing cases of this description, which were in the nature of a dilatories, made the order.

NOTE.—His Lordship made a similar order in *Byde v. Masterman*, Michaelmas term 1840.

[408] STUBBS v. SARGON. Jan. 11, 1841.

On a motion to discharge an alleged irregular order, no parties can be heard in support of the application but those who have joined in the notice of motion to discharge it.

An order was alleged to have been obtained irregularly by a purchaser under the Court, in the absence of A. B. and C. D., two of the parties to the cause. A notice of motion was given by A. B. to discharge the order.

Mr. Pemberton, in support of the motion.

Mr. Rogers for C. D., in whose absence the order had been obtained, but who had given no notice of motion to discharge it, was proceeding to support the present application, when

Mr. C. P. Cooper objected, that he could not be heard in support of the motion to discharge the order, unless he gave notice for that purpose, and he contended, that as the case stood, he could only be heard in support of the existing order.

THE MASTER OF THE ROLLS considered the objection well founded.

[409] DUNCAN v. M'CALMONT. *Nov.* 13, 14, 1840; *Feb.* 22, 1841.

[S. C. 10 L. J. Ch. 335; 5 Jur. 262.]

Jurisdiction of this Court to restrain proceedings in the Admiralty Court on bottomry bonds.

Injunction granted to restrain proceedings in the Admiralty Court respecting a bottomry bond and freight of a ship, on the ground that the matters could be more conveniently, directly, and effectually determined in this Court.

In this case a motion was made that the Defendants Robert M'Calmont, Hugh M'Calmont junior, William John Newall, Frederick Sanders, and Charles Sanders, might be restrained from prosecuting any suit in the High Court of Admiralty against the cargo of the ship "Lord Cochrane," or against the Plaintiffs as the owners thereof, and their respective bail, upon, or in respect of the bottomry bond in the bill mentioned.

The case was as follows:—Messrs. Benson being the owners of the ship "Lord Cochrane," in the year 1839, sent the same under the command of Luke Hall Smith as master, to the island of Ascension, laden with Government stores; the ship went under the same command from the island of Ascension, either in ballast, or at least with but a small cargo of goods, to Pernambuco; and when it arrived there, the master, pursuant to authority given him by the owners, gave it in charge to M'Calmont [410] & Co. who were merchants there. The ship being supplied with a homeward cargo of great value, which belonged partly to the Plaintiffs in this cause, and partly to M'Calmont & Co., sailed on the 28th June 1839, with the intention of proceeding to Liverpool, but having on the next day struck on a sandbank and received serious injury, she returned to Pernambuco. The cargo was unloaded, and very extensive repairs effected under the superintendence of M'Calmont & Co. acting as agents of the ship, as they said, under the master, or of Lloyd's agent.

The repairs were completed in the month of December 1839; the cargo was put on board again, and on the 6th January 1840 the master executed a bottomry bond to M'Calmont & Co. binding ship, freight, and cargo for the payment of £8558, 12s. 4d., as the sum due for the money expended on the repairs, and in taking care of the cargo, with commission and premium at £20 per cent.

The bond was transmitted by M'Calmont & Co. from Pernambuco, to M'Calmont Brothers & Co., their correspondents at Liverpool, and was indorsed to them.

The ship sailed on the return voyage on the 11th of January, and arrived at Liverpool on the 20th of March. Before the arrival, a warrant of arrest, founded on the bottomry bond, was sued out of the Court of Admiralty; and being executed on the arrival of the ship, commissions to take bail were taken out by the owners and consignees of the cargo; and bail being taken for the sum of £7500, as the amount of goods belonging to the Plaintiffs, the arrest was suspended. After this, at the instance of the owners of the cargo, the claimants under the bottomry bond brought in their [411] "act on petition," and under an order of the Court of Admiralty the sum of £1765, 18s. was paid into Court, as for the homeward freight of the ship, exclusive of the freight payable in respect of the goods consigned to M'Calmont Brothers & Co.; the ship itself was ordered to be sold, and was afterwards sold for £1675.

The Plaintiffs in this cause, being the owners of the largest part of the cargo, filed their bill on the 17th of August 1840, insisting that the transaction was fraudulent and void; and that at all events, the freight of the homeward cargo belonging to Messrs. M'Calmont, and the outward freight in the hands of the owners of the ship, ought to be applied in part discharge of the bond; they prayed either that the bond might be declared fraudulent and void as against them, or that an account might be taken of what was justly due on the security of the bond, and of all the monies which ought to be first applied in satisfaction of the bond; and that the amount of what was justly payable in respect of that part of the cargo which belonged to the Plaintiffs, might be ascertained, they offering to pay what should appear to be so payable; and in the meantime they asked for an injunction to restrain the proceedings in the Admiralty Court.

The Defendants M'Calmonts by their answer denied all fraud; they stated that they were ready to allow the amount of freight payable by themselves or their firms amounting to about £433 in the usual way, and insisted that this Court neither had, nor ought to have any jurisdiction as to the subject-matter of this suit, especially having regard to the state of the proceedings in the Admiralty Court, and the security given by the Plaintiffs to the parties suing them there.

[412] The Plaintiffs now moved for an injunction in the terms above stated.

Mr. Pemberton, Mr. S. Sharpe, and Mr. Rolt, in support of the motion, contended, that the nature of the transaction was such as to be open to the greatest suspicion, and that an opportunity ought therefore to be given of having it fully investigated. A charge of £5000 was attempted to be thrown upon the owners of the cargo, for the repairs of a ship which had been afterwards sold for £1675 only. The bottomry bond, at a very high rate of interest, had been given to Messrs. M'Calmont, the agents at Pernambuco for Messrs. Benson the owner, and was signed by the master, a person wholly under the controul of the agents, and without the concurrence of the shippers, and now it was sought by these agents to charge the greater part of the amount against the shippers. It did not appear that the advances had been wholly made on the security of the ship, which was necessary for the validity of a bottomry bond, "*The Augusta*" (1 Dod. 285), and this, too, was a proper subject for investigation.

They contended, that the Court had jurisdiction to interfere in all cases where securities had been improperly obtained, and even when the subject related to matters usually determined in the Admiralty Court, *Glascott v. Lang* (3 Myl. & Cr. 451), *Dobson v. Lyall* (Rolls, January 1837). That the Admiralty Court in its proceeding "by act on petition," decided on affidavits only, and had not the means of effectually dealing with a matter so complicated as the present, where it was necessary to have a full discovery from the parties, and the evidence of witnesses abroad; [413] besides which it had not effectual jurisdiction to compel the owners of the other part of the homeward cargo to contribute, nor could it settle the equities as against Messrs. Benson the owners, who had abandoned the ship, and had not appeared in the suit in the Admiralty Court. That for these reasons, the investigations would be much more effectual and complete in this Court.

Mr. Kindersley, Mr. Turner, and Mr. Roupell, *contra*, for Messrs. M'Calmont, contended that there appeared no fraud in the transaction; that the question depended on maritime law and the usage of merchants, and was a subject peculiar to the jurisdiction of the Admiralty Court. That there was no reason for interfering with the proceedings in the Admiralty Court, which had possession of the suit and of the produce of the ship and freight, and had ample powers to determine the several questions arising in it. It had jurisdiction "to consider if a bond is fraudulent," and "if it should happen that there were any unfair charges, they would be referred to the registrar and merchants, and be reduced;" "*Tartar*" (1 Hag. Ad. R. 1), "*The Jacob*" (4 Robinson, 245). So, "if the charges were a matter of dispute;" "*Alexander*" (1 Dod. 278).

The following cases were also cited:—As to the amount of interest charged, "*La Ysabel*" (1 Dod. 273), where 45 per cent. was allowed. As to the proceeding by act on petition, "*Ville de Varsovie*" (2 Dod. 174): to shew that a bottomry bond given to a consignee was not invalid, "*Nelson*" (Hag. Adm. Rep. 169): and that the Admiralty Court will not decide the right to property, "*The Aurora*" (3 Rob. 133), "*The Guardian*" (ib. 93). The other cases referred to were "*Calyppo*" (3 Hag. 163), "*Barbara*" (4 Rob. 1).

[414] Mr. Hall, for Messrs. Benson, did not take any part in the discussion.

Mr. Pemberton, in reply.

THE MASTER OF THE ROLLS postponed giving judgment.

Feb. 22, 1841. THE MASTER OF THE ROLLS [Lord Langdale], after stating the above circumstances, said: For the Plaintiffs it is alleged that the mere circumstance of a bond for £8558, 12s. 4d. being given for the repairs of a ship at Pernambuco, which ship on its voyage from England had, together with its tackle, apparel, and stores, been insured for only £4500, and which ship after the repairs and a single voyage from Pernambuco to Liverpool, was sold for only £1675, is, of itself, evidence either of fraud or of such improvident conduct that the circumstances ought to be investigated before any payment is enforced.

There are in the bill various charges of facts and circumstances tending to shew

either that a fraud was wilfully committed, or, at least, that there was such an entire neglect of the interests of the owners of the cargo, and such an absence of all necessity for resorting to a bottomry bond affecting the cargo, that the Plaintiffs, as owners of the cargo, ought not to be held liable for the bond.

The answers deny the truth of most, if not all, these charges; and certainly, if this case were to be decided merely upon the facts stated or admitted in the answer, the Plaintiffs would not be entitled to the decree which they ask; but the circumstances require explanation, [415] and, in the absence of such explanation as may possibly be hereafter afforded, give rise to very strong suspicion. There seems great reason to believe, that the ship was insured by the owners for more than its worth, and consequently, that the owners and their agent, the master, had no interest to see that unnecessary expense was not incurred; and after making allowance for part of the expense being incurred, not in repairing the ship, but in taking care of the cargo, the expenditure, whether considered with reference to the insured value of the ship or to the value as realised by the subsequent sale, appears to be such as could scarcely have been incurred in a prudent management of the business. M'Calmont & Co., having acted as agents of the ship, by the authority of the master, given to him by the owners, may be considered as the agents of the owners; and it would be extraordinary if the owners, having insured the ship for more than its value, could get it repaired at an expense beyond the value of the ship and freight, and throw the excess upon the owners of the cargo. It is said that the shippers must have seen the repairs going on; but it does not appear that any notice was given them that the cargo would be in any way liable for the repairs. How the fact may really stand, must depend on the evidence to be hereafter adduced; but I am of opinion, that upon the statements made in the affidavits and in the pleadings, there is sufficient to shew that the Plaintiffs are entitled to have this case investigated in a Court of Equity; and this Court having jurisdiction to give relief upon bottomry bonds which have been improperly obtained, the only question is, whether the jurisdiction ought to be exercised after such proceedings as have already taken place in the Court of Admiralty.

Before this bill was filed, the cargo had been arrested, and afterwards released on putting in bail to the amount [416] of £7500, under the authority of the Court of Admiralty. "An act on petition" had been brought by the Defendants on the requisition of the Plaintiffs. The ship was ordered to be sold, and the freight payable on the goods of the Plaintiffs, ordered to be brought into Court.

The Defendants, M'Calmont Brothers & Co., as consignees of M'Calmont & Co., obtained possession of their goods without giving any bail; and the freights payable on these goods has not been paid into the Court of Admiralty.

The Plaintiffs, moreover, claim to have the outward freight of the ship, together with the homeward freight and the proceeds of the ship, applied in reduction of what, if anything, is really due on the bond, before the cargo is resorted to; but the outward freight was received by the owners, and there is no proceeding in the Admiralty Court in respect thereof.

The first question to be tried is, whether the bond is valid; and if so, what is the amount payable upon it. Supposing the bond to be valid, the objects will be:—

First. To realise and apply all the funds which ought to be applied in reduction of the claim, before the cargo is resorted to, including the freight payable on the goods shipped by M'Calmont & Co., and, as the Plaintiffs contend, the outward freight.

Secondly. To apportion the sum which may remain chargeable on the cargo between and amongst the goods of the Plaintiffs, in respect of which they have given bail to the amount of £7500, and the goods which were consigned to and have been received by M'Calmont [417] Brothers & Co., but in respect of which no security has been given.

These are objects which this Court has power to effect, if it should, in the result of this cause appear to be just to do so.

On the other hand, the Court of Admiralty has jurisdiction to decide whether the bond is valid or not, and if the bond be valid, to ascertain by reference to the registrar and merchants what sum is justly payable in respect of it. The Court of Admiralty can well deal with the purchase-money which it has, and also with the

value of the Plaintiffs' goods for which bail was given, and I apprehend that it is not powerless with respect to the freight of the goods consigned to M'Calmont Brothers & Co., or even with respect to the outward cargo, because the Court may refuse to give to M'Calmont Brothers & Co. any relief, unless they, who are the actors in the Admiralty suit, consent to do what is just and equitable on their part, to take all necessary steps to bring proper parties before the Court, and raise all such questions as are necessary to enable the Court to do complete justice to the parties who are sought to be charged. But still it does not appear that the Court of Admiralty can, so conveniently, directly, and effectually as this Court can, compel the Defendants to do all that is necessary for the full and satisfactory investigation and determination of the rights of these parties.

Nothing was done towards determining the rights of the parties in the Admiralty Court before the filing of this bill. The Defendants had obtained bail for the amount of the Plaintiffs' goods, the amount of freight on the Plaintiffs' goods had been brought into Court, and a commission had issued for sale of the ship, and [418] although the ship had been sold, the commission had not been returned. The Defendant's "act on petition" was brought in in May, but nothing was done upon it. It is therefore evident, that the proceedings in the Court of Admiralty are not now in a state so effective for the investigation of the matters in question as the proceedings in this Court, even in this early stage of them, now are.

It is true, that the proceeding "by act on petition" was adopted at the instance of the Plaintiffs, but this was long before it appeared, that the value of the ship was so much less than might have been reasonably expected, and at this time the only proceeding is by "act on petition," which Sir William Scott (*Ville de Varsovie*, 2 Dods. 184) describes as "a summary mode of proceeding in which the parties state their respective cases briefly, and support their statement by affidavits, a form convenient enough in matters of slight interest and not of very delicate investigation." Conceiving that, upon a proper case being made out, and upon certain terms, the form of proceeding in the Admiralty Court might even now be altered and made more effective for the investigation of such a case as this, it is, I think, sufficient for me to say, that the proceedings in the form now adopted cannot be well adapted to a case, which appears to me to require evidence which it might be wholly impossible to obtain on affidavit.

It was suggested that a difficulty might arise in consequence of the money being paid into Court, and the bail being given under the authority of the Admiralty Court; but upon this point it does not seem to me that any doubt ought to be entertained. In a case before Sir William Scott (*The Guardian*, 3 Rob. 94), where he refused to exercise the *juris-diction* in a question of property, he expressed himself thus: "It is a case entirely proper for the discussion of other Courts, to which this Court (i.e., the Court of Admiralty) will undoubtedly be auxiliary in handing over the property as soon as it is determined in whom it legally resides, if the use of its process can be deemed serviceable to justice in carrying their judgments upon that point into direct execution;" and I can scarcely conceive a case in which any Court, in the exercise of its own jurisdiction, would have reluctance to assist any other Court in the administration of justice.

On the whole, therefore, this being a case in which it appears to me, that the transaction ought to be satisfactorily investigated, before the Plaintiffs are compelled to pay what may be due from them on the bond:—this Court having jurisdiction over the subject-matter, and having the means of complete investigation and effectually doing justice between the parties:—the proceedings in the Admiralty Court being now in such a state that (whatever power there may be to adopt a different course of proceeding), the investigation cannot be satisfactorily conducted, and there being equities, the determination of which can be satisfactorily secured in this Court only, I am of opinion that the injunction asked for must be granted.

NOTE.—The judgment was, in principle, affirmed by Lord Cottenham, on the 3d of August 1841.

[420] WILLATS v. BUSBY. Nov. 2, 1840.

A cause stood over for want of parties; one of such parties was brought before the Court, but another was out of the jurisdiction. Liberty was given to enter into evidence as to the former, and to prove the latter out of jurisdiction.

This was a bill filed for the specific performance of a contract for the sale of a freehold estate. When the cause came on for hearing, upon the 6th of August 1840, it was found that all the necessary parties were not before the Court; and the cause was ordered to stand over, for the purpose of the Plaintiff taking such steps as she might be advised with respect to the absent parties.

The Plaintiff accordingly enforced the appearance and answer of Edward Selater Busby, one of such parties, and the cause was now at issue as to him, but David William Busby, the other party, was still out of the jurisdiction of the Court, and had not appeared.

It was now moved, on behalf of the Plaintiff, that she might be at liberty to exhibit interrogatories to prove David W. Busby out of the jurisdiction; and that she might be at liberty, as against Edward S. Busby, to examine the several witnesses who had been examined against the Defendant as to whom the suit was before at issue, and such other witnesses as the Plaintiff might be advised; and that Edward S. Busby might be at liberty to cross-examine such witnesses, and to examine such witnesses by interrogatories, or as he might think fit, and for a commission.

Mr. Pemberton and Mr. James Russell, in support of the motion.

[421] Mr. Bacon, *contrà*, contended that the application was irregular, and that the Plaintiff ought to take steps to compel the appearance of the parties out of the jurisdiction, which might be done under the recent statutes.

THE MASTER OF THE ROLLS. I do not consider this application irregular. It is a great misfortune that the Plaintiff cannot compel the parties out of the jurisdiction to appear and answer; but I think he is entitled, as against those who have appeared, to have the opportunity of proving his case; and as to those abroad, he is entitled to prove them to be out of the jurisdiction.

[421] BAINBRIGGE v. BLAIR. Jan. 14, 1841.

A receiver who had been appointed in consequence of the misconduct and incapacity of trustees under a will, discharged, upon the appointment of new trustees by the Court.

A receiver is appointed for the benefit of all parties interested, and will not therefore be discharged, merely on the application of the party at whose instance he was appointed.

The testator, who died in 1818, devised and bequeathed his real and personal estate to three trustees, upon trust, after payment of his debts and certain legacies, for the Plaintiff for life, with remainder to her first and other sons in tail. The Plaintiff filed this bill for the administration of the estate, and in 1835 applied for a receiver of the estates, which was granted, on the grounds of the misconduct of one, and the incapacity, through age, of the other trustees. Mr. Blair, one of the trustees, became bankrupt, and a supplemental bill being filed, the several trustees were removed, and new trustees had been appointed under the sanction of the Court (1 Beavan, 495), and the estates conveyed to them.

The tenant for life died in 1838, and her eldest son, who was entitled to the estate, subject to the charges, [422] now applied by petition to discharge the receiver, on the ground that the trustees were willing to act, and that the expense of the receiver which amounted to £140 a year, would be saved thereby.

There were charges amounting to £10,000 on the estate, besides the legacies given by the will of the testator, and debts to the amount of £5000. To answer this, there were £8900 consols to the credit of the cause, and the estate produced £2000

a year. No report had been made by the Master of the debts and legacies. The legatees, whose legacies were charged on the real estate, were parties to the suit.

Mr. Pemberton and Mr. Daniel, in support of the petition, contended, that, as responsible persons, approved by the Court, had been appointed trustees, and were willing to act gratuitously, there was no reason to continue the receiver at the expense of the tenant in tail: that the receiver had been appointed on the application of the Plaintiff alone, on the ground of the misconduct of the former trustees; and this ground having been removed, that the necessity for burthening the estate with the expense of a receiver had ceased. The trustees would undertake to pay the money into Court in the same way as the receiver had done.

Mr. S. Sharpe, for the legatees, who were the only parties who resisted the application, contended, that when a receiver is appointed by the Court, he is so appointed on behalf of all parties, and not of the Plaintiff only. *Davis v. The Duke of Marlborough* (2 Swans. 108). That the legatees had priority over the estate of the tenant in tail, and were entitled to the benefit of the [423] receiver. In *Murrough v. French* (2 Molloy, 498) it was held, that "if there are prior creditors parties in a cause, having claims on the estate, and the Court, by appointing a receiver, interferes with their rights, though the Plaintiff may dismiss his bill, yet the Court will protect the rights of such creditors, parties in the cause, by continuing the receiver, putting the persons so protected under terms to file a bill forthwith." Here, the legatees, relying on the security of the receiver, had had no opportunity of satisfying themselves of the solvency and fitness of the new trustees: that the continuance of the receiver was the only mode of compelling the Plaintiff to press forward the cause, and without one the legatees might be indefinitely delayed. He asked, if the receiver should be discharged then that the trustees might enter into their own recognizances for duly accounting for their receipts.

Mr. Pemberton, in reply. The legatees are parties to the cause, and were present at all the proceedings; they are, therefore, aware of the fitness of the trustees.

THE MASTER OF THE ROLLS [Lord Langdale]. There is no doubt, that where a receiver is appointed under the authority of the Court, he is appointed for the benefit of all parties interested: and therefore he will not be discharged merely on the application of the party at whose instance he was appointed. This, however, is not a case in which it is proposed to deprive one party of the protection he has by means of the receiver; but what is asked is, that the trustees should occupy the place of the receiver, and receive the rents and profits, and apply them in the same way as the receiver has been directed to apply them. The only way in [424] which the parties can be prejudiced is this, that whereas the receiver had given security for the due performance of his duty, the trustees would perform it in the execution of their trust, and without giving such security. It is said, that these trustees have been appointed in the absence of the persons who now oppose this application; the answer is, that the latter were parties to the cause, and were served with all the proceedings; the rejoinder is, "we had no occasion to look at the character or responsibility of the new trustees, because there was a receiver in whom we rely." What I have to consider is, that one party ought to have proper protection, and the other ought not to be unnecessarily charged with the costs of a receiver: and I think I ought not to continue the receiver, if I am satisfied that he may be discharged without injury to the legatees. The question then comes to this, whether there is sufficient reliance to be placed in the trustees. It would be quite a different case if the receiver were discharged, and the owner thereby put in possession; that is not the proposal here, it is proposed by means of the trustees, to do without expense that which is done by the receiver at the expense of the owner of the estate; and the only question is, whether it can be properly and satisfactorily done. If any objections were shewn to the trustees, I would not grant the application. In the absence of any personal objections to the trustees, and on the understanding that they will perform this duty gratuitously, I am disposed to discharge the receiver.

His Lordship discharged the receiver, the trustees undertaking, without entering into recognizances, to receive and to pass their accounts half yearly before the Master in the same way as the receiver.

[425] THE ATTORNEY-GENERAL V. KERR. Jan. 14, 1841.

[S. C. 10 L. J. Ch. 177. For other proceedings, see 2 Beav. 420; 4 Beav. 297.
See *Attorney-General v. Pilgrim*, 1849, 12 Beav. 62.]

The papers in the suit were accidentally burnt in the offices of the relator's solicitor, and new office copies became necessary for the hearing of the cause. A decree was afterwards pronounced against the Defendant, with costs as between party and party. Held, that the extra costs occasioned by this accident ought not to be borne by the Defendant.

By the decree, the costs, as between party and party, were ordered to be paid by the Defendants. In the taxation of the costs, it appeared that during the progress of the suit, the offices of the relator's solicitor, which were situate in the Temple, had been accidentally burnt, together with the papers in the cause, and it had therefore become necessary to have second copies of the proceedings in the cause, the charges for which were disallowed by the Master on taxation, he being of opinion that the loss ought not to fall on the Defendant.

This was a petition by way of appeal from the Master's decision, and seeking to have the costs in question disallowed.

Mr. Pemberton, in support of the petition, contended, that as the Defendants had failed in their defence, and were wrong from the beginning, they ought, under the decree, to pay the whole of the costs, which had been necessarily incurred in bringing the cause on before the Court for adjudication: that the papers having been destroyed through no fault or misconduct of the solicitor, had necessarily been supplied, and that the expense, which had been occasioned by the resistance of the Defendants to a just demand, ought to be borne by them. That, in a case analogous in principle, the point had been finally settled by the practice of the Master's office: for, generally, the fees of two counsel only were allowed, but where, by the advancement to the bench of one of the counsel who had been retained, it became necessary to instruct a third, the three fees [426] were allowed. In that case, as in the present, the clients were by accident deprived of the services of one of the counsel they had retained, and the losing party was held bound to bear the burthen of the accident.

Mr. G. Turner and Mr. P. Parry, *contrâ*. These are *extra costs*, which were ordered by the decree to be paid out of the fund, and ought not therefore to be charged against the Defendant. It is said they are necessarily incidental to the prosecution of the suit, so it might be said if the Plaintiff appointed a new solicitor; but the expenses incurred in making him acquainted with the nature of the suit would not fall on the Defendants. If this application be granted, the decision must lead to this, that a person ordered to pay taxed costs is liable for every accidental loss, as if the papers were stolen; besides this, the loss arises from matter foreign to the suit, and is not like the case put of counsels' fees, which are incidental to the suit: and the parties might have insured against loss by fire. If a Defendant is liable for the loss by fire of his adversary's papers while in his solicitor's offices, he would have an interest in the Plaintiff's papers, and consequently a right to see to their protection, he might then go to the solicitor, and insist on their being properly taken care of. This absurdity of such an interference, shews that the party in the hands of whose agent the papers were destroyed, must bear the loss.

Mr. Pemberton, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. There are many classes or degrees of costs: the late clerk in Court, Mr. Jackson, computed not less than seven. (Chancery Commission Report, Appendix B, No. 24, p. 552.) In this case the Defendants are charged with [427] the costs of the cause as between party and party, and the question is, whether they are to be charged with every expense necessarily incurred in the cause, though arising from accidental circumstances over which they have no control, and for the loss of property to which they could afford no protection? I am sorry to hear that the case as to counsel has ever given rise to any question, but I do not think the case analogous. If I were to grant this application, I must lay down the rule that when any additional expense is necessarily incurred by a Plaintiff

in the prosecution of the suit, that expense ought to be part of the costs of the suit as between party and party. I must dismiss this petition with costs.

THE ATTORNEY-GENERAL v. KERR.—After judgment had been given in this case, see 2 Beavan, 420, the terms of the decree as to compensation to Dr. Kerr's estate, became the subject of considerable discussion. The following is an extract of the decree as ultimately settled:—

"And his Lordship doth declare, that the estate of the said William Kerr will, upon the determination of the said term granted by the said lease of the 4th of January 1769, be entitled to have allowed out of the charity estate, compensation for the increased annual value, if any, to the charity at the time of the determination of the term granted by such lease of the said lands and premises comprised therein, arising from or occasioned by the expenditure of the said William Kerr and the said Mary Kerr after his decease, before the filing of the information in the first above-mentioned cause, in and upon the said land and premises, beyond what the annual value of the said land and premises would have been to the said charity at the time of the determination of such last-mentioned lease, supposing the covenants therein contained to have been duly performed; such compensation, if any, to be computed with reference to the additional term intended or expressed to be granted by the said lease of the 18th December 1784. And the said Mary Kerr, or any party or parties therein interested, are to be at liberty to apply to this Court when such order shall be made, upon the footing of the said declaration, as the case may require."

[428] GOOCH v. HAWORTH. Jan. 14, 1841.

A. B. had obtained an order in the Exchequer for payment of costs, against a party to a suit in this Court, who was tenant for life of certain property over which a receiver had been appointed, with directions to pay her the rents. The Court gave leave to A. B., notwithstanding the appointment of receiver, to sue out and execute such writs as he might be advised.

In 1833 Sarah Haworth instituted a suit in the equity side of the Court of Exchequer, which, at the hearing in May 1840, was dismissed with costs, to be paid to Fanny Bostock, a Defendant in that suit. The costs were afterwards taxed at the sum of £398; the certificate of taxation was dated the 8th of July 1840.

Under the 1 & 2 Vict. c. 110, s. 20, and the General Orders of the Court of Exchequer (3 Younge & Col. App. iv.), Fanny Bostock became entitled to issue a writ of *fiat facias* or *elegit*. By the same Act, sect. 11, the sheriff under an *elegit* is authorised to make and deliver execution unto the party suing, of all such lands, &c., as the person against whom execution should be sued, or any person in trust for him, should have been seized, &c.; and it was also enacted by the eighteenth section, that all decrees and orders of Courts of Equity, &c., whereby any money or costs should be payable, should have the effects of judgments in the Superior Courts of Common Law.

Fanny Bostock presented a petition in the above suit of *Gooch v. Haworth*, which had been instituted in this Court, stating these circumstances, and that Sarah Haworth, who was residing in France, had no other property of any kind in this kingdom whereon levy could be made for the said costs, except a life interest in the real estate of Peter Everitt Mestaer, the testator in the cause, which by virtue of orders made in this cause [429] (*Gooch v. Haworth*) were under the management, and in the possession of the receiver of the Court. The rents of the estate were, by order of the Court, paid by the receiver to Sarah Haworth, the tenant for life.

The petition also stated, that if the estate had not been in the hands and possession of the receiver of this Court, the Petitioner would have been able to issue an *elegit* against the said estate, and seize the same for enforcing payment of the costs of the Exchequer suit.

The petition prayed, either that the receiver might be authorised to pay the £398, the amount of taxed costs; or that the Petitioner might be at liberty to sue out

a writ of *elegit*, and put it in execution against the life-estate of Sarah Haworth, and cause the same to be seized, and possession given to the Petitioner, for the purpose of securing the £398, and that the receiver might be ordered to give up possession; and that the Petitioner's costs of this petition might be taxed.

The petition was served on the clerk in Court of Sarah Haworth and on the receiver, and was supported by affidavit.

Mr. Pemberton and Mr. Follett, for the Petitioner.

Mr. C. P. Cooper, *contra*, contended that the interest of Mrs. Haworth was not such as could be taken in execution at law; and that, if the Petitioner had a mere charge to be made effectual in equity, her application was premature, for by the thirteenth section of the Act referred to (1 & 2 Vict. c. 110), it is enacted, that no judgment creditor shall be entitled to proceed in equity to obtain the benefit [430] of his charge, until after the expiration of one year from the time of entering up judgment; and here the decree was in May 1840, and the Master's report in July 1840.

THE MASTER OF THE ROLLS [Lord Langdale] said, the only question was, if the receiver of this Court was to stand in the way of the legal rights of the Petitioner against the property of Mrs. Haworth; that would depend on the purpose for which the receiver had been appointed. The rents, it appeared, were to be paid over to the Respondent; his Lordship, therefore, thought, that notwithstanding the appointment of receiver, the Petitioner ought to be at liberty to sue out and execute such writs as she might be advised; and he made the order in the latter alternative of the prayer of the petition.

[430] STUART v. STUART. Jan. 14, 15, 1841.

[S. C. 10 L. J. Ch. 148; 5 Jur. 3.]

An application under the 4 & 5 W. 4, c. 29, to invest trust funds on Irish security refused, for though for the benefit of the tenant for life, as increasing his income, it was otherwise as to those in remainder, as affording a less secure investment.

The testator gave his real and personal estate to trustees in trust, to convert and lay out the same "in the public funds of Great Britain, or at interest upon Government or real securities in England or Wales," and at their discretion to vary the same. He gave the income to his wife, subject to two several sums of £10,000 each to his daughters, and subject to the interest of his wife, he gave the residue to his two daughters, if they should attain twenty-one years, or marry under that age with the consent of their guardians. There was a gift over to other parties in case of the daughters not obtaining vested interests in the funds. The daughters had been declared to be entitled to the interest on the contingent legacies of £10,000.

[431] The daughters were infants, and some of the parties entitled over in contingency were infants, and married women.

A considerable sum being in Court, the widow presented a petition under the 4 & 5 W. 4, c. 29, praying to be at liberty to lay before the Master proposals for investing it on mortgage on real securities in Ireland, and if he approved of the proposal, to inquire into the title of the estates.

By the Act above cited, persons having authority under any direction, trust, or power, to lend money at interest on real securities in England, Wales, or Great Britain, are authorised to lend the same on real securities in Ireland.

Mr. S. Sharpe, for the petition.

Mr. Pemberton, for the infant Plaintiffs.

Mr. J. J. Jervis, for the Defendant.

Jan. 15. THE MASTER OF THE ROLLS [Lord Langdale]. I have read over the petition and the Act of Parliament, and it seems that the £10,000 is given over to other persons on a certain contingency. If the fund had been in the hands of the trustees, they would have been bound to act for the benefit of all parties interested in the fund, not for the benefit of the tenant for life only. Such being the duty of the trustees, and the fund being in Court, it becomes equally my duty, to see that the proposed variation in the investment will be for the benefit of all the parties interested

therein. The direction in the will to lay out in England or [432] Wales, is a strong argument that the testator's intention was that it should not be laid out elsewhere. I could not order the fund to be laid out in Ireland without a reference to the Master; and the question is, whether it can possibly be for the benefit of all parties that the fund should be so invested. I can conceive that it will be for the benefit of the Petitioner, because the investment will produce her a larger income if vested in Irish securities; but I cannot see how it can be beneficial for those entitled in remainder to change the present secure investment. I do not think that I can even direct a reference to the Master on the subject.

[432] *OLDFIELD v. COBBETT. Jan. 18, 1841.*

[S. C. 2 Beav. 444; 12 Beav. 91; 1 Ph. 557; 1 Coll. 169; 1 Ph. 613.]

An executor or administrator cannot sue or defend *in forma pauperis*.

Mr. Cobbett presented a petition, the object of which was to discharge the order for dispaupering him. (2 Beavan, 444.)

Mr. C. P. Cooper, in support of the petition, contended, that the order was erroneous, as the Defendant was defending not only in his character of executor, but as a legatee and creditor; and that the latter character was sufficient to support the order to defend *in forma pauperis*. That a party might even be examined *pro inter esse suo* as a pauper, *James v. Dore* (2 Dickens, 788).

That there was a difference recognised in practice between an executor suing *in forma pauperis*, and defending in that manner, and as in the latter case he [433] was brought before the Court *in invitum*, he was allowed to defend *in forma pauperis*. *Paradise v. Sheppard* (1 Dick. 136; and see Beames on Costs, App. 377) and *Wallop v. Warburton* (2 Cox, 411), were cited.

Mr. Pemberton was not heard on the other side.

THE MASTER OF THE ROLLS [Lord Langdale]. The Defendant has had the advantage of having the point which he argued in person again discussed with learning and ability by his counsel, but I see no reason for coming to a different conclusion from that to which I arrived on a former occasion.

According to my understanding of the practice of this Court, a party cannot either sue or defend *in forma pauperis* when he happens to be a mere executor or administrator. The practice was clearly ascertained by my immediate predecessor, who had occasion to investigate the point when sitting here. It seems that the Defendant Cobbett being the executor of his father's will, and defending the suit in that character, obtained an order empowering him to defend *in forma pauperis*. Having obtained the order to defend, he has taken the benefit of the Insolvent Act, and his beneficial interest has therefore passed to them, and in consequence the order has been discharged.

It is said that it ought not to be discharged, because Mr. Cobbett has an interest besides, first as creditor, and secondly as legatee; yet it is admitted, that the latter interest is vested in his assignees, and that he is now only a party to this suit in his representative character, in respect of which, if his conduct be without impeach-[434]-ment he may ultimately be declared entitled to have his costs out of the fund.

I am of opinion that the order was right, and this petition must therefore be dismissed with costs.

[434] *HOLFORD v. PHIPPS. Jan. 20, 1841.*

[S. C. 10 L. J. Ch. 209; 5 Jur. 36; 4 Beav. 475.]

Where parties call on trustees to part with their estate on the ground that their trusts have terminated, they are bound clearly and satisfactorily to shew the fact to the trustees.

Trustees of a term, the trusts of which had been put an end to by the *cestui que trust*,

held entitled to their costs of a suit to compel an assignment of the term to the purchaser of the property, on the ground that full and accurate information had not been tendered them before bill filled.

This bill was filed by the purchaser of an estate against the trustees of a marriage settlement, in whom was vested a term of ninety-nine years to secure to the wife upon the death of her husband a rent charge of £400 by way of jointure. The object of the bill was to compel the trustees to surrender the term, and to pay the costs of the suit.

No evidence was entered into, and the only question being one of costs, the Defendants had the benefit of the statements contained in their answer; in this situation of things the facts appeared to be as follows:—

By the settlement made on the marriage of Mr. and Mrs. Crespigny, dated in 1814, Mr. Crespigny granted to his wife out of large real estates, a rent charge of £400 for life, in case she should survive him, as her jointure and in bar of dower, and he demised the estate to three trustees, Phipps, Trent, and Murray, for a term of ninety-nine years on trusts, for securing the same. In 1837 Mr. Crespigny and his eldest son, who had attained twenty-one, agreed to sell the estate to Major Holford, and the latter retained a sum of £11,430 on mortgage of the estate, as an indemnity against the [435] jointure of £400 a year. So far as appeared, the sale was effected without any communication whatever with the trustees, but on the 29th of January 1838 the draft of a deed was sent to the trustees, whereby Mrs. Crespigny purported to release her jointure of £400 a year, and whereby the trustees by her direction, purported to convey the term of ninety-nine years, to the intent that it might merge. No consideration appeared on the deed for the release of Mrs. Crespigny's right.

On the 9th of February 1838 Mr. and Mrs. Crespigny called at the office of the solicitor of the Defendants, and there had an interview with Defendant Murray, and upon that occasion Mrs. Crespigny stated, that she was willing to release her jointure, provided the said annual sum of £400 should be properly secured to her in some other way, and that her husband then said, that the annuity should be secured by an investment of stock; whereupon the Defendant Murray observed, that if such stock should be placed in the names of the trustees of the marriage settlement, the trustees would assign the term, but Mr. Crespigny the husband, refused to allow such stock to be invested in the names of the trustees of the marriage settlement. On the day following, the 10th of February 1838, Mr. Murray returned the draft with the following memorandum indorsed thereon:—"Having looked at this draft, I must express my surprise that it was presented to me without any kind of explanation. With Captain Trent, the brother of the lady, I have now communicated, and he desires me to state that he was equally uninformed of the proposed surrender of Mrs. Crespigny's jointure of £400 per annum; he however concurs with me in agreeing that if the sum retained by Major Holford (viz., the sum of [436] £11,430) is invested in the funds, or on mortgage in the trustees' names for protecting this jointure, he will consent to surrender the term, but not otherwise. In this Captain Phipps the other trustee coincides."

Nothing was shewn to have taken place between the parties between this time (the 10th of February 1838), and the 8th of November, when the Plaintiff's solicitor wrote to the trustees as follows:—"On the part of Major Holford, the purchaser of Mr. Charles Crespigny's estate of Cathedine, in the county of Brecon, as well as on that of Mr. and Mrs. Charles Crespigny, we are instructed to apply to you to know whether you will assign the term of ninety-nine years vested in you and your co-trustees for securing Mrs. Crespigny's jointure of £400. Mrs. Crespigny by a deed acknowledged according to the statute has discharged the estate from the jointure, as she has an undoubted right to do; and Major Holford, having paid the whole consideration money, is entitled to have the term assigned to a trustee of his nomination. Mr. Crespigny has amply secured Mrs. Crespigny's jointure by an investment of a competent sum in the public funds, and the deed by which it is secured, we are willing, for your satisfaction, but not as a matter of right, to produce and shew to you before any proceedings are taken to enforce an assignment. We have thought it right to require an explicit answer, whether or not you will assign the term, and should you decline to do so, for what reason."

No answer was returned to this letter, and nothing more appeared to have been done until the 6th of February 1839, when Major Holford filed this bill against the trustees, stating that Mrs. Crespigny by deed duly acknowledged, dated the 10th of April 1838, had released her jointure, and that nevertheless the [437] trustees refused to execute the deed of assignment, though a provision had been made for the jointure by an investment in the funds in the names of three trustees; the bill prayed for a surrender of the term, and that the trustees might pay the costs of the suit.

The deeds which were received in evidence by admissions between the parties, shewed that the estates in question had been conveyed to the purchaser on the 5th of April 1837, who retained the sum of £11,430 on mortgage, as an indemnity against the rent charge until it had been released; and that by a deed of the 7th of April 1837, the purchaser mortgaged the property in fee to secure the sum retained; it appeared also from a declaration of trust, that on the 6th of April 1838 Mr. Crespigny had transferred the sum of £11,428 3½ per cents. to trustees for the purpose of securing the £400 a year.

The Defendants by their answer stated, that the settlement of 1814 had been made under an order of this Court, Mrs. Crespigny being at the time of her marriage a ward; that no evidence of the execution and acknowledgment of the deed of the 10th of April 1838 by Mrs. Crespigny had been produced to them, and that no ingrossment thereof had been tendered or produced to them. They submitted that they ought not to have taken upon themselves to determine whether Mrs. Crespigny had power to release her jointure, and, that they ought not to render any assistance or voluntarily to do any act to defeat the aforesaid provision for Mrs. Crespigny. They further insisted, that if they were bound to release the term (in case the said Mrs. Crespigny had duly released her jointure), proper evidence of such release and of all acts essential to make the same valid ought to have been produced to them; but that [438] such evidence had not been produced, and that no deed had ever been tendered to them for their execution, or produced or shewn to them.

Mr. E. J. Lloyd, for the Plaintiff. Upon Mrs. Crespigny releasing her jointure, the trustees possessed a bare legal term, and had no longer any trust to execute. They were bound, therefore, to assign the term to the purchaser who had paid the whole of his purchase-money; they had no right to stipulate for terms, and insist that an investment should be made in their own names to secure the jointure. They absolutely refused to assign the term, except on certain conditions which they were not justified in imposing; and if they had taken the opinion of any counsel, they would have been advised that their objection could not be sustained. They did not do this, but exceeded their duty; their vexatious conduct rendered this suit necessary, and they ought therefore to pay the costs which they have occasioned.

They now say, that no deed or evidence was tendered to them, but they made no such requisition; to the letter of November 1838, which gave them full information, they returned no answer; this shewed that they persisted in their refusal to assign until their terms had been complied with. He cited *Angier v. Stannard* (3 Myl. & K. 566), *Willis v. Hiscox* (4 Myl. & Cr. 197).

Mr. Pemberton and Mr. Piggott, *contra*. The Defendants have no interest, except to protect the rights of the married lady, for which purpose alone they were appointed by this Court; having no interest it was the duty of those who called on them to take any active step and determine the trusts, to shew, satisfactorily, that the [439] trustees would incur no personal responsibility; and that their *cestui que trust* had fairly and with full knowledge given up her rights, and that they were satisfactorily provided for.

The sale took place altogether behind the back of the trustees, and in January 1838, several months after the conveyance, they were suddenly called on to divest themselves of the term. In the next month Mrs. Crespigny herself stated that she was only willing to give up her jointure, "provided that it could be properly secured in some other way;" and to this day it had not been shewn that such security has been given. Nothing was done from February to November, and then no further proof was furnished to the trustees. Surely, therefore, under these circumstances, the trustees were justified in not executing an assignment of the term, if it had been tendered, which it has not. A trustee would not be justified in paying over a legacy

to the husband of a married woman, until a provision had been made for her out of it.

The rule of Court is, that trustees are entitled to their costs, unless they act from motives of obstinacy and caprice. *Taylor v. Glanville* (3 Madd. 177). Even where they act erroneously, the Court gives them their costs, *Poole v. Pass* (1 Beav. 600), and the Court in none of these cases have ordered them to bear the costs of their *cestui que trusts*. *Knight v. Martin* (1 Russ. & Myl. 70), *Angier v. Stannard*. In the latter case there were many circumstances of conduct which are not set out in the report, and which influenced Sir John Leach in his decision.

Mr. Lloyd, in reply.

[440] THE MASTER OF THE ROLLS [Lord Langdale]. The arrangements for the sale of this property appear to have been made without any communication with the trustees, and the first intimation to them, so far as appears, was the sending the draft in January, whereby the trustees were suddenly called on to assign the term for the purpose of its being merged, and to divest themselves of their legal power to protect this jointure. The draft was returned on the 10th of February 1838, and though the parties proceeded to act on the arrangement, and got the assignment executed by Mrs. Crespigny in April following, yet I do not find that any communication was made to the trustees until November, when they were peremptorily called on to execute the assignment. No answer was sent, and this bill was filed.

Though I consider that an answer ought to have been sent to that letter, yet I think that I never heard a more unreasonable demand than that which is now made for the whole costs of this proceeding. According to the present constitution of our law, a very large proportion of the property in this country is vested in trustees; and it is too often manifest in this Court, that, in dealing with trust property, trustees have a very arduous and painful duty to perform; their greatest difficulty ordinarily seems to be to say "no" to the importunities and requests of their *cestui que trusts*. They are subject to the most hazardous responsibilities, and in cases where they have mistaken their duties and acted erroneously, and where they have assisted or obstructed parties in the disposition of the trust property, we find they have been made personally liable for the consequences. It is therefore of the utmost importance that they should do nothing but what is perfectly clear and free from doubt. In the present case the trustees had a [441] duty to perform in the protection of this married lady; and when it was alleged that this duty had been put an end to, they were entitled to have the facts clearly and satisfactorily proved to them.

It seems, that between the time when the trustees received the draft assignment and returned it with the memorandum stated, they had had a personal communication with their *cestui que trust*, who said she was willing to release her jointure, provided it could be properly secured in some other way; this communication took place the very day preceding that, on which the memorandum on the draft was written. The Plaintiff alleges by his counsel, that I must take this memorandum as a determination on the part of the trustees, that, unless their conditions were complied with, they would make no assignment of the term. It does not, however, appear, that they had had any communication in the *interim* with their *cestui que trust*, and I cannot assume, that on being properly satisfied, that that which was alleged to have been done had been rightly performed, the trustees would have refused to do what is now asked. Nothing more occurred until the month of November, when, without taking the trouble of satisfying the Defendants that the trusts had been determined, the Plaintiff's solicitor wrote the letter of the 8th of November. No notice seems to have been taken of it, and then this bill was filed. I am of opinion that the trustees were entitled to further explanation and evidence, which was not produced to them; and that without it, they were justified in refraining from making the assignment. I certainly think that an answer ought to have been returned to the letter; but the neglect to do so, did not relieve the Plaintiff from the performance of his duty of shewing to the trustees that there was an end of the trust, and of producing to them the deed effecting it. [442] This ought to have been done before the bill was filed, if the Plaintiff wished to charge the trustees with the costs of these proceedings.

With regard to the general observations which have been made on trustees during the argument, and without referring to these Defendants, I must observe, that in my experience I have known very many cases in which changes of trustees have been

made, solely for the purpose of getting the trust property into the hands of trustees who were willing to comply with requests which the old trustees had refused to accede to. Without imputing any such intention in this case, yet when I find the husband and wife in the presence of the trustees disagreeing, the trustees saying they will be satisfied, if a proper investment to secure the jointure be made in their names, and the husband declining, though he afterwards made an investment in the names of other trustees, I think there was good ground for the Defendants to insist on having the matter cleared up before they merged the term.

Thinking, therefore, that the trustees were entitled to have full and accurate information, and the production of the deed before they could be called on to execute the assignment, and their trusts now appearing to be at an end, there must be a decree for the assignment of the term, and the Plaintiff must pay the trustees their costs of suit.

[443] *MAYER v. TOWNSEND. Jan. 28, 1841.*

[S. C. 10 L. J. Ch. 216; 5 Jur. 91. See *Salisbury v. Petty*, 1843, 3 Hare, 91; *Lassence v. Tierney*, 1849, 1 Mac. & G. 563; 41 E. R. 1384; *Butler v. Gray*, 1869, L. R. 5 Ch. 30; *Bousfield v. Bousfield*, 1869, 21 L. T. 137; *Carter v. Smith*, 1871, 25 L. T. 555; *Savage v. Tyers*, 1872, L. R. 7 Ch. 362; *In re Mercer's Trusts*, 1876, 4 Ch. D. 188; *In re Sidway Hall Estate*, 1877, 37 L. T. 457.]

A testator directed his trustees "to raise £5000 for his daughter," and to invest "his said daughter's legacy" and pay the interest to her for life, for her separate use, and not to be under the control of any husband, with remainder to her children absolutely, and he gave her the power of appointing a life interest to her husband. The will contained no ultimate limitation of the property, but charged the legacy on the real estate in case of a deficiency of the personality. Held, that subject to the interests given to the children, the daughter took an absolute interest, and having died unmarried, that her personal representatives were entitled thereto.

The testator, Dr. Townsend, by his will, dated the 7th of June 1830, gave his residuary personal estate to trustees, in the first place to pay his debts, and subject thereto, to "raise therefrom the sum of £5000 for his daughter Elizabeth L. Townsend; and when, and as soon as he or they might have obtained the same, then upon trust to place his said daughter's legacy at interest on Government or real security, and to pay and apply the dividends to arise thereby, unto his said daughter for and during the term of her natural life, to and for her sole and separate use and benefit;" and he declared the same should not be liable to the debts, controul, or engagements of any husband with whom she might marry; "and from and immediately after the decease of his said daughter (subject nevertheless to the proviso thereafter contained), he gave and bequeathed the legacy so thereinbefore given to her by him, to be equally divided between her children lawfully begotten, share and share alike; but if there should be only one such child, then the whole to such one child, his executors or administrators. Provided always, and it was his will and meaning, and he did thereby declare, that it should and might be lawful for his said daughter, provided she might marry, to direct, appoint, and require by any will or deed, under her hand, his said trustees, and the survivor, &c., to pay the interest of the said sum of £5000 so given by him, to her husband, for and during the term of his natural [444] life, in case he might outlive her;" and in case his personal estate should not be adequate to raise "the legacy" bequeathed to his daughter, then he charged it on certain real estates.

The testator and his wife had a power of appointment over a sum of £2000 for his younger children charged on another estate. On the 7th of June 1830 they appointed £1950, part of it, to trustees, upon trust to invest and pay it to his daughter Elizabeth L. Townsend for life for her separate use, with remainder to her children, with power for her to give her husband a life interest in the fund, "and subject thereto, upon trust for the said Elizabeth L. Townsend, her executors, administrators, and assigns."

By a codicil of even date, after referring to the deed of appointment, the testator declared, that the sum of £1950 should be considered as part of the legacy given to

her by his will, and he charged the residue on certain hereditaments which he had devised to the Defendant William Townsend.

The testator died in 1830, and his personal estate proved insufficient for the payment of his debts and legacies. His daughter died in 1838 without ever having been married. The Plaintiff, who was her executor, filed this bill to have the £3050, the residue of the £5000 after deducting the £1950 raised out of the real estates charged therewith.

Mr. Tinney, Mr. Pemberton, and Mr. K. Parker, for the Plaintiff. The gift was absolute to the daughter in the first instance, but the testator afterwards subjected that in-[445]-terest to certain limitations to her children, and to a power in favour of her husband; the absolute gift, therefore, remained in her, subject to the qualification introduced in favour of the husband and children which failed; the daughter therefore took an absolute interest, and the Plaintiff, as representing her, is now entitled. The expressions "my said daughter's legacy," "the legacy given to her," "the legacy bequeathed to my daughter," shew clearly that the testator intended to give it her absolutely, and the ultimate trust in the deed of £1950, to her executors, administrators, and assigns, fortifies that conclusion.

Mr. G. Turner and Mr. Parry, *contra*, for the Defendant out of whose estate it was sought to raise the charge, contended, that the daughter did not take an absolute interest in the £3050. The trustees were directed to raise the £5000, but as to her for the limited interest afterwards specified, namely, for life only, and then for the other purposes stated; these having all failed, and there being no ultimate trust, the charge sunk for the benefit of those entitled to the estate out of which it was to be raised. (See *Cooke v. The Stationers' Company*, 3 Myl. & K. 262.) In *Hewitt v. Wright* (1 Bro. C. C. 86; and see *Gawler v. Standerwick*, 2 Cox, 15), an estate was conveyed, in trust to sell and raise a sum of £1500, and pay the interest to D. till she married, and to pay her the principal within twelve months after her marriage. D. died without having been married, and it was held that the £1500 resulted to the settler. A trust in favour of the daughter, further than to the extent expressed, cannot be implied; for the law never implies, and the Court never presumes, a trust, except in a case of absolute necessity. *Cook v. Fountain* (3 Swans. 592).

[446] The deed in no way strengthens the construction contended for by the Plaintiff, for it shews that when the testator intended to give an absolute interest to his daughter in default of children, he accurately expresses it. The husband, also, is to have no controul over the property, but he might obtain it, contrary to the will of the testator, if the wife were held to take an absolute interest, and died without children, leaving a husband surviving.

Mr. Willcock, for a trustee.

THE MASTER OF THE ROLLS [Lord Langdale]. In one sense this was not an absolute gift to the daughter, for it is made subject to certain restrictions and contingencies which her father had in contemplation. The testator first directs the trustees "to raise the sum of £5000 for his daughter Elizabeth." If he had ended there, she would, without any question whatever, have been entitled to the legacy absolutely; he then directs, that when the trustees should have obtained the same, they should invest it, and then he imposes certain restrictions; and first the trustees are to apply the dividends unto the daughter for her separate use for life. Suppose the will had ended here, I apprehend the daughter, being unmarried at her father's death, would have been entitled to have taken the £5000 absolutely, notwithstanding the gift was to her separate use, and notwithstanding the decision of Sir John Leach to the contrary, which has been since overruled (*Woodmeston v. Walker*, 2 Russ. & M. 197). After the decease of the daughter, there is a limitation to her children; by this contingency, she might be deprived of her absolute interest, and it might go to her children; there follows a power under which she might further diminish her interest, by giving a life-estate to any husband. It is said, that it could not be intended that she should take an absolute interest, be-[447]-cause, if there were no children, a husband surviving her, might take the property absolutely; I apprehend there would be a great deal to say on that point; but it does not arise; the question is, whether the legacy given absolutely by the first clause, is to be subject to any other contingencies or limitations beyond those expressed; and without looking to the deed (which would confirm my opinion), it appears to me that the qualifications and

restrictions ought not to be extended beyond those expressed. None of these having taken effect, the absolute interest remained in the daughter, and the Plaintiff is entitled to have the amount raised.

[447] THE ATTORNEY-GENERAL v. WRIGHT. Feb. 8, 1841.

[S. C. 10 L. J. Ch. 234.]

Notice of motion given *on behalf of a relator* in an information, held irregular; it should be on behalf of the Attorney-General.

This was an information filed by the Attorney-General at the instance of a relator.

Notice of motion was given, "*on behalf of the relator*," that the Defendant should pay a sum of money into Court.

Mr. Chandless, *contra*, objected to the form of the notice of motion, the Court not recognising the relator as Plaintiff in an information.

THE MASTER OF THE ROLLS [Lord Langdale]. It is wrong in form. Relators should know that they are not parties to informations, and have no right of their own authority to make any application to the Court. The Attorney-General is the only person whom the Court recognises in such cases. (See *Attorney-General v. The Ironmongers' Company*, 2 Beav. 313.)

[448] BALLS v. MARGRAVE. Feb. 11, 1841.

[S. C. 3 Beav. 284; 4 Beav. 119.]

A. brought an action at law against B., and filed a bill of discovery, in aid of the action, against B. alone. B. pleaded that he was a mere mortgagee, and that he ought not to be compelled to give the discovery in the absence of C. the mortgagor. The plea was overruled.

This cause again came on (3 Beav. 284) upon a plea to a bill of discovery, in aid of an action at law.

The bill stated that in the year 1769 Thomas Cheek, being seized in fee-simple of certain property, demised it to one Joseph Rowland for a term of ninety-nine years, at a rent of £26, which Rowland, for himself, his executors, administrators, and assigns, covenanted to pay. It traced the devolution of the interest of Thomas Cheek, the lessor, to the Plaintiff, and shewed how the remainder of the term had become vested in the Defendant by an assignment from a Lady Daniel. It stated that the Defendant was in possession of the property, and that the rent being considerably in arrear, the Plaintiff had commenced an action of covenant against the Defendant Margrave, in the Court of Exchequer, to recover the same; but that the indenture of lease being in the possession of the Defendant, who refused to produce the same, or to allow the Plaintiff to have an inspection, and there being no counterpart thereof, the Plaintiff was unable to proceed in the action without a discovery.

The bill prayed a discovery of the matters stated in the bill, and especially of the particulars of the lease; and that the Plaintiff might have the benefit of such discovery at the trial of the action; and that the lease might be produced.

The Defendant pleaded in effect, that the conveyance by Lady Daniel to Margrave was by way of mort-[449]-gage, and subject to redemption; that the equity of redemption was vested in Chinn, who had not been made a party to the suit; and that, in his absence, the Defendant was not bound, and ought not to be compelled to give to the Plaintiff the discovery and production sought by the bill.

Mr. Kindersley and Mr. Evans, in support of the plea, contended that Chinn ought to have been made a party to this suit, in order to entitle the Plaintiff to the discovery which they sought. [Mr. Pemberton. That would be impossible. *Glyn v.*

Scars (3 Myl. & K. 450; 1 Y. & Coll. 644; and 1 West, P. C. 258) and *Irving v. Thompson* (9 Sim. 17) shew that no person can be made a party to a bill of discovery in aid of an action at law who is not a party to the action.] Lord Eldon, in *Lambert v. Rogers* (2 Mer. 490; and see *Faw v. Guppy*, Hare Disc. 124), lays it down "that a mortgagee has no right to shew his mortgagor's title." The Defendant, therefore, would not be justified in disclosing the title in the absence of the mortgagor.

Mr. Pemberton and Mr. Taylor were not heard by

THE MASTER OF THE ROLLS [Lord Langdale], who said: This plea must be overruled. The action is brought against a person who is in possession of the property, and the alleged mortgagor is no party to the action. The bill is for a discovery in aid of the proceedings at law; and the case is very different from that cited, which was for relief. I have no authority to alter the practice of the Court, which does not permit any person to be made a Defendant to a bill for discovery in aid of an action who is not a party to that action. I have no hesitation at all in overruling this plea.

[450] RADBURN v. JERVIS. HARE v. HILL. Nov. 23, 26, 1840; Feb. 22, 1841.

A testator, in his lifetime, by bond secured to H. C. C. an annuity of £300 for life, payable on the usual quarter days, &c.; and by his will he confirmed it, and bequeathed a further annuity of £200, payable in the same manner, it being his intention that she should receive an annuity of £500 instead of £300. By a codicil, the testator directed his trustees to raise £500 a year and pay the same to H. C. C. during her life, by quarterly payments. Held, that the second annuity was cumulative.

A testator appointed A. B. and C. D. trustees and executors of his will. By a codicil, he bequeathed to each of the trustees named in his will the sum of £5000, on condition that he accepted the trusts thereof. By a subsequent codicil, he revoked all that part of his will which related to C. D., and requested E. F. "to undertake and fulfil the same purposes and intentions, and on the same conditions, for the effecting of which he had appointed the said C. D. By a subsequent codicil he revoked the appointment of A. B. and C. D. as trustees and executors, and all legacies to them, and he nominated E. F. executor and trustee thereof. Held, that E. F. was entitled to the legacy of £5000.

A testator devised a portion of his real estate to trustees for sale, and directed them to apply the proceeds and his personal estate in payment of the legacies and annuities thereby bequeathed; and in case the same should be insufficient, he charged all his real estate with the payment thereof. By several unattested codicils, he gave further legacies and annuities, and subsequently he executed a duly attested codicil, whereby he varied the appointment of trustees and executors. Held, that the legacies and annuities bequeathed by the unattested codicils, were not charged on the real estate.

A perpetual annuity was granted by King Charles the Second to A. and his heirs payable out of the coal duties. Held, that though descendable to the heirs, it was personal and not real estate.

Several questions arose in this cause upon the will and thirteen codicils of Sir Thomas Clarges, Bart., which so far as they are material, were as follows:—

By his will, duly attested and dated the 18th day of August 1821, the testator expressed himself as follows: "I give and devise unto and to the use of Henry Brooksbank, of Pall Mall, Middlesex, banker, and Johnathan Moore, of Gray's Inn, Middlesex, gentleman, their heirs, executors, and administrators, according to the natures and qualities thereof respectively, my manors and estates of Sutton-upon-Derwent in the county of York, and of Norton, Disney, and Bitshfield in the county of Lincoln, [451] the freehold annuity of £500 per annum, secured to me and my heirs under a grant from King Charles II., my moiety of the theatre at Brighthelmstone, in the county of Sussex, and all and singular other my lands, tenements, goods, chattels, and effects, of what nature or kind soever and wheresoever, upon trust as to the said manors and estates of Sutton-upon-Derwent and at Norton and Disney, and

their appurtenances" (the testator then declared the trusts of this property and some leaseholds in favour of certain families therein named, and then continued): "As to my estate of Bitchfield, I direct the same to be sold and converted into money; and hereby authorise my said trustees, or the trustees or trustee for the time being of this my will, to give receipts for the purchase-money upon such sale, and declare that their or his receipt shall discharge any purchaser from all liability in case of non-application or misapplication thereof. And as well as to the money to be produced from such sale as also to the residue of my estate and effects whatsoever and wheresoever not hereinbefore specifically devised or bequeathed, in trust, thereout, to pay all my just debts, the expenses of my funeral, and of proving this my will, and the legacies and annuities hereby bequeathed; and in case the same shall be insufficient for that purpose, then I charge all my real estate with the payment of the same respectively, and subject thereto, for the said Sir Dudley Saint Leger Hill, his heirs, executors, administrators, and assigns, for his and their own use and benefit." He then gave the trustees certain powers, and directed that the said Jonathan Moore should be allowed to act as the solicitor or attorney in the management of the trusts thereby created, so long as he should continue a trustee under the said will, and should also act as receiver for the same; and he gave to his trustees a power of sale and exchange over his real estates, and proceeded: [452] "And I hereby confirm three several bonds, by one of which I have secured one annuity of £300 to Harriet Catherine Cock, of Brighthelmstone aforesaid, spinster, during her life, in the event of her surviving me; by the second of which, an annuity of the like amount is secured to Sarah Cock of Bellevue Cottage East, in Brighthelmstone aforesaid, during her life, in the event of her surviving me and the said Harriet Catherine Cock; and the third of which bonds secures an annuity of the same amount to William Cock of Brighthelmstone aforesaid, Esquire, for his life, in the event of his surviving me, the said Harriet Catherine Cock, and the said Sarah Cock; and, in addition to the £300 so secured to the said Harriet Catherine Cock, I give and bequeath to her the further annuity or yearly sum of £200, to become due and be payable at the same days and in the same proportions, and in every respect in the same manner, as in the said bond by which the said annuity of £300 is secured to her, it being my intention that the said Harriet Catherine Cock shall receive a full annuity of £500, to be payable and be considered, in every respect, as if that sum had been originally mentioned in the said bond, instead of the said sum of £300." The testator appointed Henry Brooksbank and Jonathan Moore executors of his will.

The testator afterwards made thirteen codicils to his will, two only of which, viz., the first and eleventh, were attested by three witnesses.

By the first he merely altered the specific devise.

The third, so far as affected the question, was as follows: "I direct the trustees named in my will to raise the annual sum of £500, and to pay the same unto Harriet Catherine Cock during her life by quarterly [453] payments." "I give likewise and bequeath to each of the trustees named in my will the sum of £5000, on condition that he accepts the trusts thereof; also to Mr. Jonathan Moore of Gray's Inn, in consideration of the friendly regard and zeal he has for many years shewn in my concerns, £2000. January 26th, 1826."

The sixth was as follows: "In consideration of the very kind and liberal attention Henry Brooksbank, Esquire, has hitherto constantly displayed in my concerns, I bequeath to him the sum of £5000; and I declare that this sum, and also the sum of £2000 to Mr. Jonathan Moore, are in addition to the sums given to them as trustees to my will."

The ninth was as follows: "I hereby revoke and annul all that part of my last will and testament which relates to Mr. Jonathan Moore, and I hereby request Mr. Jonathan Brundrett, of the Temple, London, to undertake and fulfil the same purposes and intentions and on the same conditions, for the effecting of which I had appointed the said Mr. Jonathan Moore. June 22d, 1826."

The eleventh, which was duly attested by three witnesses, was as follows: "This is a further codicil to the last will and testament of me Sir Thomas Clarges, Bart., made this 10th day of April 1828. I hereby do revoke the appointment of Mr. H. Brooksbank and Jonathan Moore as executors and trustees of my will; and do also revoke all and every legacy and bequest whatsoever to them given and bequeathed

either by my last will or any codicil thereto, or any previous will or codicil thereto; and I hereby nominate, constitute, and appoint Jonathan Brundrett, Esquire, of the Inner Temple, gentleman, executor and trustee of my will."

[454] By his codicils he had given several annuities and pecuniary legacies.

The testator died in February 1834, and his will was proved by Jonathan Brundrett alone.

With respect to the annuity of £300 to Harriett Catherine Cock, it is necessary to state, that the testator had, in his lifetime, executed a bond whereby he secured to her an annuity of £300, to be paid to her during her life, by quarterly payments, on the usual quarter days, and a proportionate part to be paid up to the time of her death; with a provision that she was not to alienate or encumber the annuity, and that the same was to be settled, on her marriage.

It should be also stated, with reference to the freehold annuity of £500 a year, mentioned in the testator's will, that by letters patent dated the 26th of November, in the thirteenth year of the reign of King Charles II., His Majesty, in consideration of the signal services done and performed for and in his restoration by Sir Thomas Clarges, Knight, who was, by many hazards, eminently and opportunely instrumental therein, granted "unto Sir Thomas Clarges, his heirs and assigns for ever, one annuity or yearly pension of £500" out of the duty or composition of 12d. in the chaldron for coal.

The several questions which arose under these circumstances were:—

First. Whether the annuity of £500 bequeathed by the third codicil to Harriett Catherine Cock was in addition to or in substitution for the legacy of £500 which the testator, by his will, gave her in lieu of the annuity of [455] £300 secured by his bond. As to this question *Hurst v. Beach* (5 Mad. 351), *Fraser v. Byng* (1 Russ. & M. 90) were cited.

Secondly. Whether, under the fifth, eleventh, and twelfth codicils, Jonathan Brundrett was entitled to a legacy of £5000. On this point *Barber v. Barber* (3 Myl. & Cr. 688) was referred to.

Thirdly. Whether the legacies given by the unattested codicils were charged by the will on the real estate; and, if not, whether they were so charged by the thirteenth codicil, which was duly attested. As to the effect of republication, the following cases were cited: 1 *Wms. Saunders*, 277, *e* and *f*, *Utterton v. Robins* (1 Ad. & E. 423), *Guest v. Willasey* (2 Bing. 429; and 3 Bing. 614), *Gordon v. Lord Reay* (5 Sim. 274), *Crosbie v. Macdowal* (4 Ves. 610), *Goodtitle v. Meredith* (2 M. & S. 5), *Barnes v. Cross* (1 Ves. jun. 486; and 4 Bro. C. C. 2), *Warren v. Davies* (2 Myl. & K. 49), *Gibson v. Lord Montfort* (1 Ves. sen. 485); and as to the annuities and legacies given by the intermediate unattested codicils, the following cases were cited: *Masters v. Masters* (1 P. W. 420), *Hewell v. Whitaker* (3 Russ. 343), *Brudenell v. Boughton* (2 Atk. 274), *Habergham v. Vincent* (2 Ves. jun. 236), *Bonner v. Bonner* (13 Ves. 378), *Strong v. Ingram* (6 Sim. 197), *Smart v. Prujean* (6 Ves. 560).

Fourthly. Whether the real estate specifically devised should not be exonerated out of the general personal estate and the estates not specifically devised.

[456] And fifthly. Whether the perpetual annuity of £500 a year, which in the will was called a freehold annuity, was to be considered as real or personal estate. On this point *The Earl of Stafford v. Buckley* (2 Ves. sen. 171) and *Aubin v. Daly* (4 B. & Ald. 59) were cited.

Mr. Treslove and Mr. Wilcock, for the Plaintiff Richard G. Hare.

Mr. Kindersley and Mr. Bacon, for the heir at law.

Mr. Pemberton and Mr. D. James, for Jonathan Brundrett.

Mr. James Russell and Mr. Prendergast, for H. C. Cock.

Mr. Tinney and Mr. James Campbell, for devisees.

And Mr. K. Parker and Mr. Rogers, for other parties.

Feb. 22, 1841. THE MASTER OF THE ROLLS [Lord Langdale]. This cause came on to be heard on exceptions to the Master's report, and for further directions.

The testator Sir Thomas Clarges had made a will which was duly executed and attested, and thirteen codicils, of which two only were duly executed and attested. The decree established the will and the two attested codicils, and directed various accounts to be taken. The Master made his report on the 28th of February 1840, and to this report two exceptions have been taken.

The first relates to an annuity of £500 which was given to Harriett Catherine Cock by the fifth codicil, [457] and which the Master has found her to be entitled to, in addition to an annuity directed to be paid to her by the will. The exception insists that the Master ought not so to have found.

It appears, that the testator had in his lifetime executed a bond, whereby he secured to Harriett Catherine Cock an annuity of £300 to be paid to her during her life, by quarterly payments on the usual quarter days, and a proportionate part to be paid up to the time of her death, with a provision that she was not to alienate or encumber the annuity; and that the same was to be settled on her marriage. By the will he confirms this annuity, and gives to the annuitant a further yearly sum of £200, to become due and payable at the same days and in the same proportions, and in every respect in the same manner as in the bond by which the £200 was secured to her; it being the testator's intention that she should receive an annuity of £500, instead of an annuity of £300. By the fifth codicil, without taking any notice of the bond or of the direction in the will, the testator expresses himself thus:—"I direct the trustees named in my will to raise the annual sum of £500, and pay the same to Harriett Catherine Cock during her life by quarterly payments;" and under these circumstances I concur in the finding of the Master. Whatever we may conjecture as to the testator's intention, and however improbable it may seem, that he intended to double the annuity, yet, having regard to the modified interest in the annuity secured by the bond and confirmed and increased by the will, and to the mode in which the annuity of £500 is given by the codicil, and the rules adopted by this Court, for the purpose of determining, whether gifts by successive instruments are to be deemed substitutionary or accumulative, it appears to me, that the gift by this codicil must be taken to be additional. The principal argument for the exception was founded [458] on the expression, "the annual sum of £500," which it was said must refer to the annuity of £500, the payment of which was directed by the will; and the testator may have so intended it, but if he did, I think that he has not expressed himself with sufficient distinctness; and it does not appear to me that the words are necessarily to be taken as referential to the annuity of £500, the amount of the annuity secured by the bond, and confirmed and increased by the will; I must therefore overrule this exception.

The second exception relates to a legacy of £5000, to which the Master had found Mr. Brundrett to be entitled, and which the exception insists he ought not to have done.

Henry Brooksbank and Jonathan Moore were the trustees appointed by the will. The testator directed that Mr. Moore might act as solicitor and receiver, in the management of the trust, but by the will no legacy was given.

By the fifth codicil, which was not attested, he gave and bequeathed to each of the trustees named in his will, that is, to Mr. Brooksbank and Mr. Moore, the sum of £5000 on condition that he accepted the trust thereof, and he gave to Mr. Moore, in consideration of friendly regard and zeal, £2000.

By the eighth codicil, in consideration of the kind and liberal attention Mr. Brooksbank had displayed, he bequeathed to him the sum of £5000; and he declared that sum, and also the sum of £2000 to Mr. Moore, were in addition to the sums given to them as trustees.

By the eleventh codicil, he revoked all that part of his will which related to Mr. Moore, and requested Mr. [459] Jonathan Brundrett to undertake and fulfil the same purposes and intentions, and on the same conditions for the effecting of which, he had appointed Jonathan Moore.

The word "conditions" is not accurately employed in this codicil, but the intention of the testator does not appear to me to be doubtful. He requested Mr. Brundrett to undertake the purposes and intentions; that is, to perform the trusts, for the performance of which Mr. Moore had been appointed, and on the same conditions. Now what was the situation, what were the circumstances, or what was the condition in which Mr. Moore stood with respect to the trust? By the will, he was allowed to act as solicitor in the management of the trusts, and by the fifth codicil he was to have a legacy of £5000 on condition that he accepted the trust; and I am of opinion that the testator, by the eleventh codicil, intended to place Mr. Brundrett in the like position, and that a gift of the legacy must be implied. I therefore think that the second exception must also be overruled.

The Master's report being confirmed, a question is raised on the construction of the will, whether the legacies given by unattested codicils, are within the words of the will, charging the real estates with the payment of the legacies; and if not, whether they or any of them are charged on the real estates by the thirteenth and last codicil, which was duly attested.

The testator declares the trusts of his residuary real, and personal estate in these words, "In trust thereout to pay all my just debts, the expenses of my funeral, and of proving this my will, and the legacies and annuities hereby bequeathed; and in case the same shall be insuff[460]-ficient for that purpose, then I charge all my real estate with the payment of the same respectively:" that is, with the payment of the debts and expenses, and of the legacies and annuities hereby bequeathed; and I am of opinion that these words do not create a general charge of all legacies, but only of such legacies as are given by the will. The object of the last codicil, which was duly executed and attested, was to revoke the appointment of trustees and executors named in the will, and the bequests given to these trustees, and to appoint Mr. Brundrett to be executor and trustee; and though, in effect, it operated as a republication of the will and former codicils, and might have extended any prior general devise to lands subsequently acquired before the date of the last codicil, and have subjected such subsequently acquired lands to a general charge contained in the will, yet, considering it as a republication of the will, and all the preceding codicils, I do not think that the effect is to charge on the land legacies, which by those codicils were not so charged; and Harriett Catherine Cock being entitled to her second annuity, and Mr. Brundrett being intitled to his legacy under a codicil which was not duly attested, and there being no general charge of legacies, I think that this annuity and this legacy, and the other legacies given by the codicils are not charged on the land.

The next question raised is, whether in the application of the assets in payment of the charges, the real estates specifically devised should not be exonerated out of the general personal estate, and the estates not specifically devised. The testator has directed his estate called Bitchley to be sold; and has directed the money to arise from the sale thereof, and all the residue of his estate and effects not specifically devised and bequeathed, to be held, in trust thereout to pay all [461] debts and expenses, and the legacies given by his will; and the deficiency is charged on all his real estate. The Bitchley estate, and the general residuary estate, real and personal, are therefore to be applied in payment of these charges; and if it shall appear that there is a deficiency, and it is necessary to resort for payment of the debts to the general charge effecting the real estates specifically devised, it will, at the proper time, be necessary to consider, whether (to the extent to which, the general personal estate applicable to the payment of legacies not charged on land, has been exhausted by the creditors) the pecuniary legatees may be entitled to resort to the estates specifically devised; but in the present state of the cause, the question which may arise out of that state of things seems scarcely ripe for decision.

The next question was, whether the annuity of £500, which in the will is called a freehold annuity, and is thereby specifically given, is to be considered as real or personal; and upon the authority of the cases which were cited in the argument, viz., *The Earl of Stafford v. Buckley* (2 Ves. sen. 171) and *Aubin v. Daly* (4 B. & Ald. 59), I am of opinion, that it is what Lord Hardwicke called a personal inheritance, which the law suffers to descend to the heir, but which has nothing to do with the realty.

In the course of the argument a claim was made, to have a balance, which, at the time of the decease of Sir Thomas Clarges, was alleged to be in the hands of the trustee under a deed, applied towards payment of a debt due to Mrs. Bastard; but the facts necessary for the decision of that claim do not sufficiently appear, [462] and, if necessary, there must be an inquiry on the subject.

Overrule the exceptions.

Declare that the legacies, &c., given by the unattested codicils, are not charged on the land. Carry on the accounts. Direct the sale of Bitchley; and

Reserve further directions.

[462] BETHUNE v. KENNEDY. (*Ex relations*.) Feb. 26, 1841.

[S. C. on main point. 1 My. & Cr. 114; 40 E. R. 320 (with note).]

A. conveyed to B. his reversionary interest in a fund in Court, and B. obtained a stop order. When the fund fell into possession, B. presented a petition for payment to him. On the hearing of the petition, A. insisted that the purchase was invalid, being a purchase of a reversionary interest at an undervalue. The Court would not decide the point, but proposed to retain the funds in Court for a limited time, if A. would undertake to file a bill to set aside the conveyance. A. not giving the undertaking, the fund was paid out to B.

This case is reported on the hearing in 1 Mylne & Cr. 114.

Henry Van Bodicoate, one of the Defendants in the suit, being entitled, under the will of Charlotte Peyton, to one-third of the testatrix's residuary personalty, the remainder expectant upon the decease of Hester Kennedy, executed an indenture whereby he assigned his reversionary interest for a valuable consideration to Marmaduke Robert Langdale and others; the indenture contained the usual power of attorney for the receipts of the funds.

In June 1836, on the petition of Bodicoate and Langdale, the common stop order was obtained; whereby the funds were directed not to be sold, transferred, or disposed of, without notice to Langdale.

[463] On the death of Hester Kennedy, the assignees presented a petition for payment out of Court of the funds comprised in the indenture of assignment.

The execution of the indenture by H. Van Bodicoate was proved by affidavit.

An affidavit was filed in opposition to the petition, disputing the validity of the purchase; on the ground that, the subject being a reversionary interest, the price given, was inadequate; the affidavit contained valuations purporting to prove the allegation.

Mr. Pemberton, for the petition.

Mr. Kindersley, *contra*, for Henry Van Bodicoate, opposed the payment, on the grounds that the assignment was invalid; and he contended, that the assignees ought to be required, if they insisted on the validity of the instrument, to file a bill for the purpose of establishing it.

THE MASTER OF THE ROLLS said he was bound, *prima facie*, to give credit to an instrument under a party's own hand and seal; and he inquired whether Henry Van Bodicoate would undertake to file a bill to set aside the assignment, in case the fund in question were retained in Court for a limited time, for that purpose.

Mr. Kindersley intimating that he was unable to give such undertaking,

THE MASTER OF THE ROLLS [Lord Langdale] directed the funds to be paid over to the Petitioners as prayed.

[464] LANGTON v. HORTON. Feb. 8, 1841.

[S. C. on other points, 1 Hare, 549; 5 Beav. 9.]

Injunction to restrain proceedings in an issue at law, directed by a Judge of the Court of Queen's Bench, under the Interpleader Act.

The Interpleader Act applies only to those cases where the opposite claims depend on legal rights, and not on matters peculiarly of equitable jurisdiction.

By indenture of the 2d of March 1838, the Defendant George Burnie, who was owner of the ship "The Foxhound," then on her voyage to the South Seas, assigned the ship and tackle, and also all oil and head matter and other cargo which might be caught, or brought home in the said ship or vessel, on and from her then present voyage; and also the policies of assurance therein mentioned, and all muniments, writings, and papers relating to the said ship called "The Foxhound," unto the Plaintiffs, for securing the monies in the said indenture mentioned.

The assignment was produced to the proper officer of the port of London, and registered, but was not indorsed on her register, the ship being on her voyage.

The ship returned, with a large cargo of oil, to England in January 1841; and on the 9th of January 1841 it was taken possession of by a messenger, on behalf of the Plaintiffs.

On the 13th of January 1841 the Sheriff of Surrey seized the ship and cargo, under a writ of execution sued out of the Queen's Bench by Horton, who was a judgment creditor of Burnie; the Plaintiffs thereupon gave notice of their title to the sheriff, who under the Interpleader Act, 1 & 2 W. 4, c. 58, and 1 & 2 Vict. c. 45, summoned the Plaintiffs and Horton before one of the Judges of Her Majesty's Court of Queen's Bench, to appear and state the nature and particulars of their respective claims, and to maintain or relinquish the same. On the 19th of January 1841 one of the Judges [465] of that Court, upon hearing counsel on behalf of the Plaintiffs, and the attorneys or agents on behalf of Benjamin Horton, and the said Sheriff of Surrey, ordered, that an issue should be tried, in which the Plaintiffs were to be Plaintiffs, and Benjamin Horton, as the execution creditor, was to be Defendant; and that the sheriff should remain in possession at the expense of Plaintiffs, from that day, until security for the amount of the levy should be given; and he further ordered, that the question of costs should be adjourned.

On the 29th day of January the Plaintiffs filed their bill against Horton, the Sheriff of Surrey, and Burnie, praying a declaration that the indenture of the 2d of March 1838 operated as a good and sufficient equitable assignment of the ship and cargo for the monies intended to be secured, and that they had priority over Horton; and for an injunction to restrain the levying the amount of the execution, and to restrain the prosecution of the order under the Interpleader Act; and that upon the Plaintiffs giving security for the amount of the judgment, or at all events, on paying the amount into Court, the ship might be delivered to him; and if necessary that a receiver might be appointed.

The Plaintiffs now moved for the injunction and receiver, if necessary.

Mr. Pemberton and Mr. Rolt, for the Plaintiffs.

Mr. Bethell and Mr. E. R. Adama, for Mr. Horton.

Mr. Painter, for the sheriff.

THE MASTER OF THE ROLLS [Lord Langdale]. The real question, between the parties in this case, is, whether in respect of the ship and cargo, William Hor-[466]-ton the execution creditor, is or is not entitled to have priority over the Plaintiffs, who claim the ship and cargo under an assignment from the owner. The property is in the possession of the sheriff, who, in consequence of the adverse claims of the parties, availed himself of the provisions of the Act of Parliament referred to, and applied to a Judge of the Queen's Bench, for the purpose of having the contest between the two parties who are likely to vex him, settled under the authority of the Court of law.

It appears, however, that the rights of these parties do not depend upon the decision of mere legal questions. The right and title claimed by the Plaintiffs depend upon questions which must be determined in a Court of Equity; and the first question, therefore, which arises, upon the present occasion, is, whether such a matter as this can be determined, or was intended to be determined, by the Common Law Judges under the authority of the Act of Parliament. I must own it appears to me upon this occasion, that the Judges at Common Law have not conferred upon them, by that Act of Parliament, the power to determine matters which are peculiarly within the jurisdiction and province of a Court of Equity; and that the intention was to afford the relief in those cases only, in which opposite claims were made, depending upon legal rights, and not upon matters exclusively of equitable jurisdiction.

It appears that both these parties, when they went before the Judge of the Queen's Bench, conceived that their claims depended upon a legal title; and it being so stated to the Judge, he conceived that that legal right might be determined upon the trial of a feigned issue, which he directed; but the terms of that issue never were proposed to, or in any way determined upon, by [467] him. What I collect from the evidence, which is not very distinct, is this: that when the parties left the Judge's chambers, they were both of opinion that this was a matter properly of legal jurisdiction, and both of them intended to have it tried in the way in which the Judge had proposed;

but that sometime afterwards, those who acted for the Plaintiffs in the cause, discovered that there was matter which was not properly of legal jurisdiction, and therefore conceived that it could not conveniently, if at all, be tried in the manner proposed upon the summons before the Judge; and that it was consequently necessary to file a bill in equity for the purpose of having their rights determined.

The bill being then filed in equity, is there anything whatever to prevent that equitable right from being tried? Suppose that this matter had never been brought under the consideration of a Common Law Judge at all; and that the party, finding he could not sustain the legal right, which he supposed he had, and that he had an equitable title only, which could only be enforced in this Court, had filed a bill, could it be said that there was no equity to maintain this suit? I think it could not; for the equity arises upon this: there was an assignment of the ship, and also of the cargo, which, at the date of the deed of assignment, was not in existence on board the ship, but was afterwards acquired. Such a prospective cargo would not, according to the rules of the Courts of law, pass by the assignment, but in equity it might pass. I think, therefore, that there is a question proper for determination here. There are other questions which are very properly raised, which may be deserving of the most serious consideration, and which may ultimately determine the rights between the parties. The question, however, is, what is to be done in the present stage of the cause, before the matters which are in [468] question between the parties can be determined, and whether the matters in dispute should be put into proper course of investigation and the property secured in the meantime; my opinion is that it ought. Then the question is, what course is to be pursued for that purpose. If Mr. Horton is content with the species of security which was offered during the proceedings before the Judge, that is well, if not, I think that the Plaintiffs must bring into Court a fund sufficient to answer the demand of the Defendant, and upon that being done, the property ought to be delivered up to be sold.

With respect to the sheriff of course he cannot be called upon to part with the possession of this ship, without being paid what is due to him.

After some discussion it was ordered, that upon payment of a proper sum into Court, the ship and cargo should be delivered over to the Plaintiff, he keeping an account, and that an injunction should issue restraining the proceedings at law, under the Judge's order.

NOTE.—See *Putney v. Tring*, 5 Mee. & W. 425; and *Sturgess v. Claude*, 1 Dowl. Pr. C. 505.

[469] DE BEIL v. THOMSON. Feb. 11, 19, 1841.

[S. C. in House of Lords (sub nom. *Hammersley v. De Beil*), 12 Cl. & F. 45; 8 R. R. 1312. Distinguished, *Maunsell v. Hedges*, 1854, 4 H. L. C. 1052. See *Williams v. Williams*, 1868, 37 L. J. Ch. 857; *Thomson v. Simpson*, 1870, L. R. 9 Eq. 506; *Ward's case*, 1870, L. R. 10 Eq. 663; *Coles v. Pilkington*, 1874, L. R. 19 Eq. 178; *Dashwood v. Jermyn*, 1879, 12 Ch. D. 781; *In re Badcock*, 1880, 17 Ch. D. 366; *In re Allen*, 1880, 49 L. J. Ch. 555; *Maddison v. Alderson*, 1883, 8 App. Cas. 473; *M'Manus v. Cooke*, 1887, 35 Ch. D. 691; *Miller & Aldworth v. Sharp* [1899], 1 Ch. 622; *In re Fickus* [1900], 1 Ch. 335; *In re Holland* [1901], 2 Ch. 151.]

A parent, by his agent, on the marriage of his daughter, entered into an engagement, in writing, with her intended husband, in which his name was written, but not signed. Held, that a letter written by the parent after the marriage, referring to the memorandum, as stating the terms of the engagement, was either a sufficient agreement signed by the party, within the Statute of Frauds, or a sufficient recognition of the use made of his name in the memorandum.

A parent, in the written proposals on the marriage of his daughter, stated, "He intended to leave his daughter a further sum of £10,000 in his will, to be settled on her and her children, the disposition of which, supposing she had no children to be prescribed by the will of her father." He died without leaving that sum. Held, under the circumstances, that there was an obligation on the parent, to be satisfied out of his assets.

The facts and points of this case are so fully set out in the judgment of the Court, that it is unnecessary here to state them. The case was argued by

Mr. Pemberton and Mr. Fuller, for the Plaintiff, and by

Mr. Kindersley and Mr. O. Anderdon, for the Defendants.

The following authorities were relied on, 29 Car. 2, c. 3, s. 4; *Coles v. Trecothick* (9 Ves. 234), *Western v. Russell* (3 V. & B. 187), *Jackson v. Lowe* (1 Bing. 9), *Norton v. Wood* (1 Russ. & Myl. 178), *Acton v. Acton* (Prec. Ch. 237), *Bawdes v. Amhurst* (Ib. 402), *Blagden v. Bradbear* (12 Ves. 466; 1 Sugden V. & P. 87, 9th ed.), *Maxwell v. Mountacute* (Prec. Ch. 526), *Taylor v. Beech* (1 Ves. sen. 297), *Smith v. Watson* (Bunb. 55), and see *Mountacute v. Maxwell* (1 Str. 236), *Luders v. Anstey* (4 Ves. 501), *Hedgson v. Hutcheson* (5 Viners Ab. 522, p. 34).

THE MASTER OF THE ROLLS [Lord Langdale]. In the year 1825 Baron de Beil, the Plaintiff's father, proposed to marry Miss Sophia Thomson; and her father, Mr. John Poulett Thomson, having consented to the marriage, stated that he should empower his sons Mr. Andrew Henry and Mr. Charles Thomson to treat [470] with the Plaintiff's father respecting the settlement to be made on the occasion.

In consequence of this statement, and by the appointment of Mr. Andrew Henry Poulett Thomson, on the 22d of December 1825, a meeting took place between Baron de Beil and the two sons of Mr. John Poulett Thomson, for the purpose of agreeing on the terms of the settlement. At that meeting Mr. Andrew Henry Poulett Thomson produced a letter from his father, authorising the sons to treat respecting the settlement; and a discussion thereupon took place respecting the fortune to be settled by Mr. John Poulett Thomson on his daughter Sophia, the terms of the settlement, and the jointure which was to be secured by the Baron de Beil to his intended wife. The result of this discussion was expressed in a memorandum in writing, the first part of which was written by Mr. Andrew Henry Poulett Thomson, and the last part of it by Mr. Charles Poulett Thomson. Baron de Beil appears to have left the brothers before the memorandum was completed; but they afterwards sent it to him, and it is expressed as follows:—

"The arrangement proposed in case of the marriage of Baron de Beil with Miss Sophia Poulett Thomson is as follows: viz., Mr. J. P. Thomson proposes to pay down the sum of £10,000 sterling, to be secured in the British funds, or other funds that may be agreed upon, in the name of trustees to be chosen; the interest to belong to Baron de Beil during the joint lives of himself and Miss Thomson, and to her in case of his death before her; the principal to be secured to the children of the marriage; or in case of there being no issue, the survivor to have the interest for life, and the capital to be at the disposition of Baron de Beil. Baron de Beil to [471] obtain the means of settling £500 per annum, to be payable to Miss Thomson for her life, secured on his estates at Mecklenburg after his death, in case of her surviving him.

"Mr. J. Poulett Thomson proposes, for the present, to allow his daughter £200 per annum, for her private use, subject to a possibility of a reduction of that sum, in case political or other circumstances should diminish his income; and also intends to leave a further sum of £10,000 in his will, to Miss Thomson, to be settled on her and her children; the disposition of which, supposing she has no children, will be prescribed by the will of her father.

"These are the bases of the arrangement proposed, subject of course to revision, but they will be sufficient for Baron de Beil to act upon. Baron de Beil should forward, as early as possible, a joint arrangement for himself and brother, settling £500 per annum on Miss Thomson; it is a question though, how far that can be given by them without the consent of their heirs, who, in case of the death of both, might vitiate it. This point should be decided."

It is, I think, impossible to doubt, what was intended by preparing this memorandum, and sending it to Baron de Beil. It was intended to be a proposal and statement of intention, deliberately made to Baron de Beil; and which, though necessarily subject to further consideration and to revision, was capable of being converted into an agreement by his acceptance: by his performance of that which was required from him: and by the solemnisation of the intended marriage, with the consent and approbation of Mr. John Poulett Thomson.

[472] Baron de Beil states in his evidence, that he accepted this memorandum

as containing, in effect, the terms of the said agreement come to between him and the two sons of Mr. John Poulett Thomson on the 22d of December 1825. It appears that he soon afterwards proceeded to do that which was required of him, by securing to his intended wife a jointure of £500 a year on his Mecklenburg estate; and he distinctly states, that the arrangement contained in the memorandum was not in any respect modified, altered, waived, or abandoned prior to his marriage with Miss Sophia Thomson, which took place on the 14th of February 1826.

A settlement was afterwards made of the £10,000, which was proposed to be paid down by Mr. John Poulett Thomson, and to be secured in the British funds, or other funds that might be agreed upon; but nothing was done respecting the further sum of £10,000, which, as the memorandum expressed it, Mr. John Poulett Thomson "intended to leave in his will, to be settled on Miss Thomson and her children."

The Baroness de Beil died on the 27th of September 1827, leaving the present Plaintiff the only issue of the marriage.

Mr. John Poulett Thomson died in the year 1837, having made a will, of which he appointed the present Defendants and his son Andrew Henry Poulett Thomson, who is since dead, executors.

The Plaintiff now claims that further sum of £10,000, which the memorandum expressed it to be the intention of Mr. John Poulett Thomson to leave by his will, to be settled on the Plaintiff's mother and her children; and he insists on payment out of the assets of Mr. John Poulett Thomson.

[473] The Defendants deny that they are under any obligation to pay the same; and they allege:—

First, That the sons, Mr. Andrew Henry and Mr. Charles Poulett Thomson, had no authority from their father to enter into any agreement, binding the father to leave the sum of £10,000 in his will to be settled; and consequently, that if the memorandum and the subsequent events amounted, in effect, to such an agreement, it was entered into without authority, and was not binding on the father, and constitutes no obligation to be satisfied out of his assets.

Secondly, That, by the Statute of Frauds (29 Car. 2, c. 3, s. 4), an agreement, entered into in consideration of marriage, is not binding, unless the same or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto lawfully authorised; and that this memorandum was not signed by Mr. John Poulett Thomson or his sons, and therefore was not binding.

Thirdly, That even if it shall appear, that the sons had the father's authority, and that the agreement is not made invalid by the Statute of Frauds, still, upon the true construction of it, Mr. John Poulett Thomson was under no obligation to leave the sum of £10,000 to be settled; it was left at his option to do as he pleased. A hope of bounty to that extent was all that the memorandum meant to hold out, and the bounty might be withheld; and after the death of the daughter, was reasonably and justly withheld. According to the expression of the Defendant's counsel, Baron de Beil might rely on bounty, but had no right to insist on obligation.

[474] Upon a due consideration of the facts of this case, as they appear in the evidence and in the correspondence, it appears to me to be sufficiently established, that Mr. Andrew Henry and Mr. Charles Poulett Thomson were authorised, by their father, to make the proposals expressed in the memorandum of the 22d December 1825; and, on the part of Mr. John Poulett Thomson, to offer those proposals to the acceptance of Baron de Beil, and enable him to convert them into an agreement by acceptance, and doing what was required on his part; and considering the proposal to have been, under the circumstances of this case, ripened into an agreement, I am of opinion that Mr. Andrew Henry and Mr. Charles Poulett Thomson had the authority of Mr. John Poulett Thomson to enter into that agreement on his behalf.

Upon the question whether this agreement is invalid, by reason of the same, or any memorandum or note thereof not being signed by Mr. John Poulett Thomson, or any person thereunto lawfully authorised, according to the provisions of the Statute of Frauds, it is to be considered in what situation the parties were and what they did.

The two sons of Mr. John Poulett Thomson were, as I think, authorised to enter

into an agreement with Baron de Beil; pursuant to the authority which they had, they made certain proposals in their father's name in writing. In those proposals they twice write and use their father's name, in a manner to shew, with sufficient certainty, the whole of that which was proposed on his part; the proposals, on his part, were accompanied by a requisition of something to be done on the part of Baron de Beil; and Baron de Beil, on receiving the proposals, accepted them and proceeded to perform [475] what was required of him; and this being performed the marriage was solemnised.

After the marriage, and after the death of the wife, Mr. Andrew Henry Thomson, representing himself to act with the authority of his father, acknowledged the memorandum, though a question had arisen upon the effect of it. And Mr. John Poulett Thomson himself, by his letter, of the 30th April 1830, recognises the agreement, of which a copy had been put into his hands by Baron de Beil. In this letter Mr. Thomson, although he says that he had forgotten all that passed at the time of the marriage, and says, that until the copy was given to him, he had not understood the exact expression to which it referred, does not repudiate the expression as unauthorised, but appears to me to admit that he had agreed to the effect proposed in the memorandum; and admitting that, he says, that he conceives the only question to be, what the expression used in "the engagement" (for so he calls it) legally implies.

In the case of *Randall v. Morgan* (12 Ves. 73), Sir Wm. Grant expressed great doubt, whether a letter written after the marriage, referring to a parol agreement before the marriage, would be sufficient so give validity to a promise, which of itself produced no obligation; but Lord Harcourt, in the case of *Hodgson v. Hutchenson* (5 Vin. Abr. 522, pl. 34), thought, that a letter after the marriage, considering the transactions before, was, in that case, sufficient. And, in this case, having regard to the transactions which took place before the marriage, it appears to me, that this letter subsequently written and signed by Mr. Thomson, referring to a copy of the memorandum, as stating the expression or the terms of the engagement [476] which he had entered into before the marriage, is either a sufficient note of the agreement signed by the party to be charged, or a sufficient recognition of the use made of his name in the memorandum, and of the obligation thereby contracted; and so thinking, it does not appear to me to be necessary to determine, whether the use of the name in the memorandum, be of itself a sufficient signature of Mr. Thomson by his agents; or whether the provision of the jointure by Baron de Beil takes the case out of the statute; or whether, independently of the statute, this Court, for the prevention of fraud, would compel the defendants to realise the expectations on the faith of which the marriage was contracted.

If Baron de Beil, on receiving the proposals, instead of acting upon them, on the faith of their being valid and binding if adopted, had required Mr. Thomson to sign them more formally, some objection might probably have been made; but I conceive that any such objection would not have arisen from any notion that the proposals would not otherwise be valid, but rather from a desire to withdraw the proposals, whilst it was yet time, from the consideration and acceptance of a person so idly jealous and suspicious of the honour and integrity of those, with whom he was dealing on such an occasion.

Upon that which Mr. John Poulett Thomson appears to me to have properly considered to be the only question, viz., the legal effect of the terms in which the engagement is expressed, I am of opinion that the Plaintiff is entitled to the second sum of £10,000 which he claims.

The memorandum is entitled, "The Arrangement Proposed in case of the Intended Marriage." It ex-[477]-presses what Mr. John Poulett Thomson proposed to do, and what Baron de Beil was required or expected to do. In a distinct sentence, it proposed an annual payment, subject to possible reduction in circumstances referred to, and then expressed the intention of Mr. John Poulett Thomson to leave a further sum of £10,000 by his will; and so far from providing, that the leaving of this sum was to be merely optional on his part, or was to be subject to any reduction, it expressly provides, that it should be at the disposition of Mr. John Poulett Thomson in a certain event only; viz., in the event of the intended wife having no children. It would have been absurd to make this provision, if the parties had meant that the gift or settlement of this sum of £10,000 was to be altogether optional. The power

of disposition would not have been expressed in one particular case, if it was intended that at all events, and in every case, the disposition and the option, whether to give it or settle it at all, was to be his. The use of the word "intend," does not appear to me to be in any way material; the parties were expressing a part of the arrangement in the case of the marriage; and the meaning is obvious, that he intended to leave the £10,000 if the marriage took effect, pursuant to the proposal and intention thus expressed.

The memorandum then expressed, that the arrangements proposed were, of course, subject to revision, but would be sufficient for Baron de Beil to act upon: and it was argued, that because the proposed arrangements were subject to revision, they could not constitute or end in a concluded agreement. It is true that, whilst the proposal remained subject to revision, it could not constitute a concluded agreement. Proposals of this nature cannot result in an agreement all at once, or be otherwise than subject to revision. The proposals were [478] an offer of some things to be done by Mr. Thomson, and a requisition of some things to be done by Baron de Beil, with reference to the intended marriage. Until Baron de Beil had performed his part, and prior to the marriage, the whole was to be subject to revision; but no revision took place. The proposals and intentions, thus expressed, remained without any alteration whatever, up to the time of the marriage; and I am of opinion that the proposals, which up to that time had been subject to revision, did then, by the acceptance of Baron de Beil—by his due execution of the required settlement on his part—and by the solemnisation of the marriage, with the approbation of Mr. Thomson, become an agreement which Mr. Thomson was bound specifically to perform.

I am, therefore, of opinion that the Plaintiff is entitled to the relief which he prays, and that there must be a decree accordingly, with costs.

Mr. Puller. Does your Lordship think that interest ought to be paid on this sum from the death of the testator?

THE MASTER OF THE ROLLS. I think that interest, at 4 per cent., is payable, but only from the end of one year after the testator's death, on the footing of a legacy.

Affirmed by Lord Cottenham, 6th of August 1841.

[479] STOCKER v. HARBIN. Jan. 18, Feb. 23, 1841.

A testator, by will duly attested, gave all his real and personal estate to trustees, to convert into money and pay his debts, and then to appropriate and take out of his said trust monies £1000, which he gave to the Plaintiff. By a codicil, not properly attested so as pass real estate, he revoked the legacy. Held, that on this will the testator had made his real and personal estate a common fund for payment of this legacy: that the revocation was inoperative as regarded the real estate and that the Plaintiff was entitled in the proportion which the real estate bore to the personal.

The testator, James Stocker, by his will, dated the 17th of September 1824, "after payment of all his just debts, funeral and testamentary expenses in the first place thereof, and so charged with the payment of the same," gave and bequeathed all his real and personal estate to his wife and two other persons, upon trust, with all convenient speed, and at farthest within five years next after his decease, to sell all his real estate, and convert into money his personal estate, and he proceeded as follows:—"And I do hereby declare and direct that my said wife Mary and the said Thomas Knott and John Sellwood, and the survivor of them, and the heirs executors, administrators, and assigns, and of such survivor, shall stand and be possessed of and hold the monies to arise and be gotten in and by virtue of this my will, in trust, in the first place, to pay all my just debts, funeral and testamentary expenses, as I have before directed; and then next and within one year after my death, to appropriate, take from and out of my said trust monies, the sum of £1000, and vest the same in trade, the purchase of Parliamentary stocks or funds of Great Britain, upon real or other good and sufficient security, at interest, as they think proper, in the names of them my said wife Mary, Thomas Knott, and John Sellwood, or the survivor of them,

her or his heirs, executors, administrators, or assigns; with full power to change and vary the said funds and securities, at their discretion; upon trust and for the purposes hereinafter expressed concerning the same, that is to say: In trust to pay, apply, and dispose of the whole of the interest, proceeds, and profits of the said £1000, whether arising [480] from being vested in trade or otherwise, from time to time, as received, for and towards the maintenance, education, and sole benefit of my son Daniel Stocker, during his minority, according as my said trustees think best for his advantage; and on my said son Daniel's attainment to the age of twenty-one years, then, upon trust to immediately pay, assign, and finally make over unto him the said sum of £1000, or the stock-in-trade, in which the same may consist, together with all the profits, proceeds, and interest arising therefrom, then remaining in their or either of my said trustees' hands, if any. And in case my said son Daniel should happen to die during his minority, and before his being paid the said legacy of £1000, and leave no legitimate issue, it is then my will, that on his so dying childless during his minority, the said legacy of £1000 shall revert to and become part of all my *residuary monies and estate*. And after taking and appropriating the said sum of £1000 out of my *residuary monies and estate*, I then give and bequeath, and direct to be paid, within one year next after the amount of my residuary monies and estate is ascertained, and realised by my said trustees, unto my daughter Elizabeth, the wife of George Harbin, one equal part or portion of all my said *residuary monies and estate*, into as many equal shares and portions divided as I shall leave children, my sons and daughters (except my said son Daniel) me surviving, first deducting from such my said daughter Elizabeth's share, the sum of £400 in lieu of the advancement I have already given to her; and which £400 it is my will shall remain to and go with my then *residuary monies* as hereinafter directed: that is to say, then upon trust to pay, apply, and dispose of the whole of the interest, dividends, and proceeds of the funds and securities upon which my then remaining monies shall be invested, and of all other my residuary estate and effects [481] whatsoever, as from time to time received, or such part thereof as my said trustees think meet, for and towards the maintenance and education, placing out to trade, business, or profession of my sons and my daughters, and such of my posthumous child or children as my said wife may be pregnant with at my decease, during their minority; and on the several and respective attainments of my said sons and daughters, and such my posthumous child or children (if any) to their ages of twenty-one years, in trust to pay, make over, and assign unto each of them my said sons and daughters, and such my posthumous child or children, one even share and portion, into as many similar and equal shares or parts divided as I have children in number, except my said son Daniel and my said daughter Mary, whose specific legacy and shares are so previously appropriated for them as I have before directed of all my *said residuary trust monies and estate*."

The testator appointed his wife and Knott and Sellwood joint executors. The testator's will was duly executed and attested by three witnesses.

He afterwards in 1830 made a codicil to his will, attested by two witnesses only, whereby he recited that he had given £1000 in his will to his son Daniel, and proceeded as follows:—"He at that time being a minor, but since having become of age, and I having provided for him in making business and other concerns, I hereby direct and most particularly request that the £1000 named in the fifty-first line of the second sheet of my said will and testament shall be null and void; and I do further direct that my son Daniel Stocker shall not receive any of my real or personal property direct or indirect, saving the sum of 1s."

[482] The testator died in 1834, and his son Daniel, who was his heir at law, filed this bill for payment of the legacy; alleging, that the revocation by an unattested codicil was void, either as to the whole legacy, or as to such proportion of it as would be payable out of the produce of the real estate.

Mr. Pemberton and Mr. Keene, for the Plaintiff.

Mr. Tinney and Mr. Sheffield, *contra*, contended, first, that the gift of the £1000 was of the character of a pecuniary legacy, for although it was charged on the real estate, it was primarily payable out of the personal estate, and that consequently it had been revoked by the codicil.

Secondly, that it came within the principle of those cases in which legacies charged

on real estate had been permitted to be altered or modified by an unattested codicil.

Thirdly, that the gift was in the nature of a portion, and had been satisfied, within the intention of the testator.

Fourthly, that if the gift had been revoked, it fell into the residue, and did not lapse for the benefit of the heir.

And lastly, that if these points failed, then that the case came within the decision in *Roberts v. Walker* (1 Russ. & Myl. 752), and that the charge must be apportioned between the real and personal estate, so as to give to the Plaintiff that proportion only, which was payable out of the realty.

[483] Mr. Pemberton, in reply.

The following authorities were referred to: *Hooper v. Goodwin* (18 Ves. 156), *Gallini v. Noble* (3 Mer. 691), *Attorney-General v. Ward* (3 Ves. 327), *Hyde v. Hyde* (1 Eq. Ca. Abr. 409), *Buckeridge v. Ingram* (2 Ves. jun. 652), *Sheddon v. Goodrich* (8 Ves. 481), *Brudenell v. Boughton* (2 Atk. 268), *Habergham v. Vincent* (2 Ves. jun. 204), *Cox v. Basset* (3 Ves. 155), *Holmes v. Holmes* (1 Bro. C. C. 555), *Amphlett v. Parke* (1 Sim. 275; 4 Russ. 75; and 2 Russ. & M. 221), *Green v. Jackson* (5 Russ. 35, and on appeal, 2 Russ. & M. 238), *Durour v. Motteux* (1 Ves. sen. 320), *Cogan v. Stephens* (1 Beavan, 482, note), *Kennell v. Abbott* (4 Ves. 802), *Noel v. Lord Henley* (7 Price, 241, and Daniel, 211), and *Phillips v. Phillips* (1 Myl. & K. 649).

Feb. 23. THE MASTER OF THE ROLLS [Lord Langdale]. James Stocker, by his will, dated the 17th of September 1824, devised and bequeathed all his real and personal estate to trustees, directing them to convert the whole into money; and he declared, that they were to stand and be possessed of and to hold the monies to arise and be gotten in, by virtue of his will, in trust, in the first place, to pay his debts, and then to appropriate and take out of his said trust monies, the sum of £1000, and vest the same, in manner in his will mentioned, for the benefit of his son the Plaintiff. The will was so executed and attested as to pass real estate by devise; and some time afterwards, by an unattested codicil, dated the 23d of September 1830, the testator, reciting the legacy, and that he had provided for his son, re-[484]-quested that the gift of £1000 mentioned in his will should be null and void.

The son has now filed his bill for payment of the legacy, alleging, that the revocation by an unattested codicil is void, either as to the whole legacy, or as to such proportion of it, as would be payable out of the produce of the real estate.

The Defendants allege, that the will is so expressed, as to constitute the legacy a charge on the real estate; and that, upon a true construction of the will, the real estate ought to be considered as applicable to the payment of the legacy, only in aid of the personal estate: and further, they contend, that this legacy is in the nature of a portion, which has been satisfied by advancement. I am of opinion that this is not a case of ademption or of satisfaction of a portion; and it appears to me, that according to the true construction of this will, the testator has made his real and personal estate one common fund, for the payment of his debts and this legacy, and for ultimate distribution:—that in the way the testator has treated his property, there is no priority, and the real estate cannot be considered as applicable merely in aid of the personal estate.

And the legacy being given out of a mixed fund, constituted of both real and personal estate, I think that the real and personal estate ought to have contributed to the payment, in proportion to their respective amounts; and that the revocation by an unattested codicil, though good as to such proportion as would have been payable out of the personal estate, fails as to such proportion as was payable out of the produce of the real estate, and that such proportion, therefore, remains a valid gift to the legatee.

[485] Refer it to the Master to ascertain the relative values of the testator's real and personal estates at the time of his death; and declare, that the Plaintiff is entitled to so much and such part of the legacy of £1000, as, upon a rateable payment out of the real and personal estates, would have been payable out of the real estate; and let the Master ascertain the amount thereof.

[485] CROSBY v. CHURCH. Jan. 22, 25, 1841.

[S. C. 10 L. J. Ch. 212; 5 Jur. 50. See *Sawyer v. Sawyer*, 1885, 28 Ch. D. 605; *Shute v. Hodge*, 1888, 58 L. T. 549.]

Bequest of consols to A. B., a *feme covert*, to be transferred to her in her own name, and the interest to be for her separate use, and the principal to remain in trust of the executors till the youngest of her children attained twenty-one, when the principal was to be her own; or in case of her demise it was to devolve to her husband. The trustees, on the death of the testatrix, transferred the fund to A. B.; she and her husband afterwards sold it out, and they both signed the transfer. Held, that a breach of trust had been committed, but that A. B. had made a valid disposition of the dividends which might accrue previous to her youngest child, born after the death of the testatrix, attaining twenty-one.

The testatrix gave the residue of her personal estate to the Defendant Mrs. Church, and she appointed Mr. Crosby (the husband of the Plaintiff), Mr. George, and the Defendant Mrs. Church executors and executrix of her will.

By a codicil, she expressed herself as follows:—"I give to my beloved granddaughter, Mrs. Charlotte Crosby, over and above any former bequest, £1000 3 per cent. consols, to be transferred to her in her own name, and the interest to be for her own sole and separate use, and the principal to remain in trust of my executors and residuary legatee till the youngest of her children shall attain the age of twenty-one years, when the principal shall be her own; or, in case of her demise, it shall devolve to her present husband, the Rev. Robert Crosby."

The testatrix died in 1815, and her will was proved by her executors and executrix. The funded property [486] was transferred into the name of Mrs. Church alone; and on the 9th of March 1815 Mrs. Church, with the assent of her husband, transferred £1000 consols into the name of Mrs. Crosby, in satisfaction of her legacy. On the 26th of July 1816 Mr. and Mrs. Crosby sold out, and transferred that sum to a purchaser. The transfer was signed both by Mr. and Mrs. Crosby.

Mrs. Crosby had two children living at the death of the testatrix, the youngest of whom attained twenty-one in the year 1833; but she afterwards had other children, the youngest of whom was born in 1825, and had not therefore attained twenty-one.

Mr. Church died in 1820, leaving Mrs. Church his executrix, and Mr. Crosby died in 1836.

In 1838 Mrs. Crosby filed her bill against Mrs. Church and the representatives of Mr. George, the other executor alleging, in effect, that the executors and executrix had committed a breach of trust by transferring the £1000 into the Plaintiff's name whereby it became liable to the control of her husband; and seeking to recover £1000 consols, and the dividends thereon, from the death of her husband.

Mr. Pemberton and Mr. Piggott, for the Plaintiff. The effect of the codicil was to give to the Plaintiff a partial interest for her separate use, with a contingent reversionary gift of the principal; the latter she and her husband were incapable of disposing of, so as to bind her if she survived; for it was in the nature of a reversionary interest in a chose in action; *Purden v. Jackson* (1 Russ. 1), and *Honner v. Morton* (3 Russ. 65).

[487] The trustees ought to have retained the fund in their own names in order to give effect to the bequest, and protect it from the Plaintiff's husband. Instead of this, they transferred the fund into the name of the Plaintiff, who was then a married woman; this, in effect, was the same as if they had transferred into the name of the husband alone, for he obtained the legal control over the fund standing to his wife's credit in the bank books. Even as regards the dividends, which were settled to her separate use, she cannot be considered as having disposed of them; she had never the option given her of refusing to assent to the disposition made by her husband, and was never placed in the situation of exercising a free power of disposition over them. Though she joined in the transfer, it was quite unnecessary, as her husband, without her consent, might have transferred the stock. That act must be considered the act

of her husband alone, under whose control she was at the time. The Plaintiff is, therefore, entitled to the principal sum and dividends; or, at all events to the principal. They cited *Nail v. Punter* (5 Sim. 555) and *Scott v. Davis* (4 Myl. & Cr. 87).

Mr. Tinney and Mr. Koe, *contra*, argued that the trustees had strictly followed the direction contained in the will, which ordered the consols "to be transferred to her in her own name," and that, consequently, there had been no breach of trust at all.

That, subject to the contingent gift to her husband, which he had waived by his disposition of the property, the gift to the Plaintiff was absolute; *Elton v. Shepherd* (1 Bro. C. C. 532), *Irwin v. Farrer* (19 Ves. 85), *Adams v. Armitage* (*Id.* 415); [488] and there being no clause against anticipation, the Plaintiff could dispose of the principal and dividends as she thought fit. That the intermediate dividends, being settled to her separate use, she must be considered, as to them, a *feme sole*, and that she had made a valid disposition thereof by her concurrence in the transfer of the stock. That at any rate she had made a valid charge on the dividends settled to her separate use; and that, if she died before her youngest child attained twenty-one, the property would then belong to her husband's estate, and the disposition by him would then be rendered valid.

Mr. Pemberton, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. It is very distressing to find claims made against a party entirely innocent, by one who has been the occasion of the breach of trust complained of. It is, no doubt, a case of great hardship, but the Court must act strictly on its established principles.

The first question is, what interest did the Plaintiff take in this legacy? The first direction is to transfer the £1000 into the Plaintiff's own name, but not as her absolute property, for the dividends were to be for her separate use, and the principal was to remain in trust of the executors until the youngest of her children should attain twenty-one; then, and not till then, the principal was to be her own. When, therefore, that time arrived, the stock was to be transferred to the Plaintiff, but until then, it was to remain in the trust of the executors. There is, therefore, an immediate gift of the dividends to the Plaintiff for her separate use, and an absolute gift of the principal to be transferred to her [489] on her youngest child attaining twenty-one, with a gift over in case of her death, before the happening of that event.

That being so, the executors and executrix, erroneously, transferred the principal at the end of a year after the death of the testatrix. They did not suffer the principal to remain in trust, but transferred it into the name of the Plaintiff; and she, being at that time under the dominion of her husband, transferred it to someone else. There never was such an investment as the due execution of the trust required; the trust was not performed, and there is nothing to deprive the Plaintiff of the benefit of the trust, so far as relates to that interest which is not settled for her separate use.

It is clear that this sum must be brought into Court; and then comes the question which has occasioned some doubt in my mind: the dividends were to be paid for her sole and separate use, and there are no words which directly or by implication create any fetter against alienation; the question then is, whether the way in which she has dealt with these funds amounts to a disposition of the dividends.

If a married woman could not dispose of her separate estate without making a direct reference to it, or without shewing an express intention to charge it, there would be an end of the question; but I apprehend there are many ways in which a married woman may render her separate property liable to a charge, without having, in the transaction, made any direct charge on, or made any reference to, the property settled to her separate use. (See *Owens v. Dickenson*, Craig & Ph. 48.)

[490] I think, that in any view of this case, the result will be that the fund must come into Court; and then the dividends must either be paid to the Plaintiff, provided she has not charged them, or if she has created a charge, then they must be paid to the Defendant Mrs. Church; and liberty must be given to apply on the youngest child attaining twenty-one, or dying under that age, or on the death of the Plaintiff. I will look at the case and mention it again on Monday.

Jan. 25. THE MASTER OF THE ROLLS again mentioned the case, and stated that

he thought that a charge had been created upon the dividends, and that the Defendant was therefore entitled thereto.(1)

[491] Between LORD ARTHUR CHICHESTER and CHARLES HENRY JOHN RICH, *Plaintiffs*; and JOHN HUNTER and CHARLES B. UTHUR, *Defendants*. Jan. 21, 28, Feb. 2, 1841.

On the death of one of two Co-plaintiffs after the cause was at issue, it was ordered, on motion, that the survivor should revive the suit within a fortnight, or, in default, that the bill should be dismissed, with costs.

This bill was filed by the above-named Co-plaintiffs, and in July 1840, after replication, and after the cause had been set down, Lord A. Chichester died.

The cause subsequently coming on, was struck out of the paper in consequence of the abatement.

Mr. Keene now moved that the bill filed in the cause might stand dismissed out of Court, with costs to be taxed by one of the Masters of this Court, as against the Defendant C. B. Uther, unless the Plaintiff C. H. J. Rich should, within three weeks, cause the bill filed in this Court to be revived. He cited *Adamson v. Hall* (Turn. & Russ. 258), where one of several Plaintiffs died before answer, and a motion was made by the Defendant that the surviving Plaintiffs should, within a limited time, revive the suit, or that the bill should be dismissed, and the application, though refused by the Vice-Chancellor, was granted by the Lord Chancellor.

Mr. Pemberton and Mr. T. Turner, *contra*, relied on 2 Daniel Pr. 363, and contended that the costs had gone by the death of the party; that as there could not be a revivor for costs, so they could not be obtained [492] in a different form; that the cause was not now in that stage that it could be dismissed for want of prosecution, and it was different from the case of *Adamson v. Hall*, the *placitum* of which case they alleged was not justified by the facts.

The case was mentioned several times, and the decision in *Chowick v. Dimes* (2) referred to. Ultimately,

THE MASTER OF THE ROLLS ordered, that the surviving Plaintiff should revive this suit within a fortnight, or in default thereof, that the Plaintiff's bill should stand dismissed out of Court, as against the said Defendant C. B. Uther, with costs. (Reg. Lib. 1840, A. fo. 853.)

(1) EXTRACT FROM ORDER:—Order Sarah Church to transfer £1000 consols into the name of the Accountant-General in trust in this cause.

Order the interest from time to time to accrue due thereon to be paid to the Defendant Sarah Church until the youngest of the Plaintiff's children shall attain the age of twenty-one, or the death of the Plaintiff or of such child under such age, with liberty for any person to apply.

Direct an account of the personal estate and effects of Robert Crosby come to the hands of the Plaintiff (she submitting to account), and an account of the estate and effects of Edward George left unadministered, come to the hands of Robert Rimell.

Reg. Lib. 1840, A. fo. 302.

(2) 3 Beav. 290. The following is an extract from the order in *Chowick v. Dimes*, which will be found in Reg. Lib. 1840, A. 393:—

"His Lordship doth order that George Samuel Ford, as administrator of the late Plaintiff William Thomas Lear Chowick, deceased, or Emma Lear Chowick, as devisee of the said late Plaintiff, do, within fourteen days from the service of this order, file a supplemental bill or bill of revivor in this cause; or, in default thereof, it is ordered that the Plaintiff's bill do stand dismissed out of this Court without costs."

[492] WEST v. SMITH. Jan. 19, 21, 1841.

An order "to discharge an irregular order with costs," carries the costs of the application to discharge it.

An order having been irregularly obtained by Mr. Maughan, a motion was made to discharge it with costs, and the Master of the Rolls accordingly discharged it with costs (3 Beav. 306); and the question was whether the last order carried the costs of the application to discharge the irregular order.

[493] Mr. Tennant contended, that the Respondents were entitled only to the costs asked by the notice of motion, which were the costs of the irregular order, and not to the costs of discharging it.

Mr. Pemberton, *contra*.

Jan. 21. THE MASTER OF THE ROLLS [Lord Langdale]. In this case an application was made to discharge an order, irregularly obtained and irregularly drawn up, with costs; and it was ordered that it should be discharged with costs to be taxed by the Master; and the question raised before me was, whether where the Court discharges an irregular order with costs, the costs of the application to discharge such irregular order are included.

It is not a question upon which I myself had any doubt, but as some doubt was suggested to me at the time the case came on, I thought it right to see into the case. It is my opinion that such an order as this does of necessity carry with it the costs of the motion. The motion was to discharge the order with costs; the order made on the motion was to discharge the irregular order with costs, and that carries with it the costs of the application.

[494] Between NATHANIEL JOSLING, *Plaintiff*; and JAMES KARR, *Defendant*.
Nov. 16, 1840.

A. purchased a leasehold of B., and paid the purchase-money, but no conveyance was executed. A. bequeathed it to B. for life, with remainders over. A.'s executor filed a bill against B. alone, for a conveyance of the property upon the trusts of the will, not, however, seeking to recover it as assets for the purposes of the executorship. Held, that the other *cestui que trusts* were necessary parties; and, *semble*, that such a suit might be maintained.

In 1825 Thomas Karr the testator purchased two leasehold houses from his son James Karr for £800. He paid the purchase-money, but no assignment was executed to him.

Thomas Karr by his will bequeathed these leaseholds to James Karr for life, with remainder to his wife for life, with remainder amongst their children, with certain remainders over, and he appointed the Plaintiff and James Karr his executors.

James Karr renounced probate, and the will was proved by the Plaintiff alone, who insisted on having the property conveyed to him on the trusts of the will. In consequence of the refusal of the Defendant James Karr to assign, the Plaintiff filed this bill against him, praying, that the Defendant might be ordered to assign the property to the Plaintiff, as executor, on the trusts of the will, and for an account of the rents.

It did not appear whether the leasehold property was required for the payment of debts, and the claim of the Plaintiff seemed based on the trusts declared in the will respecting the property.

To this bill the Defendant demurred.

Mr. Pemberton and Mr. Rogers, for the demurrer. The Plaintiff claims to have the property assigned to [495] him, not as executor, but as trustee for the other parties; this he is not entitled to. If the testator had had the legal estate, then the executors would have nothing to do but to assent to the legacy, and could only refuse to assent to the specific legacy in the event of its being wanted for payment of debts; in that case the legal estate would be in the Defendant. The Plaintiff has no right

to constitute himself a trustee for the several parties interested in this specific bequest, and has no equity to support the bill.

But the bill is informal for want of parties, for as the Plaintiff comes into Court as trustee of the leaseholds, all his *cestui que trusts* must be parties to a suit, in which their interests are to be dealt with.

Mr. Kindersley and Mr. Simpson, in support of the bill. The Defendant, the vendor of the property, ought to have conveyed it to the testator, in which case, the leasehold estate would have been vested in the Plaintiff his executor. The Defendant must perform his duty as vendor, otherwise the legal estate will remain in him; and he might then convey it away to a purchaser for valuable consideration, without notice, and defeat those in remainder. It is therefore the duty of the executor to get in this property for the benefit of all the legatees.

The executor is responsible in respect of assets to all the debts and liabilities of the testator, and cannot be completely exonerated, unless by passing his accounts in this Court; he cannot be compelled to part with any part of the assets, until it appears that there are no outstanding liabilities. Treating this as a bill for the specific performance of the agreement, the specific legatees are not necessary parties. *Poole v. Pass* (1 Beavan, 600).

[496] Mr. Pemberton, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. I think the record is defective for want of parties, and I must therefore allow this demurrer on that ground, and give liberty to amend. With regard to the other point I should have some difficulty in persuading myself that the Plaintiff has no duties to perform; and that he should leave the legal estate in the Defendant, who may thus sell and dispose of the whole legal interest as he pleases, but I will not decide that point in the absence of the other parties.

[496] FOXLOWE v. AMCOATS. Nov. 25, 1840.

[S. C. 4 Jur. 1053.]

The Defendant, a purchaser of a public-house, insisted that time was of the essence of the contract, and that the abstract had not been delivered within the time agreed on. A reference, without prejudice, was made, on motion, as to the title, and when it was first shewn.

This was a bill for the specific performance of a contract for the sale of public-house and premises.

The bill stated that the property was put up by auction on the 8th of February 1840, subject to certain conditions of sale, by one of which, the vendors were to deliver an abstract of title within twenty-one days from the day of sale. That the Defendant became the purchaser at £560. That the abstract had been delivered within twenty-one days, but that the Defendant had neglected to complete; and it prayed a specific performance.

The answer admitted the contract; but stated, that the Defendant, a victualler, had purchased the property for the purpose of carrying on his trade, and of removing from another inn, his term in which expired at Lady Day 1840. That the Plaintiffs had not shewn a good [497] title at Lady Day, and that the Defendant was in consequence obliged to take another public-house; and he submitted, that as the object of his purchase had been defeated, the contract ought not to be specifically performed.

Mr. Cockerell, for the Plaintiff, now moved for a reference to inquire whether the Plaintiff could make a good title, and whether it was shewn prior to filing the bill. He referred to the 5th General Order of 9th May 1839 (Ord. Can. 136).

Mr. Smythe, *contra*, contended, that as the property sold, consisted of a public-house, time was of the essence of the contract; *Coslake v. Till* (1 Russ. 376); and consequently that the contract could not be specifically enforced. That the preliminary question ought therefore to be first determined, and that this was not,

therefore, a proper case for a reference to the Master as to title, which after all might turn out to be useless.

THE MASTER OF THE ROLLS. The fact of whether a good title can be made, and when it was first shewn, must be determined, before there can be a final adjudication of the question between the parties. Therefore refer it to the Master to inquire if the Plaintiff can make a good title, and when it was first shewn that such title could be made, and let the reference be without prejudice to any question in the cause. (See *Bonnet v. Rees*, 1 Keen, 405, and the cases there cited.)

[498] WYATT v. SHARRATT. Dec. 9, 1840.

An executor and trustee, who had lent trust money on unsurrendered copyholds, a deposit of a lease, and a bond, ordered, on motion, to pay the amount into Court.

The testatrix gave her residuary personal estate to the Defendant Sharratt in trust for the Defendant Elizabeth Mountford for life, with remainder to the Plaintiff absolutely, but she gave no directions as to its investment.

The Defendant Sharratt, the executor and trustee, lent £820, the principal part of the residue, at interest, upon the joint security of a covenant to surrender copyhold property of the value of £50 a year, the deposit of a lease, and a bond. The copyholds had not been surrendered, and the interest on the security had been irregularly paid. The bill was filed to make the Defendant liable for the breach of trust, and for an account.

Mr. Pemberton and Mr. Puller now moved, that the Defendant might be ordered to pay the £820 into Court, on the ground that the Defendant was not warranted in investing the money on this species of security; and that the security of the copyholds were inadequate according to the rule laid down in *Stickney v. Sewell* (1 Myl. & Cr. 8), being less than two-thirds.

Mr. Hardy, *contra*.

THE MASTER OF THE ROLLS [Lord Langdale]. The money must be brought into Court, but the Defendant ought to have some reasonable time to enable him to get in the mortgage. [499] Let him have six weeks, and he can apply again for further time if the circumstances should then warrant that indulgence.

NOTE.—See *Vigrass v. Binfield*, 3 Mad. 62; *Rothwell v. Rothwell*, 2 Sim. & St. 217; *Collis v. Collis*, 2 Sim. 365; *Costeker v. Horroa*, 3 Y. & C. 530; and *Meyer v. Montrose*, *post*, vol. iv. p. 343.

[499] BIRLEY v. THE CONSTABLES AND BURGESSES OF THE TOWNSHIP OF CHORLTON-UPON-MEDLOCK. Jan. 15, 1841.

Where Commissioners of Sewers, under an Act of Parliament, are proceeding to pave and make sewers to the injury of property, in a case not within the Act, this Court, unless expressly excluded, has jurisdiction to interfere, although, by the Act, jurisdiction is given to the Justices at Sessions, whose judgment is not to be removed by *certiorari* or otherwise into any of Her Majesty's Courts of Record at Westminster or elsewhere.

A bill to restrain commissioners from paving one part of the Plaintiff's property and draining another is not multifarious.

The bill, which was filed against the Commissioners of Paving of the above township, stated, that the Plaintiffs were owners in fee-simple of a plot of ground in the above township, part of which was unbuilt upon.

That under the 2 W. 4, c. 90, the Defendants were empowered to cause the then

present and future streets, &c., "or other public passages and entries" within the township, to be paved and drained, and to remove fences, &c., for that purpose, at the expense of the owners; but it was provided, that they should previously give notice, in writing, to the owners, requiring them to pave and drain; and in case of default within six months, then the Defendants were empowered to effect the same.

The bill stated, that the Defendants had threatened, under the provisions of the Act, to take possession of a [500] part of the plot of ground, and commit trespass and waste therein, and remove the soil, which the bill alleged the Act of Parliament did not authorise them to do, inasmuch as there was no public street or passage near or adjoining the same; and it further alleged that if the case were within the Act, then that no notice had been given as required thereby.

The bill charged that the threatened interference of the Defendants was altogether unnecessary to the public interest; was opposed to the wishes of the occupiers; would be seriously prejudicial to the Plaintiffs' property, and was unnecessary for the purposes of the Act of Parliament, even if the provisions of the same Act were applicable to the case.

The bill prayed an injunction to restrain the Defendants from committing trespass or waste, from breaking down fences, and from removing the soil, and generally from exercising the powers of the Act of Parliament.

The Defendants demurred for want of equity, for want of parties, and for multifariousness.

It appeared by the 196th section of the Act referred to, that any person, who should think himself aggrieved by any order or judgment made in pursuance of any rule, bye-law, or order made in manner thereinbefore directed, &c., "or by anything done in pursuance of this Act," might appeal to the Justices in general or Quarter Sessions, who should, in a summary way, hear and determine such complaint, and might award such restitution, damages, and costs as they should think fit; and such order was to be final, binding, and conclusive upon all parties, to all intents and purposes whatsoever, and should not be removable by *certiorari* or otherwise [501] into any of His Majesty's Courts of Record at Westminster or elsewhere.

Mr. G. Turner and Mr. Rogers, in support of the demurrer. The 196th section of the Act gives a special remedy to parties aggrieved: they may apply to the Justices of the Peace, whose order must not be removed by *certiorari* or otherwise into any of His Majesty's Courts at Westminster or elsewhere. This shews an intention of excluding the jurisdiction of all other Courts. If then the Court were to sanction this application, it must be prepared to assume jurisdiction in all cases of Turnpike and Private Acts where a particular jurisdiction has been created, and the interference of Her Majesty's Courts excluded. It could never be the intention of the Legislature that a party should come, in the first instance, into one of the Superior Courts, where the Legislature has expressly excluded him from coming by *certiorari* or otherwise.

Again, this is not a case of irreparable injury; all that is stated is, that it will be "seriously prejudicial" to the Plaintiffs, and that they will be "seriously incommoded." This is the first instance of a party coming into equity on a case of anticipated trespass, in which the damage may not amount to 1s.

They contended also, that it appeared on the face of the bill that there were other persons interested in the land intended to be drained and paved, and occupiers thereof who ought to be made parties to the bill, in order that complete justice might be done to all parties.

As to multifariousness, they insisted that it appeared from the allegations of the bill, that the ground of complaint was with respect to the paving on the north-east side of the land, and as to sewerage on the north-west, [502] and that being two distinct matters they could not be mixed up in one bill.

Mr. Pemberton and Mr. Little, *contra*. The bill alleges that the case is not within the Act; that the proper notice has not been given; that the Act is unnecessary and injurious; and that the Defendants threaten to carry away the soil, which is unnecessary for the purposes of carrying the Act of Parliament into execution. There can be no doubt that this forms equity enough for the interference of this Court, unless it has been, by force of the Act of Parliament, expressly excluded from affording its relief; it is now however clearly settled, that where a special remedy is

created by Act of Parliament, the old jurisdiction of this Court is not taken away, unless there are direct words excluding its interference.(1)

Secondly, it does not appear by the bill that there are other owners or occupiers of the part of the ground claimed by the Plaintiff; and even if it did, they would not be necessary parties. *Robertson v. The Great Western Railway Company* (L. C. Dec. 5th, 1839), *Semple v. The London and Birmingham Railway Company* (9 Simons, 209).

Thirdly, as the commissioners are acting under the power contained in one Act of Parliament, the two matters, if distinct (which we dispute) are not improperly joined in one bill.

Mr. Turner, in reply.

[503] THE MASTER OF THE ROLLS. I am of opinion that this bill must be answered. If it were necessary for me clearly to understand the position of this piece of ground, I should hesitate before giving judgment, because I do not clearly comprehend it; but at present it is not necessary for me to make out how this is, as I think that there are sufficient allegations in this bill to support the prayer and to warrant me in overruling the demurrer.

The first argument is, that this Court has not jurisdiction; but I am of opinion that the Court has jurisdiction to prevent injuries of this nature unless it has been expressly taken away by Act of Parliament. In this case it has not been taken away, and the Court must therefore afford its relief if there be sufficient equity to support it. Now all the allegations in this bill, though they may hereafter turn out wholly unfounded, must, on this occasion, be taken to be true; and the allegation is, that the commissioners have, under the Act, a power to do certain things in a particular way, but that, without giving the requisite notice and without complying with the necessary formalities, they are proceeding to act in a manner not authorised by the Act, not required by the public interest, and in a way injurious to the Plaintiffs. I think there is sufficient equity, under these circumstances, to support the bill.

It is then said that the bill is multifarious in uniting two subjects of complaint; first, as to the paving; next, as to the sewerage; but here we have the same corporate body, possessing powers under the same Act of Parliament, proceeding to exercise their powers upon the same plot of ground; I cannot think this multifarious.

[504] Then comes the question, which is certainly more difficult, with regard to parties, and although the allegations are not so distinct as they might have been, I think I must, on the whole, come to the conclusion that the complaint is in respect to land belonging exclusively to the Plaintiffs. As to the tenants and occupiers also, I must overrule this demurrer, without prejudice to the Defendants' right to take the objection by their answer; this will be a sufficient protection to them.

[504] WOOD v. HITCHINGS. Jan. 25, 1841.

The rule, that where a Defendant submits to answer he must answer fully, does not apply where the matter of discovery is immaterial to the relief sought by the bill.

A Plaintiff cannot by one bill obtain specific relief, and also a discovery on a matter distinct from that specific relief.

A bill for a receiver, pending a litigation as to probate, ought not to seek discovery in reference to the merits on that litigation.

A general outline of this case will be found in a former volume, where the case is reported on a motion for a receiver. (2 Beavan, 289.) From this it will appear, that the object of the suit was for a receiver, pending an appeal from the Prerogative Court to the Privy Council; but in addition to other discovery sought, "the bill contained very searching and minute inquiries as to the third alleged testamentary paper, as to the evidence of its execution and of its being signed, and all the

(1) See *Attorney-General v. Aspinall*, 2 Myl. & Cr. 613; *Attorney-General v. Corporation of Norwich*, 2 Myl. & Cr. 430; *Attorney-General v. Corporation of Poole*, 4 Myl. & Cr. 17; *Attorney-General v. Wilson*, 1 Cr. & Ph. 1.

circumstances connected with its being brought forward, and the result of all inquiries respecting the same."

The Defendants put in their answer to this bill, to which the Plaintiff took seven exceptions for insufficiency. These having been referred to the Master were disallowed by him, and which decision was now brought before the Court on appeal.

[506] The parts in question of the bill, which were admitted to be partially but not fully answered, required the Defendants to set forth a full and true detail and statement of everything which they, the said Defendants respectively, knew, suspected, or believed, or had heard respecting the alleged codicil, bearing date in the month of July 1835, and the handwriting thereof, and the memorandum in pencil, and the handwriting thereof, and the other testamentary papers, and the burning or destruction of the same, and respecting each and every of such matters, and the grounds and reasons of such suspicion and belief of the Defendants, and from whom they respectively heard what had been heard by them respectively respecting the matters aforesaid.

This interrogatory the Defendants answered as to their knowledge and belief, omitting to answer as to suspicion or hearsay.

Another part of the bill alleged not to be answered, required (in substance) the Defendants to set forth the persons of whom they or their solicitors or agents had made inquiries as to the above matters (distinguishing such as were examined from such as were not examined as witnesses in the suit in the Prerogative Court), and to set forth the information received from such persons.

As to this the Defendants admitted having made inquiries, and having received information and statements and communications from several persons, and that they had some statements, notes, letters, and memoranda relating thereto in their possession, but they said such information was received subsequent to the time when the dispute in the Prerogative Court arose. The Defendants added, that they had not from any such information been enabled to form any knowledge [506] or belief respecting the matters inquired after. Similar answers were then given in reference to the Defendants' solicitors and proctor, and not only stating that the inquiries made, and the information and statements and communications received by them were made and received since this dispute, but that they were so made and received by them whilst acting in their respective characters of solicitors and proctor. They said that, save as aforesaid, neither they nor the solicitors or agents had received any information, or statements, &c.

Another portion complained of required, in substance, the Defendants to set forth what statements, notes, letters, or memoranda they and their solicitors or agents had had, concerning or relating to such information and the above matters, and to schedule the particulars thereof. This the Defendants insisted they were not bound to disclose.

The remaining part alleged to be unanswered, sought a discovery whether the codicil was not insisted on in pursuance of some arrangement between the legatees under the codicil, or some of them, or between some of the Defendants and the next of kin; and whether some and what deeds, agreements, instruments, wills, codicils, testamentary papers, and writings, had not been in the custody or power of the Defendants, their solicitors or agents, relating to the matters stated in the bill, and asked them to set forth a schedule of such deeds.

There were two sets of exceptions, one to the answer of the Corporation of Gloucester, and the other to the answer of the Defendants Helps and others.

Sir Charles Wetherell, Mr. Turner, Mr. Bethell, and Mr. Walker, for the Plaintiff, argued, that the Defendants, having submitted to answer, were bound, by the [507] practice of the Court, to answer fully: *Taylor v. Milner* (11 Ves. 41), *Sommerville v. Mackay* (16 Ves. 382), *Mazuredo v. Maitland* (3 Mad. p. 70), *Amor v. Fearon* (V.-C. 12th July 1834), where it is said to have been held by the Vice-Chancellor of England that, although an interrogatory and the statement in the bill on which it is founded may be immaterial, yet if the Defendant attempts to answer it, and he answers it imperfectly, the Defendant cannot, upon exceptions to the sufficiency of his answer, avail himself of the objection that the statement or question so imperfectly answered is immaterial. (Cooke's Orders, 45; but see the decision of the Vice-Chancellor in *Graham v. Coape*, 3 Myl. & Cr. 640.)

They argued also, that the discovery was most material, and might be used by the Privy Council under the 3 & 4 W. 4, c. 41, s. 7, *et seq.*, and affect their decision on the appeal.

Mr. Pemberton, Mr. Kindersley, and Mr. S. Sharpe, for the several Defendants, contended that the discovery which the Plaintiff, by his exceptions, insisted on obtaining, was quite immaterial to the relief sought by the bill, which was merely for the appointment of a receiver, in order to protect the property pending the appeal to the Privy Council; that the 74th General Order of 1828 (Ord. Can. 28), authorised the Master in deciding on the sufficiency or insufficiency of an answer to take into his consideration the relevancy or materiality of the statement or question referred to; and that such was the practice previous to those orders: *Ager v. The Regent's Canal Company* (G. Cooper, 212). That it was not stated that the discovery sought was in aid of any proceedings now pending or in contemplation; and that it could not be [508] had here in aid of proceedings in a Court which had full jurisdiction and power itself to grant the discovery; *Dun v. Coates* (1 Atk. 288; Mitford's Plead. 4th ed. 186); and that even if this discovery were obtained, it could not be used before the Privy Council. They also argued, that the bill was improper in its frame, seeking, by a bill for relief, to obtain a discovery immaterial to the relief prayed, and thereby evading the payment of the costs of the discovery; and also that it was veracious to seek a statement of all the idle gossip, and of the passing suspicions which had taken place in a provincial city in respect to a matter which had created great public interest.

THE MASTER OF THE ROLLS [Lord Langdale.] This is, no doubt, a very singular case; and I do not recollect ever having heard such an argument, upon a question as to the insufficiency of an answer.

The material facts of the case lie in a very small compass. Mr. James Wood having died in the month of April 1836, the present Plaintiff and other persons propounded the two papers dated in December 1834, which they call testamentary papers, and they were propounded as his will in the Ecclesiastical Court. The validity of those papers was opposed by the next of kin, and, during the litigation between those parties, and on the 13th of June 1836, Mr. Helps, one of the Defendants whose answer is now in question, propounded a writing dated in July 1835, and this he insisted was a codicil or testamentary paper which ought to have validity. On the 20th of February 1839 sentence was pronounced in the Ecclesiastical Court against the validity of all the papers; it was therefore held that Mr. James Wood had died intestate. Soon after this, the present Plaintiff presented his petition to the Queen in Council, which was referred, in the ordinary course, to the Judicial [509] Committee; and on the 3d of August in that year, certainly a very considerable time after the sentence had been pronounced, but how long after the appeal was presented I do not know, because that date has not been presented to me, he filed the present bill.

The bill is framed in a manner which, to me, I confess is perfectly novel. I do not recollect ever having seen a bill framed like the present. The relief which is sought by the bill, is to have the property protected pending the litigation; and a discovery is also sought of many facts. Almost all bills ask for discovery; but the great singularity of this bill is, that it asks a discovery not only of such facts as are material to the relief which is prayed by the bill, but also a discovery of very many facts which are not in the least degree material to that relief.

Very soon after the bill was filed, a motion was made to me for the appointment of a receiver. One of the objections made to that application was the frame of this bill. I have a perfect recollection that it was then said, that this bill was so much a bill of discovery that it was hardly fit or proper for this Court to treat it as a bill for relief; that was one of the several objections I had to consider. I then thought, and I believe I expressed myself, that the bill was improperly framed; but, notwithstanding this, that the title to the relief appeared to me to be clear, and I therefore granted the receiver, and this decision was afterwards confirmed on a rehearing by the Lord Chancellor. After this, the parties put in their answers, and it is perfectly clear, and is admitted by all parties, that the answers which have been put in do not fully answer all the interrogatories; and it is also admitted, that the answers which have been put in, are answers to some part of the discovery, which, by the Defendants

themselves, is considered to be quite immaterial and irrelevant to the relief which is [510] sought. They say they have thought it right (and no one can very well dispute the moral propriety of what they have done) to answer such parts of the matter immaterial to the relief, as contained imputations on their character, and there they stop; and they say they intended to go no further. Exceptions were filed to the answers, the Master has overruled those exceptions, and the matter now comes before me.

Considering this bill, as I do consider it, as most improperly framed for the purpose of relief thereby sought; the first question is, whether the Plaintiff, under the circumstances of this case, is, by means of this improper bill, to obtain a discovery which he could not legitimately have had on a bill properly framed: this, I apprehend, is really the first question; and the next question is, whether the Court is to be so entangled by technicalities and form, as to be prevented doing that which the real justice and merits of the case require. The object in view is now avowed, though it is not stated in the bill; the bill merely states that a discovery of the several matters stated by the bill is material and necessary to the Plaintiff; while the object now stated is, that, with regard to the proceedings which are taking place in the Court of Appeal from the Ecclesiastical Court, it is most material to bring forward facts, which, if known, would be taken into consideration by the Judicial Committee, and must have a material effect on their decision. In the first place I have to observe, that in my opinion, a Plaintiff has no right to mix up two such distinct matters in one suit; he has no right at the same time to maintain a bill for specific relief, and add to that, a bill for discovery on a matter which is quite distinct from that specific relief; that, I think, he has no right to do. In the next place, if this had been a simple bill of discovery, it would be a matter of serious consideration, whether, in the present state of [511] things, this Court has jurisdiction to entertain such a bill. The Judicial Committee of the Privy Council has, no doubt, under the Act of Parliament by which it is created, a right to ask for and claim new evidence and new information in respect of the subject on which it is to adjudicate; it may do so if it thinks fit, and, however strange it may seem to our notions of the functions of a Court of Appeal, that the Court should have the means of constituting a new case on which it may adjudicate, and on which adjudication there is no appeal whatever, still the Act of Parliament gives to that Court authority to call for fresh facts, to direct issues, and to make inquiries; but has it ever been supposed or imagined that an Appellant in the Privy Council has a right, without any previous order or sanction of that Court, to adduce fresh evidence which that Court must consider? If there is to be fresh evidence gone into, and if there is to be new inquiry, is not the necessity for it to be first declared by the Court itself? Can a party, without leave, and before the Court itself demands further evidence, or thinks fit so to direct, say he has a right to produce new evidence, nay further, that the Court, when it is produced, must receive it? I apprehend he has no such right. It has been observed, and I believe with perfect truth, that no Judge sitting in that Court on an appeal, has ever yet thought it a proper exercise of his discretion to call for such new evidence; no instance has been stated where any further evidence has been produced; and it certainly appears to me that a party without leave—without a previous adjudication, or order of the Court—has no right to say that fresh evidence, at his demand, shall be produced.

The case might certainly have been different, if, on the consideration of such evidence as was before it, the Judicial Committee had decided that it was necessary for the justice of the case to produce fresh evi-[512]-dence; but even if an order of the Privy Council had been made, I must own I should have hesitated before I came to the conclusion that this Court has jurisdiction to act in aid of such an adjudication, in affording discovery. It is not necessary to come to a conclusion on that question on the one side or the other; but I cannot help saying, as at present advised, that a party desiring to produce evidence, but having no order of the Judicial Committee for that purpose, has not a right in this Court to file a bill of discovery for that evidence, on a mere speculation. For anything that appears to the contrary, the Judicial Committee may be perfectly satisfied with the evidence adduced in the Court below, and might think fit to decide on that evidence, notwithstanding a bill of discovery had been filed and answered in this Court. I say it is not necessary to decide

on these points, because I have only to look at the particular nature of this case as it is stated on the bill.

The only difficulty I have had in the consideration of this case, from the first opening of it, is this, that the Defendants have submitted to answer, and have partly answered these very interrogatories, and then it comes to what I have alluded to before, that when the Court sees the discovery, ought not, under the circumstances stated to be afforded, when it is apparent that the subject of discovery is wholly and altogether immaterial to the relief sought by the bill, is it to be so bound by technicalities, as that, because the party has answered at all he must be held bound to answer completely? That is a question which I admit has created some difficulty in my mind. I do not pronounce my opinion on it without some hesitation; but I am of opinion I ought not to compel the party to answer completely, because he has answered as far as he has done; and being of that opinion, and that the discovery thereby sought is wholly immaterial [513] and irrelevant to any purposes that can be answered in this Court. I think, that under these circumstances the Master came to a sound conclusion, and that I ought to overrule the exceptions to his report (*See The Baron de Feucheres v. Dawes, post.*)

[513] HOOD v. PHILLIPS. Feb. 9, 11, 1841.

Where the same person becomes absolutely entitled to an estate and a sum of money charged upon it, the charge will be deemed extinguished, unless it appears that the owner intended otherwise.

For the purpose of shewing the intention, evidence direct and presumptive may be resorted to. A transfer to a trustee must be considered as one of the grounds rebutting the presumption of merger; but does not amount to decisive evidence against the presumption.

A. B., the owner in fee of an estate, paid off a mortgage in fee existing on it, which in 1807 was transferred to a trustee, in trust for A. B., her "heirs, executors, administrators, and assigns, respectively;" and the trustee covenanted to convey to A. B., her heirs, or assigns, or unto such other person or persons, and in such manner and form as A. B., her heirs, executors, administrators, or assigns should direct. A. B. devised the estate to a trustee to pay certain specified legacies, and subject thereto, she devised it to C. D. in fee, and upon or for no other use, trust, intent, or purpose whatsoever." A. B. died in 1832. Held, that the mortgage had merged.

The question in this case was, whether a mortgage in fee for £500, conveyed on certain trusts for the benefit of the owner of the equity of redemption, had become merged.

In 1730 the owner of an estate called East Hook, mortgaged it in fee for the sum of £500.

On the 25th of February 1807 this mortgage was in consideration of £500 transferred to John Phillips, who, on the following day, executed a declaration of trust, whereby he declared that the £500 paid for the transfer of the mortgage, was the money of Elizabeth Lort (who was then the owner in fee of the East Hook estate), and that his name had been used in trust only, and to and for the sole and only proper use, benefit, and behoof [514] of said Elizabeth Lort, her heirs, executors, administrators, and assigns respectively, and to and for no other use, intent, or purpose whatsoever. And John Phillips thereby, for himself, his heirs, executors, and administrators, covenanted with Elizabeth Lort, her heirs, executors, administrators, and assigns, that he and his heirs would, at any time or times thereafter, at the request, cost, and charges of the said Elizabeth Lort, her heirs, executors, administrators, or assigns, well and sufficiently convey, assign, and assure all and singular the hereditaments and premises, with their appurtenances, "unto the said Elizabeth Lort, her heirs or assigns, or unto such other person or persons, and in such manner and form as the said Elizabeth Lort, her heirs, executors, administrators, or assigns should direct or appoint."

Elizabeth Lort continued seised of the estate, and by her will, dated in 1829, she

devised it to the Defendant, John Lort Phillips, in fee, upon trust to pay an annuity of £20 a year to his brother for life, and upon trust to raise £1000 for certain persons named in the will. The will then proceeded as follows;—"And subject unto and charged with the payment of the said annuity of £20 unto the said James Phillips for his life as aforesaid, and of the said five several sums of £200 each as herein-before mentioned, and all expenses whatsoever in any way incident to the execution of the aforesaid trusts, I give and devise the same messuages, hereditaments, &c., unto and to the use of my godson, Peregrine Lort Phillips, his heirs and assigns for ever, and upon or for no other use, trust, intent, or purpose whatsoever;" and she gave her residuary personal estate to the two Plaintiffs.

The testatrix died in 1832.

[515] The Plaintiffs, the residuary legatees, by this bill, prayed to have it declared that the £500 was a subsisting charge on the property, and to have the same paid or the mortgage foreclosed.

Mr. Kindersley and Mr. Lewis, for the Plaintiffs, contended, that the testatrix had kept the charge on foot for the benefit of her personal estate. That the ordinary presumption was rebutted, by her procuring a transfer to a trustee and not to herself, and especially by the declaration of trust for her, her heirs, executors, administrators, and assigns respectively; and by the covenant, whereby the trustee covenanted with her, her executors and administrators, to convey to such other person as she, her heirs, executors, administrators, or assigns should direct. They cited *Duke of Chandos v. Talbot* (3 P. W. p. 605), *Donisthorpe v. Porter* (2 Eden, 162), *Oxenden v. Lord Compton* (2 Ves. jun. 69), *Forbes v. Moffatt* (18 Ves. 384), *Trevor v. Trevor* (2 Myl. & K. 675), *Earl of Buckingham v. Hobart* (3 Swan. p. 199), *Thomas v. Kemys* (2 Vern. 348), *Chester v. Wiles* (1 Amb. 246).

Mr. Pemberton and Mr. Pitman, for the devisee of the estate. Where a person having an absolute interest in an estate, pays off a charge, it is extinguished, unless you can clearly shew the intention that the charge should be kept alive. This may be done by express declaration, or from inference arising from the great advantage to the party in keeping the charge alive for his benefit. It is impossible to suggest anything like an express declaration in this case, that the charge should be kept alive, and there is no possible purpose to be answered in preserving the charge independent [516] of the estate. The covenant in the declaration of trust is to convey the estate to Mrs. Lort, her heirs and assigns, or to such other person as she, her heirs, executors, administrators, or assigns should direct.

They argued that the terms of Mrs. Lort's will were conclusive on the point; for she devised expressly, subject to certain charges, "and upon or for no other use, trust, intent, or purpose whatever;" this excludes the possibility of her intending the devisee to take, subject in addition to a mortgage of £500. They cited *Tyler v. Lake* (4 Sim. 351), *Asley v. Milles* (1 Sim. 298), *Parry v. Wright* (1 S. & S. 369, and 5 Russ. 142).

Mr. G. Turner and Mr. Bevir, for the representatives of John Phillips the trustee.

Mr. Freeling, for John Lort Phillips the trustee.

Mr. Kindersley, in reply.

Feb. 11. THE MASTER OF THE ROLLS [Lord Langdale]. In this case the testatrix, Mrs. Elizabeth Lort, was, in her lifetime, entitled to an estate called East Hook, and was also entitled to the sum of £500, charged on the same estate by way of mortgage. By her will she devised the estate, subject to certain charges, to the Defendant Peregrine Lort Phillips in fee; and she gave the residue of her personal estate to the Plaintiffs, Elizabeth Hood and Mary Saunders.

The Plaintiffs insist that the mortgage was kept up as a distinct charge, and they claim the £500 as part of the testatrix's personal estate.

[517] The Defendant, Peregrine Lort Phillips, insists, that, as the estate and the charge thereon belonged to the same person, the charge ought, in this Court, to be deemed merged in the inheritance.

And the only question in the cause is, whether the mortgage for £500 was a subsisting charge at the death of the testatrix.

The general rule in such cases is not in dispute. If the same person becomes absolutely entitled to an estate, and to a sum of money which is charged upon it, this Court will deem the charge to have become merged in the estate, or to have become,

extinguished; unless it shall appear that the owner of the estate and of the charge intended otherwise.

For the purpose of shewing the intention, evidence direct and presumptive may be resorted to; and the Plaintiffs allege it to be clear, that the testatrix did not intend to pay off the mortgage for the purpose of relieving the estate or property on which it was charged, but for the purpose of keeping a portion of her personal estate so invested.

The mortgage was of very long standing, and in February 1807 was vested in Henry Davis, who was entitled to the estate in fee, subject to redemption on payment of £500. Mrs. Lort was absolutely entitled to the equity of redemption.

The money was then paid off by Mrs. Lort; and, on that occasion, Henry Davis conveyed the estate, not to her, but to John Phillips, by a deed to which she was no party, and in which it was expressed that the mortgage was paid off by Phillips; and that, in con-[518]-sideration thereof, the estate was conveyed to him in fee, subject to redemption on payment of the mortgage money to him. On the following day, however, the 26th February 1807, John Phillips executed a deed-poll, whereby he declared that the money, with which the mortgage was paid off, was not his, but Mrs. Lort's; and that, in the deed, his name was used only in trust for her; and by the deed it was expressed that he covenanted with her, her executors, administrators, and assigns, that he would, at her request, convey the estate to her, her heirs and assigns, or unto such other person as she, her heirs, executors, administrators, or assigns should direct.

In this case, therefore, the owner of the estate paying off the charge, caused a conveyance to be so made, as not legally to extinguish the charge. The legal estate was left outstanding, and this was contended to be conclusive evidence, that Mrs. Lort intended the charge to be kept on foot for the benefit of her personal estate; and the rather, because of the introduction of the words "executors and administrators" into the declaration of trust.

The presumption being, that when the owner of an estate pays off a charge, he does it for the relief of the estate, a cotemporaneous transfer of the charge to a trustee must be considered as one of the grounds upon which the presumption may be rebutted: but no instance has been cited in which such a transfer has of itself been held to be decisive evidence against the presumption, and I am of opinion that it ought not to be so.

The object is to collect the intention: and we must look at all the circumstances of the case, at the trans-[519]-fer, at the trusts declared, and at the subsequent conduct of the party. Even if Mrs. Lort had intended in 1807 that the charge should be continued, the money and estate being her own absolutely, she was at liberty at any time to change her mind, which might have been different in 1829, when she made her will, and in 1832 when she died.

In this case Mrs. Lort was not content with merely causing the mortgage to be transferred to John Phillips, she also caused a declaration of trust to be executed. It is said, that at the time, her clear intention was to keep the mortgage on foot, and yet she has not said so; the declaration is silent as to that, and her intention in that respect (supposing it to be such as is alleged), is left as matter of implication and inference, from the mere fact of the transfer and the use which is made of the words "executors and administrators" in the deed. I am unable to adopt the reasoning which leads to the inference insisted on by the Plaintiff. It appears to me, that if she really had intended to keep the charge on foot, the declaration of trust was an occasion on which the intention must have been clearly and unequivocally expressed, and the absence of any mention of the trust on which the money was to be held, or the mode in which it was to be applied, appears to me to afford evidence in support of the ordinary presumption far outweighing any evidence against the presumption, which the use of the words "executors and administrators" in the ill-drawn deed may be supposed to afford.

There is nothing to shew that Mrs. Lort had any interest in keeping up the charge, and thinking that the transfer of the mortgage and the declaration of trust taken together, do not afford sufficient evidence to rebut the ordinary presumption that she paid off the [520] charge to relieve the estate, it does not appear to me to be material to consider what advice or what motive induced her to cause the transfer to be made as it was.

Twenty-two years elapsed between this transaction and the date of the will, and in the will no mention whatever is made of the mortgage money. Being the owner of the estate, and of the supposed charge upon it, she devises the estate to John Lort Phillips in fee, on trust to pay an annuity, and to raise certain sums by sale or mortgage, and subject to those charges and the expense of executing those trusts, she gives the estate to Peregrine Lort Phillips, his heirs and assigns for ever; and she adds the words, "and upon or for no other use, trust, intent, or purpose whatsoever."

It is very difficult for me to suppose that the testatrix, using these words, intended the estate given to her devisee, to be subject to a claim by her residuary legatee for a sum of £500 charged on that estate. What the Plaintiffs want, is proof of intention to rebut the ordinary presumption in such cases; and the occasion of making the will was such as to make it probable, to say the least, that the testatrix would have distinctly and unequivocally expressed the intention if she really had it.

If the charge had belonged to another person, it would have been in no way affected by the terms of the devise; and even in this case (the charge belonging to the testatrix), I do not think that the silence of the will on the subject of the charge is itself conclusive. But it corroborates the impression afforded by the other circumstances of this case; and, on the whole, I am of opinion that there is no sufficient evidence to rebut the [521] presumption that this lady, having paid off the mortgage, intended to extinguish the charge.

Dismiss the bill, with costs.

[521] WRENCH v. JUTTING. Feb. 13, 1841.

[S. C. 5 Jur. 145.]

A testator bequeathed to A. his household furniture and other like things, "and all other goods of whatever kind," and he appointed that certain specified monies should be divided as follows, after all his debts should be paid off. He then specified certain legacies, and proceeded, "three or four thousand pounds, or whatever remaining sum or sums to A." Held, that A. did not take the general residue.

The question in this cause turned on the will of Jacob Wrench, which was expressed as follows: "I give and bequeath all my household furniture, plate, linen, books, china, pictures, and all other goods of whatever kind unto Margaret Petronella Jutting of No. 1 Grovehill Terrace, Camberwell, and appoint J. H. Jutting of the same place sole executor, and that the money, outstanding or book debts, the remaining sum unsettled, left me by my late father, and also what may be forthcoming from the estate of the late firm of Turner & Wrench, now in the hands of Mr. Adams of Bridewell, be divided as follows, after all my debts are paid off, £50 Rev. T. W. Wrench for board and lodging; £100 Diana Maria Matilda; £50 Julia Charlotte Wood; £100 Mrs. Shyring; £100 Aged Pilgrim Society; 3 to £4000, or whatever remaining sum or sums, to my beloved Margaret Petronella Jutting."

The testator died in October 1837. It appeared that he had other personal property besides that specified in his will, consisting principally of money. The question was, whether the will contained a general residuary gift to Miss Jutting.

Mr. Pemberton, Mr. Stuart, and Mr. Craig, for the Plaintiffs, who were the next of kin of the testator, contended, that the general residuary estate was undisposed of. That it would not pass by the word "goods" in the first clause, which related to furniture and other things *ejusdem generis*, nor by the words "remaining sum or sums," which referred only to the remainder of the property just previously specifically bequeathed, for they alone were directed to be "divided as follows."

They cited *Ommanney v. Butcher* (Turn. & Russ. 260), where it was held that the residue did not pass by the words "in case there is any money remaining, I should wish it to be given to private charities," and *Wilde v. Holtzmeier* (5 Ves. 811).

Mr. Kindersley and Mr. Purvis, *contra*, contended, that the general residue passed

to the Defendant Miss Jutting, either under the words "all other goods of whatever kind," in the former part of the will, or under the words "whatever remaining sum or sums" in the latter. In *Legge v. Asgill* (Turn. & Russ. 265, n.) the residue was held to pass under the words "money left unemployed," so everything would be included in the Ecclesiastical Court under the words "*bona notabilia*." They also cited the following cases, *Campbell v. Prescott* (15 Ves. 500), *Mitchell v. Mitchell* (5 Mad. 69), *Kendall v. Kendall* (4 Russ. 360), *Arnold v. Arnold* (2 Myl. & K. 365), *Boys v. Morgan* (3 Myl. & Cr. 661), *Leighton v. Bailie* (3 Myl. & K. 267), *Dowson v. Gaskoin* (2 Keen, 14), *Rogers v. Thomas* (2 Keen, 8).

THE MASTER OF THE ROLLS (without hearing a reply). There is some obscurity, but we must collect the testator's meaning from all the words of the will. The intention imputed to the testator by the Defendant is, that he intended to give her everything he had in the [523] world, subject to the payment of his debts and legacies. If that were his intention, the way in which he expresses himself is this [his Lordship read the will], he does not direct the legacies to be paid, and then give to the Defendant all the rest, but he distinguishes a particular part of his property from all the rest, and directs it to be divided, after all his debts are paid, between certain legatees in the amounts stated, and gives £3000 or £4000, or whatever remaining sum or sums to the Defendant. In the former part of the will he had given her the furniture, &c., "and all other goods of whatever kind." It is not necessary to say what would be the effect of these words; if they had stood by themselves and if this were the only clause in the will, there would be strong reason for extending their operation; but that he did not intend all his estate to pass, is shewn by his subsequently stating what were his intentions as to a particular part of it. It has been argued, that he excepted certain pecuniary legacies from his general gift to the Defendant in the latter part of his will, and that he did not otherwise desire to extend the exception, but when it is once shewn that he did not intend, by the first words, to give everything, they must then be in some way restricted.

I think, on the whole, that these words cannot have the enlarged meaning attributed to them by the Defendant. The testator by the latter clause separates three several portions of his property: his book debts, the sum unsettled by his father, and what may be forthcoming from the late firm, and having specified them, he says they are to be divided as follows, after payment of his debts, and having directed the particular sums to be given to the legatees named; he gives "£3000 or £4000, or whatever remaining sum or sums" to the Defendant. I cannot extend the meaning of these latter words beyond the particular sum here mentioned.

[524] It was properly asked, why did the testator enumerate those particular sums at all? There could be no reason, unless he intended them alone to be subject to the disposition in that clause. I think that the general residue is undisposed of and belongs to the Plaintiffs, the next of kin.

[524] *SIDEBOTHAM v. BARRINGTON. Feb. 16, 1841.*

[S. C. 4 Beav. 110; 5 Beav. 261. See *Fraser v. Wood*, 1845, 8 Beav. 342.]

Proceedings in insolvency are not superseded by a subsequent bankruptcy founded on an act of bankruptcy prior to the insolvency.

A., who possessed a real estate, committed an act of bankruptcy; he afterwards took the benefit of the Insolvent Debtors Act, and was subsequently declared bankrupt. Held, that the assignees in bankruptcy could not make a good title to a real estate of the bankrupt: that the estate was vested in the assignees of the insolvency, and that the objection was one of title and not of conveyance.

The Court will not determine a question between the parties, on admission of facts on which they reserve to themselves the right of afterwards adducing evidence.

William Barrington, who was possessed of a life interest in a freehold estate, committed an act of bankruptcy in April 1829, and afterwards, on the 21st of April 1829, he conveyed the estate to Mr. Skirrit, in trust to sell for payment of certain

debts, and to pay the residue to him William Barrington. At the time of this conveyance the estate stood mortgaged to Mr. Royds.

In December 1829 William Barrington was imprisoned for debt, and in April 1830 he took the benefit of the Insolvent Debtors Act (7 G. 4, c. 57), and executed the usual conveyance of his property to the official assignee, but no regular assignee was then appointed.

On the 22d of February 1833 William Barrington was declared a bankrupt, and the Plaintiff was appointed his assignee. The property was sold by the [525] Plaintiff to the Defendant William Barrington the younger, who having refused to complete his purchase, a bill for specific performance was filed against him, and a reference as to the title made to the Master. (See *Ex parte Barrington* and *Ex parte Sidebotham*, 3 Deac. & Ch. 818, 4 Deac. & Ch. 461, 1 Deac. 3, 1 Mont. & Ayr. 655, 2 Mont. & Ayr. 146.) The Master's opinion being against the title, the matter now came before the Court by way of exception to his report.

The purchase-money was admitted, for the purpose of this discussion, to be more than sufficient to pay all the creditors under the insolvency, but the parties reserved to themselves the right of adducing evidence thereon.

Mr. Pemberton and Mr. Teed, for the exceptions, and in support of the title contended, first, that the *fiat* in bankruptcy wholly superseded the insolvency.

Secondly, that the assignees and creditors under the insolvency must be considered in the nature of incumbrancers, and subject to their claims, as mere trustees for the assignees and creditors under the bankruptcy; that the objection would then be one of conveyance and not of title; *Townsend v. Champenown* (1 Y. & J. 449), *Lord Braybrooke v. Inskip* (8 Ves. 436).

Thirdly, that the insolvency could not overreach the voluntary deed to Skirritt, the deed having been executed more than three months from the commencement of the imprisonment, 7 G. 4, c. 57, s. 32, but that [526] the bankruptcy did overreach that deed, because the act of bankruptcy took place prior to its execution. That consequently the assignees in bankruptcy took the estate, interest, and power conveyed to Skirritt, and had priority over the assignees in the insolvency.

Mr. Kindersley and Mr. Bethell, *contra*. The estate and interest of the assignee under the insolvency is still subsisting; *Ex parte Shuttleworth* (2 Gl. & J. 68); this also appears from the thirteenth section of the Insolvent Act. (1) The Plaintiff, as was observed by the Master when the case was before him, has sold the estate of another man, and then offers to get him to confirm the sale; this Court has never, under such circumstances, enforced the contract. The property being vested in the assignee in insolvency, can only be sold according to the formalities prescribed by the Insolvent Act (7 G. 4, c. 57, s. 20).

[527] The insolvent assignee is not a trustee, he is not in any way under the control of the Plaintiff, the objection, therefore, goes to the title, and not to the conveyance.

The deed to Skirritt is valid as against the Plaintiff, unless it were fraudulent, which is not suggested.

(1) And be it further enacted, that the filing of the petition of every person in actual custody, who shall be subject to the laws concerning bankrupts, and who shall apply by petition to the said Court for his or her discharge from custody, according to this Act, shall be accounted and adjudged an act of bankruptcy from the time of filing such petition; and that any commission issuing against such person, and under which he or she shall be declared bankrupt before the time appointed by the said Court, and advertised in the *London Gazette*, for hearing the matters of such petition, or at any time within two calendar months from the time of filing such petition, shall have effect to avoid any conveyance and assignment of the estate and effects of such person, which shall have been made in pursuance of the provisions of this Act: provided always, that the filing of such petition shall not be deemed an act of bankruptcy, unless such person be so declared bankrupt before the time so advertised as aforesaid, or within such two calendar months as aforesaid; but that every such conveyance and assignment shall be good and valid, notwithstanding any commission of bankrupt under which such person shall be declared bankrupt after the time so advertised as aforesaid, and after the expiration of such two calendar months as aforesaid.

Mr. Teed, in reply.

THE MASTER OF THE ROLLS [Lord Langdale], after reading the thirteenth section of the 7 G. 4 c. 57, decided, that the *fiat* did not supersede the insolvency, and that the conveyance to the provisional assignee in insolvency was good and valid, and he then proceeded as follows :—

On the other point, it appears that under the deed of the 21st April 1829, the equity of redemption of this estate, it having been previously mortgaged, was conveyed to a trustee upon trust to sell and to pay certain debts, and to hand over the surplus to the bankrupt. Now, whatever may be the effect of the Insolvent Debtors and Bankrupt Act upon such voluntary deeds, this at least is clear, that whatever interest was vested in the bankrupt after the execution of that deed, did, by operation of the assignment in the insolvency, become vested in the assignee in the insolvency, and it became vested in him subject to the duties he had to perform. That interest, therefore, now remains in the insolvent's assignee subject to the duties which, according to the Act, he has to perform.

I do not think it is necessary for me to advert to the difference between the provisional and an ordinary creditor's assignee, because there is now such a person in whom the estate is at present vested, and when or at [528] what particular time it became so vested, does not appear to me to be material; but the estate being so vested in the assignee, and he being subject to such duties, I apprehend it cannot be considered as a mere question of conveyance.

I apprehend a question of conveyance arises in this way. Where an interest is vested in a party to secure a right, the satisfaction of which right entitles the party who has sold the estate to call for a conveyance, then the Court considers it a question of conveyance only, but I think it has never gone further than that. If the estate be vested in a person, not for the purpose of securing a right, but for the purpose of enabling that person to perform a duty to others, then, until that duty has been performed, there can be no right to call for a conveyance.

Now here there is clearly a duty to perform in obeying the directions which are contained in the Insolvent Act. As to the value of the estate, I cannot enter into the consideration of it upon the present occasion. It appears probable that if these persons were amicably disposed, they might, by means of the assignee in the insolvency, the assignee in bankruptcy, and the insolvent himself, make a good title; they certainly could do so with the assistance of the Insolvent Debtors Court; however the question now is, what are the rights and duties of the parties with respect to one another. I am of opinion that, under the circumstances, the question is not merely one of conveyance, but one of title.

The other point has been put very ingeniously: it is said, that by the effect of the bankruptcy and the statute, the estate which the bankrupt intended to convey [529] to Skirritt has now become vested in the assignee in bankruptcy, and by acting under the powers which are contained in the deed, the Plaintiff can make a good title, wholly independent of the estate which had become vested in the assignee in insolvency in the meanwhile. I cannot, however, so consider it.

It is impossible for me to say, that there is such a right vested in the assignee in bankruptcy, that he can make a good title. Therefore I think that the exceptions taken to the Master's report must be overruled.

I think it right to say, that if I had been aware of the nature of this report before this matter was discussed I should have declined to hear the arguments. The parties have agreed, for the purpose of argument, but not for any other purpose, to admit certain facts, and reserved the right to adduce evidence on them. An adjudication might have been made by the Court, which would have proved quite fruitless; for a reference must afterwards have become necessary, to inquire into the truth of the very facts, on which the judgment of the Court was founded. The Court has not time to indulge in the discussion of imaginary cases, and if I had been aware of it I would not have heard this case on such partial admissions.

[530] CHADWICK v. BROADWOOD. March 20, 1841.

On overruling a plea, liberty was given to the Plaintiff to amend, and to the Defendant to plead *de novo*: Held, that the Defendant might, by a second plea, raise as a defence objections which he had passed over in his first plea.

Whether a negative plea can be filed to a bill of discovery in aid of an action at law, *quære*.

The Plaintiff, alleging himself to be son and heir of A., who was the son and heir of B., who was the son and heir of C., who was the eldest brother of D., who was the father of E., the deceased owner of an estate, and alleging the several descents and seisins, filed a bill of discovery in aid of an action at law. The Defendant pleaded that B. and the Plaintiff were not heirs of E., and that the property never descended to B., or to A., or to the Plaintiff, and that A. and the Plaintiff were never seised, "for that D. had never an elder brother C., and B. was not the son of any C." The plea was held multifarious, and was overruled.

Plea overruled on the ground of its not being accompanied by an answer as to a fact affecting, as evidence, the truth of the plea.

This case, which is reported *ante*, p. 308, now came on for argument upon a second plea, in the form of a negative plea.

The Plaintiff amended his bill, and which, so far as is material, stated:—that all the leases had expired twenty years next before the filing the bill.

That on the 15th of March 1768 Sir Andrew Chadwick died intestate as to his real estates, and without issue.

That, upon the death of Sir A. Chadwick, the premises comprised in the deeds of December 1717 and July 1720 respectively, descended to the Plaintiff's grandfather James Chadwick, who was the heir at law of the said Sir A. Chadwick, which said Joseph Chadwick was the eldest son of James Chadwick, who was the eldest brother of Ellice Chadwick, who was the father of Sir Andrew Chadwick, and which said James Chadwick died in the lifetime of the said Sir Andrew Chadwick, and that the Plaintiff's said grandfather Joseph Chadwick, as such heir at law, became well seised and entitled of and to the said several premises for an estate in fee-[531]-simple absolute in reversion, expectant upon the determination of the said term of sixty years, and the other terms of years subsisting therein, and granted by the said Sir Andrew Chadwick as aforesaid.

That, on the 7th of April 1790, the Plaintiff's grandfather, Joseph Chadwick, died intestate as to his real estates, and thereupon the said several premises descended to the Plaintiff's father, Thomas Chadwick, who was his only son and heir at law; whereby Thomas Chadwick became well seised and entitled of and to a like estate in the same premises.

That, on the 27th of August 1801, the Plaintiff's father, Thomas Chadwick, died intestate as to his real estates, and thereupon the several premises descended to the Plaintiff John Chadwick, as his only surviving son and heir at law, whereby the Plaintiff became well seised, and entitled to a like estate in the said premises.

That the said term of sixty years expired on the 24th of June 1825, or about that time, and that the other terms of years granted by the said Sir Andrew Chadwick as aforesaid respectively, expired at some time or times within two years, either prior or subsequent to the 24th of June 1825.

The bill also stated that the Plaintiff was seised in fee, and was entitled to have possession of the premises delivered up to him by the Defendants, "but that the Defendants refused to deliver up the same, notwithstanding they and the person or persons through or under whom they claimed, obtained possession of the said premises under or by virtue of the leases thereinbefore men-[532]-tioned to have been granted thereof respectively; and as evidence thereof the Plaintiff shewed, that the said Defendants, and the person and persons through or under whom they claimed, or some person or persons on their respective behalf, from time to time paid the rents reserved by the said leases respectively, and took receipts or acknowledgments in writing for the same, and that some of such payments were made to, and

some of such receipts or acknowledgments were signed by the said Sir A. Chadwick, Joseph Chadwick, Thomas Chadwick, and the Plaintiff respectively; and although the others of such payments were made to, and the others of such receipts or acknowledgments were signed by, some other person or persons, yet such other person or persons received such payments, and signed such receipts as the agent or agents for and on the behalf of Sir Andrew Chadwick, Joseph Chadwick, Thomas Chadwick, and the Plaintiff respectively.

And that if the said Defendants would discover and set forth, as they ought to do, the dates and contents of the several receipts or acknowledgments for rent paid as aforesaid by them, or by any person or persons through or under whom they claimed, and the name or names, and description or descriptions of the person or persons who received the said payments respectively, and who signed the said receipts or acknowledgments respectively, it would appear, or the Plaintiff would thereby be enabled to prove, that all such payments of rent as aforesaid were made to, and that all such receipts or acknowledgments were signed by, Sir A. Chadwick, Joseph Chadwick, Thomas Chadwick, and the Plaintiff respectively, or by some person or persons on their respective behalf. And it is also stated that the Plaintiff was unable to proceed in his contemplated action "without [533] a discovery of the several matters, or without the production by the Defendants of the several deeds and documents therein respectively inquired after, and especially without the production by the Defendants of the leases and counterparts of leases, and the receipts or acknowledgments for rent thereinbefore mentioned, which indentures, counterparts, receipts, and acknowledgments was then in the possession of the Defendants."

To this bill the Defendant put in a plea, which, after excepting certain parts of the discovery which he afterwards answered, pleaded, "That Joseph Chadwick never was, and that the Plaintiff was not the heir at law of Sir Andrew Chadwick deceased, and that the premises did not, nor did any of them, ever descend to Joseph Chadwick as the heir at law of Sir A. Chadwick deceased, or to the Plaintiff's father, Thomas Chadwick, as the only son and heir at law of the said Joseph Chadwick, or to the Plaintiff as the only surviving son and heir at law of Thomas Chadwick, and that Joseph Chadwick never did become seized of, or entitled to the said premises, or any of them, as the heir at law of Sir A. Chadwick; and that Thomas Chadwick never did become seized of, or entitled to the said premises, or any of them, as the heir at law of Joseph Chadwick, and that the Plaintiff never did become seized of or entitled to the premises, or any of them, as the heir at law either of Sir A. Chadwick, or Joseph Chadwick, or of Thomas Chadwick; for that Ellice Chadwick, the father, never had an elder brother named James, and never had a brother named James who had or left issue; and Joseph Chadwick, the Plaintiff's alleged grandfather, was not the son of any James Chadwick who was a brother of Sir A. Chadwick's father Ellice Chadwick; and therefore the Defendant pleaded the matter aforesaid, to so much of the said bill as aforesaid, and humbly prayed the judgment of the [534] Court whether he ought to make any further answer to so much of the said bill as was before pleaded to."

The plea was accompanied by an answer in effect denying the possession of any documents, &c., shewing the alleged links of the pedigree, of the several descents or seizins, but there was no denial of the payment of rents as alleged in the bill.

Mr. Girdlestone and Mr. Teed, in support of the plea.

Mr. Pemberton and Mr. Bird, *contrà*. The Defendant has no right, under the order to plead *de novo*, to plead a fact which he admitted by his former plea, he should only have amended his plea on the Statute of Limitations.

The present plea is open to several objections. First, it is a negative plea to a bill of discovery; it puts in issue the very point to be determined at law, and in aid of which this bill of discovery has been filed; so that the legal point would, in the first place, have to be determined in equity, without that very preliminary discovery which the Plaintiff alleges is necessary to enable him to establish his right. (See Wigram on Discovery, 32; Beames on Pleas, 276; Redesdale, 191; and the cases there referred to.)

Secondly, the plea is multifarious, raising many distinct issues, and not reducing the defence to a single point. It says, that Joseph was not heir of Sir Andrew: that the Plaintiff is not heir. That the estate did not descend to Joseph, or to Thomas,

or to the Plaintiff; and that neither Joseph, nor Thomas, nor the Plaintiff [535] were seized. You cannot plead these distinct facts, heirship, descents and seizins of several parties, which may exist independently of each other.

Thirdly, the plea is argumentative, for it states as a reason, that Ellice never had a brother James, and never had a brother James who left issue, and Joseph was not the son of any James who was the brother of Ellice.

Fourthly, the plea is either overruled by the answer, or is not sufficiently supported thereby. The Defendant answers as to the possession of receipts for rents, but does not answer as to whether any rent was paid. If, therefore, he was right in answering the former, he was wrong in answering the latter, and if the latter were properly omitted, the plea is overruled by the answer to the former. *Thring v. Edgar* (2 Sim. & St. 274), *Hardman v. Ellames* (5 Sim. 640), *Sanders v. King* (6 Mad. 61), *Harland v. Emerson* (8 Bligh, 63), *Gun v. Prior* (1 Cox, 197).

Mr. Girdleston, in reply. The Plaintiff himself has taken advantage of the liberty to amend, and has accordingly made such amendments as he pleased, it was therefore open to the Defendants to raise any defence they thought advisable to the amended record.

Whether doubts might have formerly existed it is now settled, that a plea may be filed to a bill of discovery. *Gait v. Osbaldeston* (5 Mad. 428, and 1 Russ. 158; and see *Mendizabel v. Machado*, 1 Sim. 68; *Robertson v. Lubbock*, 4 Sim. 161).

[THE MASTER OF THE ROLLS. Suppose a bill of discovery in aid of an action at law shewed on the face of [536] it that the Plaintiff had no title, is there any doubt but that the Defendant might demur? None, and a plea merely introduces a fact which the Plaintiff has either purposely omitted or misrepresented.

The plea is not multifarious, the point raised is simply that of heirship, or, in other words, whether Ellice had a brother James, and the consequent destruction of the other links of the pedigree; the descent and seizin are the mere consequences of that single fact.

The payments stated in the bill are evidence of tenancy, and not of heirship, and it is not therefore necessary that they should be answered.

March 20. THE MASTER OF THE ROLLS [Lord Langdale]. This is a bill of discovery, in which the Plaintiff alleges himself to be heir at law of Sir Andrew Chadwick. It is filed against the Defendants, who are alleged to be in possession of certain property, which formerly belonged to Sir Andrew Chadwick, who is said in his lifetime to have demised it for a term of sixty years, which expired about the year 1826. The Plaintiff claims as heir at law, in which character he alleges he is entitled to recover, and he has filed this bill for a discovery of those matters which are to enable him to establish his right at law.

A plea of the Statute of Limitations was put in to this bill as it was originally filed, and it was overruled; but at the time when it was overruled leave was given to the Defendants to plead *de novo*, and to the Plaintiff to amend his bill if he thought fit.

The Plaintiff took advantage of that liberty to amend his bill, consequently there was no longer any oppor-[537]-tunity of pleading *de novo* to the original bill; but the amended bill having been filed, I conceive that to that amended bill, the Defendant had a right to make any defence he might be advised he could make available. He has put in a plea and answer; I need not say what is unfortunately too well known in the experience of every one, that, from the strictness of the technical rules of pleading, this is a mode of defence which can with the utmost difficulty be sustained; but it is not necessary for me now to enter into the reasons which gave rise to those rules, or the reasons which may perhaps be urged for their alteration. I must take them as they are, and endeavour to decide on them accordingly.

I have heard quite enough to shew me that every care and attention has been used to make a short defence to this bill; its success, however, must depend on the nature of the allegations contained in the bill, and on the form and substance of the plea. The bill alleges, that on the death of Sir Andrew Chadwick the lessor under whom the Plaintiff claims, the premises, which are described therein, descended to the Plaintiff's grandfather Joseph Chadwick, who was the heir at law of Sir Andrew Chadwick, which said Joseph was the eldest son of James, who was the eldest brother of Ellice, who was the father of Sir Andrew.

It then alleges that James died in the lifetime of Sir Andrew; that Joseph, who

was the grandfather of the Plaintiff, became well seised and entitled to those premises; that Joseph died intestate; that the premises then descended to the Plaintiff's father, Thomas; and that thereby Thomas became well seised; and then it alleges that the premises descended to the Plaintiff from Thomas. So what is here alleged is, that there was an [538] heirship and descent, and that there was a seisin in consequence of the heirship and descent. Now, upon this occasion, I do not think it at all necessary to consider a question which has not been argued as carefully as it would have been, had it been material; namely, as to the validity of a plea of this sort to a mere bill of discovery. I mean to express no opinion whatever on that subject. I will assume that a negative plea may be a valid plea to a bill of discovery. Now the plea which has been put in is certainly very singular in its form; it is alleged to be a mere negative plea of not heir, and to amount shortly to this: "You, the Plaintiff claiming the property as heir, are not heir, and, therefore, there is an end of your title." That is alleged to be the sum and substance of the plea: but the plea is really to this effect, that the Plaintiff's grandfather was not the heir of Sir Andrew, and that the Plaintiff is not the heir of Sir Andrew. The plea then goes on to assert that the premises did not descend to Joseph, who was the grandfather, as the heir of Sir Andrew; it further proceeds, neither did they descend to Thomas, as the heir of Joseph, neither did they descend to the Plaintiff as the heir of Thomas. It further goes on, that Joseph, the grandfather, did not become seised as the heir of Sir Andrew, nor did Thomas become seised as the heir of Joseph, nor did the Plaintiff become seised either as the heir of Thomas, his father, or as the heir of Joseph, his grandfather, or as the heir of Sir Andrew, who was the lessor under whom he claims. Now I take it to be quite clear, that the fact of a party being heir is consistent with the fact of there being no descent; and that under certain circumstances there may have been a descent without a seisin. These things, therefore, are several matters; they are not all the same; and consequently this is not a single plea of not heir, but it is a plea of not heir with those several [539] other circumstances annexed, not heir, no descent, and no seisin. The plea ends with a reason, "for that Ellice, who was father of Sir Andrew, had no elder brother named James, or any brother named James who had left issue; and Joseph, the grandfather, was not the son of any James who was the brother of Ellice the father of Sir Andrew."

It has been very ingeniously argued, that the plea really amounts to this, that the Plaintiff is not descended from any James through whom the descent from Sir Andrew could be traced. If that point had been brought forward on the plea, or if a single fact had been brought forward, which, by destroying the general links of succession in the pedigree, had, in that way, disproved the Plaintiff's title; or if the general result had been a simple statement of "no heir," I should have been inclined to think, that subject to any other objection raised, the plea would have been good, and ought to have been allowed, but it does not appear to me that a plea, in the present form, is a good plea. It pleads matters which appear to me to be distinct and several, and which, as would be seen at once if this were a bill for relief, would have a totally different effect. Suppose this had been a bill for relief, and no heirship had been pleaded, the Plaintiff might have replied to the plea; and if it had been proved that the Plaintiff was the heir, then the other facts, the descent and the seisin, would have been admitted; this evidently shews that this is a plea of several matters.

It is further objected to this plea, that it is informal, and that it does not accomplish that, which is rarely, if ever, accomplished by the union of a plea and answer, in consequence of objections arising from the several rules of pleading. The rules have been agreed upon [540] by both sides, the difficulty is in acting on them in each particular case. They may be stated thus; you are to answer everything charged in the bill, which if true would displace the plea, and this you must do whether the bill does or does not expressly charge those matters to be evidence of the facts. If they are material for the purpose of displacing the plea they are to be answered, but, on the other hand, if they are not material for that purpose, you are not to answer them, for by so doing you overrule your plea. Now in this case it is said that the Defendant has either done too much or too little; there are certain receipts and acknowledgments for rent, which are stated in the bill to have been in the possession of the Defendant, and to be evidence of the matters charged in the

bill or some of them ; there are also statements in the bill of the payments of rent, for which these are the receipts and the acknowledgments. The Defendant has answered as to the receipts and acknowledgments, but he has not answered as to the payment of rent. Now it is said he has either answered too much or too little ; for if he was bound to answer as to the receipts and acknowledgments, then he has done too little, because he has not answered as to the payments. On the other hand, if he was not bound to answer as to the payments, then he has done too much, because, in that case, he ought not to have answered as to the receipts and acknowledgments.

Now the distinction which has been drawn by Mr. Girdlestone on that point is to this effect ; he says this is not a payment which you may apply to anything stated in the bill, but a payment alleged in the bill as evidence of tenancy and not of heirship. I think he is mistaken as to that ; and that it is stated as evidence of the Plaintiff's title, which consists in his heirship and nothing else, and it appears to me, therefore, even on this [541] point of form, if the Defendants got over the other difficulties, that this plea would have to be overruled. (NOTE.—This rule of pleading has since been altered by the 36 & 37 General Orders of August 1841 ; see Beavan's Ord. Can. 175.)

[541] DOWDING v. SMITH. Feb. 26, March 9, 1891.

[S. C. 10 L. J. Ch. 235.]

Bequest "to A. and to the children of B. to be equally divided." Held, that they took *per capita*.

The question in this cause was, in what shares the residuary estate of the testator was to be distributed as between the residuary legatees.

The testator by his will, dated in 1825, gave a number of legacies, and among them specific legacies, and £400 a year to his wife, and a legacy of £500 consols to the children of Mrs. John Stockdale. He afterwards added a memorandum as follows :—"No legacies to be paid till after the decease of my dear wife Mrs. Nancy Stockdale, and then the residue of the property do devolve to my niece Miss Mary Stockdale of Piccadilly, and to the children of Mr. John Stockdale to be equally divided."

There were five children of John Stockdale, one of whom was born after the decease of the testator, but in the lifetime of his widow.

The testator's widow died in 1839, and the question, which arose between Miss Mary Stockdale and the five children of John Stockdale, was, whether the former took a moiety of the residue, or one-sixth part thereof only.

[542] Mr. Koe, for Mary Stockdale, contended that she was entitled to a moiety of the residue ; and that, at all events, those children only, who were born in the lifetime of the testator, were entitled to share in the residue.

Mr. Roupell, *contra*, contended that the five children were entitled to share equally with Mary Stockdale, as the gift was to a class after the death of the widow.

Mr. Pemberton and Mr. Wood, for other parties.

THE MASTER OF THE ROLLS. I think there are several authorities bearing on this question which have not been cited, my difficulty arises from the repetition of the word *to*. The residue is to devolve to A. and to the children of B., to be equally divided.

March 9. The case was again heard, when Mr. Koe, for Mary Stockdale, argued as before ; and also contended that the words "equally to be divided" applied to both parties, and meant that the property was to be equally divided between Mary Stockdale and a class consisting of the children of John Stockdale, so that Mary Stockdale was entitled to a moiety.

Mr. Roupell, for the children of John Stockdale, admitted that the words, "equally to be divided," applied to both parts of the sentence, but contended that there was to be an equal division between Mary Stockdale and the children.

[543] They relied on the following authorities, *Blackler v. Webb* (2 P. Williams, 383), where the testator bequeathed the surplus of his personal estate equally to his

son J. and to his son P.'s children, to his daughter T., and to his daughter W.'s children, and his daughter M. P. was dead, leaving several children, and W. was living and had children. It was held the legatees took *per stirpes*. In *Buller v. Stratton* (3 B. C. C. 366), where the trust was to sell and divide equally between R. C. S., J. S., and the children of M. P., it was held they took *per capita*; and also on *Bolger v. Mackell* (5 Ves. 509), and *Barnes v. Patch* (8 Ves. 604).

THE MASTER OF THE ROLLS [Lord Langdale]. There is some obscurity in the expression used, the ambiguity depends on the way in which the words, "to be equally divided," ought to be applied; both parties contend that they ought to be applied to both parts of the sentence, but in a different manner. One says that the whole is to be equally divided into two parts, and that one is to belong to Mary Stockdale, and the other half to the children of John Stockdale; on the other hand it is contended, that Mary Stockdale and the children are to take equally between them. I cannot read the expression differently than I should if the direction had been to divide it between Mrs. Stockdale and the children of John in equal shares. There is some difficulty, but the authorities come in aid, and shew that the proper construction is that contended for by Mr. Roupell, and that the division ought to be *per capita*. (1)

[544] BEASLEY v. KENYON. Feb. 13, 1841.

A. being entitled to a legacy of £5000, the executor and residuary legatee misrepresented the amount to be £4000, and for this sum the residuary legatee gave his bond to A. The executor, having paid all the debts and other legacies, handed over all that remained to the residuary legatee, and which was more than sufficient to satisfy A.'s demand. Held, that a bill might be sustained by A. against the residuary legatee and the representatives of the executor for recovering the extra £1000 and interest, without making the representatives of the testator a party.

This bill was filed by Mr. and Mrs. Beasley, and it represented that, under the will of her father, who died in 1806, Mrs. Beasley was entitled to two legacies, amounting together to the sum of £5000. That she was an infant at the time of his death, and that, on her marriage, the Defendant H. E. Boates who was entitled to the testator's residuary estate, and Mr. Williams the sole executor, improperly represented to the Plaintiff that her portion was £4000, which was in the possession of her brother, the Defendant H. E. Boates; who, not being able conveniently to pay it, gave to the Plaintiff, Mrs. Beasley, a bond for securing the £4000, which was made the subject of a settlement.

It stated, that the executor possessed himself of the assets of the testator and paid all the debts and other legacies; and that there remained a considerable surplus, more than sufficient to pay the Plaintiff's legacies, "but which surplus, Mr. Williams the executor, afterwards and a short time prior to the marriage of Mr. and Mrs. Beasley (1827), handed over to, or permitted the Defendant H. E. Boates to possess himself of, without first setting apart a sufficient sum to answer the legacies so bequeathed to the Plaintiff."

That several years after, the Plaintiffs, who had been previously in ignorance of their rights, discovered the misrepresentation.

The bill was filed against H. E. Boates, and the representative of Mr. Williams (who was not however the [545] representative of the testator), and the trustee of the settlement; and it prayed a declaration that the Plaintiff, J. B. Beasley, in right of Plaintiff's wife, was entitled, as against the estate of Mr. Williams and Henry Ellis Boates, to be paid the further sum of £1000 and interest thereon at the rate of £5 per cent.

To this bill one of the Defendants demurred, partly on the ground that the representatives of the original testator had not been made parties to the suit.

Mr. Pemberton and Mr. J. Russell, for the demurrer, contended that this being

(1) And see *Lenden v. Blackmore*, 10 Sim. 626; *Cooke v. Bowen*, 4 Y. & C. 244; and also *Ackerman v. Burrows*, 3 V. & B. 54, as to the force of the word "divide."

a suit for a legacy, could not be sustained in the absence of the legal personal representative of the testator.

Mr. Kindersley and Mr. Lewis, *contra*. This is not a bill for a legacy, but it proceeds on the assumption that the whole estate of the testator has been administered; that this legacy has been retained and misapplied, and that, therefore, the Defendants are chargeable personally. It states, that Mr. Williams the executor alone proved the will, that he received the assets, and paid all the debts, and all the other legacies except this; that he had a surplus in his hands more than sufficient to pay the legacy, which the bill alleges the executor, under some secret arrangement between him and the Defendant Boates, the residuary legatee, paid over to the latter. This bill asks relief in respect of a breach of trust for which the Defendants are personally responsible.

Mr. Russell, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. The Plaintiff alleges that Mrs. Beasley his wife, was entitled under the will [546] and codicil of her father to two legacies, amounting to £5000, that ample assets were possessed by the executor who proved the will, and that he, having paid all other demands on the estate, handed over the residue, without having paid the legacies due to the Plaintiff. Several years after, the Plaintiff being about to marry, the executor and residuary legatee represented to her that her fortune was £4000, for which sum a bond was given by the residuary legatee. This sum, represented to be her fortune, was made the subject of a settlement. The marriage took place; and it is alleged, that the Plaintiffs afterwards discovered the fraud which had been practised on them, for having a fortune of £5000, a security for £4000 only was given them. The bill is filed, not seeking payment out of the assets of the testator who bequeathed the legacy, the whole of which has been paid to the Defendant, with the improper concurrence of Mr. Williams, but claiming the £1000 out of the estate of Mr. Williams the executor, and personally from H. E. Boates. It is true, that upon an examination of the facts, it may turn out that the Plaintiffs are not entitled to the relief they ask against the estate of Mr. Williams and against the Defendant Boates personally. If that should be the case, the suit will fail altogether, because the Plaintiffs do not by their bill ask any other relief. I must overrule the objection for want of parties. Let the costs be costs in the cause.

[547] WILLIAMS v. WILLIAMS. March 9, 1841.

A question arose as to the right of the parties under a Scotch settlement. The Court referred it to the Master to enquire as to its construction according to the law of Scotland. The Master made his report founded on the opinion of Scotch advocates, and the cause coming on, the Court acted thereon, and ordered accordingly.

Mr. Loftus Wigram, in support of the petition.

[547] STANHOPE v. STANHOPE. Nov. 17, 1840; March 9, 1841.

Under the Draining Act, where the tenant for life is an infant, the petition must be presented in the name of his guardian.

Form of reference under this Act (3 & 4 Vict. c. 55), and of the subsequent proceedings thereon.

Amount of the expenses of draining ordered to be paid out of a fund to which the infant tenant for life was absolutely entitled, in lieu of charging the lands.

This was a petition presented by an infant tenant for life for a reference under the Draining Act (3 & 4 Vict. c. 55).

Mr. Kindersley, in support of the petition.

Mr. L. Wigram, for the other parties.

THE MASTER OF THE ROLLS [Lord Langdale] was of opinion, that under this Act the petition ought to be presented in the name of the infant's guardian, and gave leave to amend the same accordingly.

This being the first application under the Act, the terms of the order of reference became the subject of [548] consideration. His Lordship penned the following form of order, which was afterwards delivered out to the registrar.

Refer it to the Master to "inquire and state to the Court, whether the Plaintiff is tenant for life of the lands in the petition mentioned to be called Reveley Park, according to the true intent and meaning of the Act of the third and fourth years of the reign of Her present Majesty, intituled 'An Act to enable the Owners of Settled Estates to Defray the Expenses of Draining the same by way of Mortgage;' and if the said Master shall find that the Plaintiff is such tenant for life, then he is to inquire and state to the Court, whether it would be for the benefit of the said lands, and proper and beneficial to all persons interested therein, to make, under the provisions of the said Act, any and what permanent improvement in the said lands, by draining the same with tiles, stones, or other durable materials in a permanent manner: and after the Master shall have made his report such further order shall be made as shall be just."

The Master reported, that the infant was now tenant for life of the lands proposed to be drained, according to the true intent and meaning of the Act; and that it would be for the benefit of the said lands, and proper and beneficial to all persons interested therein, that 250 acres should be permanently improved, under the provisions of the said Act, by draining the same with proper draining tiles in a permanent manner, at an expense not exceeding £5 per acre, or the sum of £1250 in the whole.

The matter coming before the Court on a petition to confirm the report, it appeared that there were large [549] accumulations of the rents to which the infant was absolutely entitled, and it was suggested that it would not be advisable to execute a mortgage or charge on the estate for the payment of the £1250, but would be more to the interest of the Petitioner, that the amount should be paid by the receiver out of the rents, placing the tenant for life in the situation of incumbrancer, so that his personal representatives, in case of his death, might have the benefit of the petition.

The Court confirmed the report, and gave liberty to the guardian to execute the improvements approved of by the Master; and it appearing to the Court to be beneficial to the infant Plaintiff, that the amount of such expense should in the first instance be advanced and paid by the receiver appointed in this cause, out of the rents and profits of the estates, the same was ordered. The order then proceeded as follows: "and when and in case it shall be alleged that any such improvement as aforesaid has been executed, it is ordered that the Master, on the application of the Petitioner, or the Plaintiff, if he shall then have attained the age of twenty-one years, do inquire and state to the Court, whether such improvement has been executed, and whether the annual value of the lands so drained has been increased by such draining, to an amount equal to £7 per cent. at the least on the sum so expended; and if the Master shall so find, he is to determine and recommend by what number of yearly instalments the sum so expended ought to be paid off, when and in case the same should be charged on the said lands; and after the Master shall have made his report, such further order shall be made as shall be just."

[550] FYLER v. FYLER. Feb. 19, 20, 27, March 1, 1841.

[S. C. 5 Jur. 187. See *Harries v. Rees*, 1867, 37 L. J. Ch. 107; *Mara v. Brown*, [1896], 1 Ch. 209.]

A person knowingly inducing trustees to lend trust money to his debtor on a security not warranted by the trusts, in order that when advanced such person may obtain thereout payment of his debt, is accountable to the *cestui que trusts*.

Solicitor knowingly procuring trustees to commit a breach of trust for his benefit, must be considered as a partaker in the breach of trust.

Trustees investing trust money on an unauthorized security, are responsible for any future loss traceable to that first error.

A trustee, who was not authorized to lend the trust money on leasehold security, applied to his solicitors to procure an investment for some trust money, so as to produce a larger income. The solicitors had a client who was considerably indebted to them, and who wanted to borrow money on leasehold security, and they proposed it to the trustee. The trustee personally took measures to ascertain the value and validity of the security, and thereupon advanced the money, which was paid to the solicitors and carried to the credit of their debtor's account. The solicitors acted on behalf of the borrower, and, to some extent, for the trustee, but another solicitor also acted for him and for one of the *cestui que trusts* in the matter. The solicitors had notice that the fund was trust money in which infants were interested, but had no knowledge of the trusts or of the limited powers of the trustees. The security turned out ample, but part of the trust funds were afterwards lost by being transferred to a similar security of the same party. The lending on leaseholds being a breach of trust, Held, that the solicitors were not liable to the *cestui que trusts* for the loss.

In the answer to a bill for relief in respect of a breach of trust, it was alleged that some of the *cestui que trust* had assented thereto. Held, that the parties sought to be charged were entitled to an enquiry.

Solicitors against whom charges of fraud had been made which were unsubstantiated, and against whom the bill was dismissed, held not entitled to their costs, on the ground, that by the position in which they had placed themselves, they had exposed themselves to an investigation which had not unreasonably been instituted.

This bill prayed for the restitution of certain trust funds, which, it was alleged, had been lost by a breach of trust, and it also prayed a declaration of the liability of the several Defendants to make good the same.

The trust had its origin in the year 1814, when the Defendant James C. Fyler, being disposed to make a provision for his father, his mother-in-law, and their children, by deed made between himself of the one part, and Thomas B. Fyler and W. R. Glazier of the other part, assigned to the latter a sum of £10,000 Navy 5 per cent. annuities (in the deed incorrectly stated [551] to have been that day transferred into their names), in trust to pay the dividends to his father, Samuel Fyler, for his life, and after his death to pay the dividends to his mother-in-law Mrs. Margaret Fyler for life, for the maintenance, &c., of herself and children; and after her death to pay the principal to all her children by Samuel Fyler as should be living at her decease. The deed contained no power to change the securities, or to appoint new trustees on the resignation of any trustee.

It appeared that the money was not, in fact, transferred into the names of the trustees at the date of the deed, but that at various times in the years 1819 and 1820, James C. Fyler transferred into the names of the two trustees several sums which ultimately consisted of £9,458, 4s. 6d. four per cent. annuities.

Samuel Fyler died in 1825.

After his death Mrs. Margaret Fyler and her son Thomas B. Fyler acting, as was alleged, on her behalf, were desirous that some better income should be made from the trust fund, by means of a change in the investment; and Thomas B. Fyler, the active trustee, applied by letter to Messrs. Blunt, Roy & Blunt, his solicitors, to obtain an investment of part of the trust fund so as to produce £5 per cent. Messrs. Blunt, Roy & Blunt happened to have a client of the name of Baxter, who was largely engaged in building speculations; they had extensive transactions with him in the way of their business, and he was at the time indebted to them in a sum of about £3000. Baxter was desirous of raising £6000 by way of mortgage, at £5 per cent. on a leasehold house in Park Lane, and Messrs. Blunt, Roy & Blunt proposed this security to Mr. Thomas B. Fyler; a correspondence took place between them, and [552] full explanations were given as to the nature of the security proposed. Mr. Thomas B. Fyler himself engaged a surveyor to value the property. In his correspondence he stated, he "was acting for minors on his own responsibility," and he ultimately agreed to advance the money on the security proposed. Glazier, however, refused to concur, and retransferred the trust fund into the name of James C. Fyler the settlor.

£6000, part of the trust money, was afterwards sold out of the bank, and lent to

Baxter on a mortgage of the leasehold premises in Park Lane, which was executed to Thomas B. Fyler and Dr. Reed a new trustee; the whole £6000 was paid over to Messrs. Blunt, Roy & Blunt, on behalf of Baxter, and was placed by them to the credit of his account. Messrs. Blunt, Roy & Blunt at the same time entered into a guarantee for payment of the ground rent of the house, and the interest on the mortgage "until the premises were under-let or sold."

Messrs. Blunt, Roy & Blunt, though aware that the money advanced was trust money, in which infants were interested, seemed to have had no knowledge of the extent of the power of the trustees over it.

In the transaction, Mr. Dimond a solicitor, was in some manner employed for the trustees, and for the *cestui que trusts* or some of them; the mortgage deed, though prepared by Messrs. Blunt, Roy & Blunt, was sent to him for his perusal, and was afterwards settled by an eminent conveyancer on behalf of the parties for whom Mr. Dimond acted. After this transaction had been completed, the mortgage deed was retained in the custody of Messrs. Blunt, Roy & Blunt on behalf of the trustees.

[553] In February 1827 the house was sold for nearly £10,000; the purchase money was consequently ample to provide for the mortgage; but it having been stipulated, that in case of a sale of that property, Baxter should retain the £6000 on giving security on other leasehold property, to the satisfaction of the mortgagees and their solicitors, the mortgage money was not paid off, but was retained by Baxter on another substituted security of leasehold property in Upper Grosvenor Street and Regent Street. The Regent Street house was afterwards sold, and a leasehold house in the Quadrant substituted, and on the sale of the latter, a sum of £1500 was received by the trustees.

In all these transactions, Messrs. Blunt, Roy & Blunt were concerned, but Thomas B. Fyler was active in seeing to the value of the properties. Baxter ultimately became bankrupt and died insolvent, and the mortgaged premises in Upper Grosvenor Street having proved deficient, a considerable part of the trust fund was lost.

This bill was filed by the children of Samuel Fyler by Margaret his wife, against the trustees, Mr. Munro, who had been newly appointed trustee, James C. Fyler, and Messrs. Blunt, Roy & Blunt, and it sought to make them responsible for the loss sustained.

The case as against the trustees, was for a breach of trust in improperly investing the funds contrary to the trusts of the deed; but as against Messrs. Blunt, Roy & Blunt the following charges were made by the bill, though not proved:—"That in the year 1825 Baxter was in great pecuniary difficulties, and that Messrs. Blunt, Roy & Blunt, who were not only his solicitors but in some manner connected with him in his building [554] speculations, or involved by his embarrassments, and had an interest in getting money for him to relieve him from his embarrassments, applied to Thomas B. Fyler, and proposed to him to lend Baxter a sum of £6000 out of the trust funds upon the security hereinafter mentioned; and they recommended such security to Thomas B. Fyler as being a sufficient security."

"That Messrs. Blunt, Roy & Blunt acted upon the occasion aforesaid, not only as the solicitors of Samuel Baxter, but also as the solicitors of Thomas B. Fyler, as such trustee as aforesaid; and they approved of and accepted the proposed security on his behalf; and at their instance and under their advice, the sum of £6000 was afterwards lent and advanced to Baxter as hereinafter mentioned, and a great part if not the whole of such sum was retained by them for their own use."

"That in 1825, and when Messrs. Blunt, Roy & Blunt procured the said Thomas B. Fyler to lend the sum of £6000, part of the trust funds to Baxter as aforesaid, Baxter, was in great pecuniary difficulties, and was largely indebted to them, the said Messrs. Blunt, Roy & Blunt; and Messrs. Blunt, Roy & Blunt were, to some extent concerned or interested with him in his building speculations, and were under pecuniary liabilities and engagements for him to a large amount; and that when he applied for and procured such loan to be made to him as aforesaid, they had a direct personal interest in procuring the same, and the whole of the said sum of £6000 was paid into their hands, in order that the same might be applied by them, partly in liquidation of the said Samuel Baxter's debt to them, and partly in or towards payment of debts, for which they or some of them were [555] personally liable, and had come under engagements to pay."

"That, under the circumstances, the aforesaid loan of the said sum of £6000, and the subsequent dealings with the said several securities were not only breaches of trust, in which Messrs. Blunt, Roy & Blunt were parties, but were direct frauds by them against the Plaintiffs and the trust estate; and that Messrs. Blunt, Roy & Blunt are therefore liable in equity to replace the said trust funds."

The bill prayed, as against Messrs. Blunt, Roy & Blunt, "that they might be declared liable, to the extent of the trust monies which came to their hands respectively, to make good the same, and that they might be decreed to do so accordingly."

The Plaintiffs failed in substantiating by evidence these grave charges of fraud, as will be found noticed in the judgment of the Court.

Mr. Kindersley and Mr. Teed, for the Plaintiffs, made no claim against James C. Fyler further than was necessary to charge the other parties. They directed their argument principally against Messrs. Blunt, Roy & Blunt, and contended, that the lending the money on leasehold security was unauthorised by the deed, and constituted a plain breach of trust against all parties concerned; that those who participated in the first fault, were liable for all that subsequently happened, unless they could shew that the fund had been brought back into a proper state of investment.

That Messrs. Blunt, Roy & Blunt, admitting that they knew that the money was trust money, had constructive, if not actual notice of the trusts of the settlement, and must therefore be taken to have known that a breach of trust was being committed. They received the trust property with knowledge, and became accountable as trustees.

[THE MASTER OF THE ROLLS. Your argument would lead to this, that if trust property were committed to a carrier or a messenger, he would become liable as a trustee if he knew that it was subject to a trust.] This case goes far beyond; for here Messrs. Blunt, Roy & Blunt, with knowledge, assist in a breach of trust, and receive the money in discharge of their own debt. The case is precisely similar to that of *Wilson v. Moore* (1 Myl. & K. 126), and *Harvey v. Harvey*, before Sir John Leach and Lord Cottenham, on appeal. They are not merely agents, but have, for their own interest, mixed themselves up in the breach of trust, and have therefore become principals.

That they were the solicitors of the trustees is plain from their acts, they prepared the mortgage deed, which was part of the duty of a mortgagee's solicitor.

Mr. Pemberton and Mr. Evans, for the widow.

Mr. Tinney and Mr. Koe, for the representatives of Thomas B. Fyler.

Mr. Bethell and Mr. Heath, for Mr. Munro, a new trustee.

Mr. Girdlestone and Mr. Hall, for James C. Fyler.

Mr. Loftus Wigram, for Lawrence Fyler, one of the children.

[557] Mr. Turner and Mr. Campbell, for Messrs. Blunt, Roy & Blunt. The Plaintiff has wholly failed in making out as against Messrs. Blunt, Roy & Blunt, the case alleged against them by the bill. The proposal appears plainly from the correspondence to have originated from the Fylers, and not from Messrs. Blunt, Roy & Blunt. Throughout the proceedings Mr. Thomas B. Fyler appears to have been most active, and to have shewn the greatest care and caution in seeing to the validity and value of the security.

The case against the solicitors proceeds on the two grounds, of a breach of trust and a fraud having been committed by them; but unless fraud can be made out, there is no principle on which to charge them as trustees. There is no foundation whatever for the charge of fraud, £6000 were invested in property worth £10,000; the money was perfectly secure, and although the trustee, who acted with full knowledge, and, as he says, "on his own responsibility," committed a breach of trust, still there was no fraud, full value was given, and the £6000 when received became the property of Baxter. The case has no resemblance to that of *Wilson v. Moore*, in which agents, having notice, applied trust fund in payment of a private debt due to them from their principal, who was embarrassed in his circumstances; that was a case of fraud, and what the Court held was this that the Defendants could not retain a fund which they knew to belong to A. in payment of a debt due to them from B. There, no consideration at all was paid, but here full consideration was given for the trust money, and though technically a breach of trust as against the trustees, still there is no semblance of fraud.

If then, there was no fraud, Messrs. Blunt, Roy & Blunt, at the utmost, were mere agents, and as such [558] accountable to their principal only, and not to the *cestui que trusts*; *Adams v. Fisher* (2 Keen, 754; 3 Myl. & Cr. 526, 549), *Mylor v. Fitzpatrick* (6 Mad. 360). They had no notice of the trustees' powers or duties, and if they had, they could not, by mere notice, be converted into implied trustees. *Nickolson v. Knowles* (5 Mad. 47). In *Keane v. Roberts* (4 Mad. 356), Sir J. Leach speaking of the agents of trustees says, "If they had reason to believe that Thomas and Fennell (the trustees) were so misapplying the assets, it would be difficult to find a ground which would make them responsible, for paying to their principals the monies which had been placed in their hands for the purpose of being remitted to them: that would be to make every trustee accountable for his conduct in the trust to every agent whom he happened to employ, and would carry the principle of a constructive trust to an inconvenient, and indeed to an impracticable length."

In *Davis v. Spurling* (1 Russ. & Myl. 64), "An executor, who was employed by his co-executor as his agent to sell an estate, which, under the will of the testator the co-executor alone had power to sell, and who handed over the price of the estate to his co-executor, was held not accountable for the misapplication of that price by the co-executor, because he had no legal right to retain, although, by the will of the testator, the price of the estate when sold was to be considered as part of his personal estate." Sir J. Leach there said, "Colchester (the party selling), had no legal right to retain the price of Whimper Bradey's moiety of the estate; for it was in his hands not as executor, but simply as agent of John Bradey, who alone had the power to dispose of that moiety, and to receive the price of it."

[559] Messrs. Blunt, Roy & Blunt could not have filed a bill of interpleader. *Crawshaw v. Thornton* (2 Myl. & Cr. 1), or resist payment to Baxter.

There is no case in which a solicitor has been held liable, because with knowledge his client has committed a breach of trust; were it otherwise, it would become the duty of a solicitor to denounce his client whenever he determined to act contrary to the trusts. If it were held, that a person dealing with a trustee without notice of everything relating to the trust, and is bound to see that no breach has been committed therein, even bankers, agents, solicitors, clerks, or messengers when they have dealings with trustees would have the duty imposed on them, to see, in every case, to the due execution of a trust.

There was no loss on the first transaction, and whatever loss may have subsequently happened, arose from the trustees postponing the sale of the property, and from exchanging the securities at a time when it is not alleged that anything was done from Baxter to Messrs. Blunt, Roy & Blunt.

Any claim of the Plaintiffs is barred by the Statute of Limitations, which throws not a bar to a direct trust is a bar to a constructive trust; *Beckford v. Beal* (17 Ves. 87).

Mr. Kindersley, in reply.

THE MASTER OF THE ROLLS [Lord Langdale] (after stating the principal circumstances of the case). It is said by some of the parties in answer to this bill, that although these proceedings in respect of the trust money must be admitted to have been irregular, [560] because there was no authority at all to change the securities, yet it was done manifestly for the advantage of one of the *cestui que trusts*, and with the consent of some of the others; and if that were so—if all this has taken place with the consent of the parties now complaining, it certainly appears to me that they would not have any right to maintain this suit, for *volenti non fit injuria*. If they had authorized this course of dealing with their own fund, it would be in the highest degree unjust, to permit them to establish a claim against those who have acted under their authority. There is no evidence upon which I can properly act as to that matter; but I am clearly of opinion that there must be an inquiry whether the investments, or any, and which of them, took place with the consent of any of the parties, with liberty for the Master to state special circumstances.

But there are other persons sought to be charged, as to one of whom, namely, Monro, I conceive there is no doubt at all. The circumstances under which he came into this trust, are not such as appear to me to render him in any degree liable for the breaches of trust that have been committed. The other parties are Messrs. Blunt, Roy & Blunt, in respect of whom alone the argument of this day has been

addressed to me. Messrs. Blunt, Roy & Blunt, at the date of the first of the transactions which is now brought into question, happened to be the solicitors of Mr. Thomas Bicliffe Fyler, who calls himself the acting trustee in this matter, and also the solicitors of Mr. Baxter, who desired to have this loan; and it is alleged, that their own personal interests were so involved in the transaction, that they must be considered to have acted not as solicitors and agents alone, but as persons, who, being solicitors and agents, took advantage of their [561] position, to acquire a benefit for themselves at the hazard, if not to the prejudice of the trust; and that, under those circumstances, the Court ought to impute to them the duty of seeing to the due application of this trust money; in other words, will impute to them the character of trustees. The argument, as it was first addressed to me, was certainly pushed to a greater extent than I have ever heard attempted with regard to charging persons with the duty of trustees. It has now been most properly reduced within narrower limits, and their liability turns upon the point which I have last adverted to—whether they can be considered as having so involved their own personal interests, in the matter in which they were concerned as agents, that this Court, in the exercise of its jurisdiction, ought to impute to them the character of trustees. I do not mean to decide it at this moment, because I think I ought to look at one or two cases before I come to a decision upon it; but, looking at the facts as far as they relate to these gentlemen, they stand thus:—Being such solicitors as I have mentioned, at the time when the first transaction took place, a large debt was due to them from Mr. Baxter. The sum which was raised, was received by them for him, carried to the general account between them, and applied therefore in immediate liquidation of the debt which was due to them from Mr. Baxter. So that there can scarcely be a doubt, that they had an immediate advantage from the completion of this transaction; but when it is said, that they got this advantage, by improperly inducing their client the trustee, knowingly to commit a breach of trust. Is that made out? Did they knowingly induce him to commit a breach of trust? They did not apply to him to do this done; on the contrary, he being desirous to effect this object—to change the security so as to procure a higher rate of interest, applied to them, in order that they might assist [562] him in finding a fit security for the purpose, and they, being applied to by him, did, in compliance with his request, look out for a security. Unfortunately they found that security from another client, and therefore got involved in that perplexity, which all solicitors get entangled in, when they are acting for persons who may have opposite interests. A gentleman of the name of Dimond was undoubtedly to have been consulted for the interest of some of this family. In that capacity he was consulted, or what advice he gave, does not very clearly appear to me. It does appear by the whole of the transactions, that Messrs. Blunt, Roy & Blunt, were acting as the solicitors of Thomas B. Fyler, by the preparation of the deeds, by the deeds being in their possession afterwards, and so on. The trust money, which was properly invested, was sold out, Mr. Roy being one of the persons named in the power of attorney for its sale; this fact has not been dwelt upon, but still it is in some respects an important circumstance to take notice of. It appears also that they received the £6000 for Mr. Baxter; Baxter was giving security which turned out to be ample, in exchange for this money, and the trustees, receiving ample security, pay the money to Mr. Roy as the agent, and on account of Baxter. When the trustees got the security, they made it subject to the trust, and the money which was paid over could scarcely then be considered trust money; it was intended to be given to Baxter for his own use, and was paid to him by the hands of Blunt, Roy & Blunt. I do not mean to state fully my opinion upon it, but if this be the state of the transaction, can the case be considered exactly like that of Wilson and Moore, where the agent of the trustee stood in the name of the trustee certain sums of money, which he afterwards, pursuant indeed to the order of the trustees, applied to a purpose contrary to the trust? Was this money, at the moment it was placed in the hands of Messrs. Roy & Blunt, to be considered as trust money? Must they be considered as involved with their client, the trustee, that the exchange of the security for the money cannot be considered as a complete substitution of one for the other, but as continuing to retain its character of trust money? I apprehend really that the whole case depends on this; because it must be admitted that this was the trans-

action by which all the future loss was occasioned. If this money had been allowed to remain in its original state of investment, no loss could have afterwards taken place, by the diminution of the value of the house in Upper Grosvenor Street; but it was that transaction which led to all the rest. The Plaintiffs in this cause are not content to take up the transaction at the time when the trust money stood in that sufficient and secure investment, partly in stock and partly on the mortgage upon an estate of sufficient value; but professing themselves to be most exceedingly reluctant to do anything by which they may charge Mr. James C. Fyler their benefactor; say in substance, we would rather attack him, however ungraciously, than leave Messrs. Blunt, Roy & Blunt unassailed. If they have a right to charge Mr. James C. Fyler of course they must have the benefit of it; and whatever one may think of the feelings by which persons are actuated in such a case, there is an undoubted necessity to give effect to any rightful claim which they make. Cases which are very painful are not unfrequent in this Court; we find a married woman throwing herself at the feet of the trustee, begging and entreating him to advance a sum of money out of the trust fund to save her husband and her family from utter and entire ruin, and making out a most plausible case for that purpose; his compassionate feelings are worked upon; he raises and ad-[564]vances the money; the object for which it was given entirely fails; the husband becomes bankrupt; and in a few months afterwards the very same woman who induced the trustee to do this, files a bill in a Court of Equity to compel him to make good that loss to the trust. These are cases which happen, they shock everybody's feelings at the time, but it is necessary that relief should be given in such cases: for if relief were not given, and if such rights were not strictly maintained, no such thing as a trust would ever be preserved. The hardship, therefore, of individual cases must not be taken into consideration, and if these parties think fit to insist on their strict rights, they are entitled to have them.

I will look into the authorities which have been cited, and mention this case again but this I must say, that if I should hold that Blunt, Roy & Blunt have made themselves liable, they are entitled, just as much as any other party, to the benefit of an inquiry, whether this was done with the consent of the *cestui que trusts*.

March 1. THE MASTER OF THE ROLLS: In this bill it is alleged, that Messrs. Blunt, Roy & Blunt, the solicitors of Thomas Bilcliffe Fyler, and also of Samuel Baxter, being creditors of Mr. Baxter to a large amount, and being connected with him in his building speculations, or involved by his embarrassments, and liable for the payment of debts which he owed to other persons, did, for the purpose of procuring payment of the debt due to themselves, and relieving themselves from their liabilities to other persons for Baxter, knowingly prevailed upon Thomas Bilcliffe Fyler, who was a trustee for the Plaintiffs, to violate his trust, and lend £6000 trust money to Baxter, in order that they, as Baxter's agents, [565] might receive the amount, and apply the same for their own benefit, in satisfaction of the debts due to themselves, and for which they were liable to other persons. And it is charged, that this loan and the subsequent dealings with the money were not only breaches of trust to which Blunt, Roy & Blunt were parties, but were direct frauds by them against the persons entitled to the trust money. If the facts were, as alleged, I conceive that the Plaintiffs would be entitled to the relief which they pray; but it appears to me, that in the commencement of the transaction, Blunt, Roy & Blunt had no knowledge of the trusts, or of the power of the trustees, and that although they were the solicitors of Thomas Bilcliffe Fyler the trustee, and at his request suggested the proposed security, yet that they neither advised him as to his powers under the trust deed, nor suggested to him the propriety or expediency of the loan; and that the proposed security was suggested by them only in consequence of Thomas Bilcliffe Fyler's application to them. In the progress of the treaty, Blunt, Roy & Blunt became informed that the money intended to be lent was trust money, in which infants were interested (letter of 18th September 1825), and it appears that Mr. Dimond, or the firm of Baker & Dimond, was in some manner employed for the trustees, and *cestui que trusts*, or some of them. Mr. Roy, in the letter of the 19th October 1825, which was read in evidence, after representing the wants of Baxter, says, "Your surveyor has reported on the value, and we have explained to Mr. Dimond the exact nature of the security, which is simply a lease from Lord Grosvenor; any other circumstances attending it are particularly the subjects of consideration for you and Mr. Dimond."

but you should decide one way or other, as it is a serious inconvenience to Mr. Baxter [566] that the business should continue open." It further appears by the letter of the 20th October that the power of attorney, under which it was intended to transfer the stock, was with Mr. Dimond; and from the whole transaction it must, I think, be collected that the trustee did not rely on Blunt, Roy & Blunt alone. The loan was proposed by the trustee; on his application the particular security was proposed by Blunt, Roy & Blunt; the title was explained to Mr. Dimond; the value was ascertained by a surveyor employed by Mr. Fyler himself; Blunt, Roy & Blunt informed Mr. Fyler that other circumstances attending the transaction were particularly subjects of consideration for himself and Mr. Dimond; and the drafts of the deed and bond, though prepared by Blunt, Roy & Blunt, were sent by them to Baker & Dimond for their perusal and approbation, on the behalf (as it is expressly stated in a part of the answer of Blunt, Roy & Blunt which has been read against them as evidence) of Margaret Fyler and the trustees; and it seems to have been by the advice of Mr. Brodie, obtained by Messrs. Baker & Dimond, that a guarantee was demanded for payment of the ground rent of the house intended to be mortgaged, and of the interest of the mortgage money so long as the house should continue untenanted and unsold. The required guarantee was given by Blunt, Roy & Blunt, and the transaction being completed on the 29th of October 1825, Blunt, Roy & Blunt kept the securities including their own guarantee in their possession for the trustees.

To some extent, therefore, though not to the extent and in the manner alleged, Blunt, Roy & Blunt, notwithstanding the employment of Dimond, or Baker & Dimond were acting as solicitors for the trustees. They were at the same time creditors of Baxter to the amount [567] of nearly £3000, they personally gave the guarantee which was required for completing the security; they received the money and carried it to the credit of Baxter's account with them; and at a subsequent period the account between themselves and Baxter was in favour of Baxter.

But the allegations in the bill that Blunt, Roy & Blunt were connected with Baxter in his building speculations and embarrassments, and that they were liable for debts owing by Baxter to other persons, are wholly unsupported by evidence; and although it appears to me probable that before the transaction was concluded, Blunt, Roy & Blunt had the means of knowing, and possibly did know, that the leasehold security was not authorised by the trust, yet the fact is not proved to have been so, and they do not appear to have advised the trustee on the subject, and they had reason to think that in that matter he acted either on his own opinion or on other advice.

There can be no doubt, but that the transaction on the part of the Fylers, though erroneous, was *bona fide* intended to be beneficial to Mrs. Fyler, and not prejudicial to her children, but being unauthorised and a subsequent loss (which could not have occurred but for the first deviation from the trust) having happened, the principals may be liable. The transaction was conducted by Blunt, Roy & Blunt, and the charge against them is principally supported by inferences deduced from her interest, and leading, it is said, to the conclusion that they prevailed on the trustee, or being his solicitors permitted him to commit a breach of trust for their benefit, under semblance of the transaction being a loan to Baxter.

But a charge of this nature should be manifest from the transaction itself, and should be distinctly proved; [568] their knowledge of the limited powers of the trustees is not proved, and the facts established do not warrant the inferences drawn from them. The security was of ample value, no mere semblance, but a real and valuable security. Baxter, or Blunt, Roy & Blunt, by means of such security could have had no difficulty in procuring the loan elsewhere; the security in the hands of the trustees afforded them the means of recovering the money; and the facts admitted as to the state of the account between Blunt, Roy & Blunt and Baxter, so far from necessarily leading to the conclusion desired by the Plaintiffs, are consistent with the supposition, that the whole amount of the mortgage money was applied in payments to other persons pursuant to the orders of Baxter. How the case really stood does not appear, but the Plaintiffs who have had the means of investigating the account of the dealings between Baxter and Blunt, Roy & Blunt, and have produced no evidence on the subject, are not entitled to presume all the material facts to be such as will support their charge.

In the transaction of 1825 the breach of trust consisted, not in the misapplication of the money given as a consideration for the mortgage, but in the acceptance of a security not authorised by the trust.

The trustees having, without authority, procured and accepted in lieu of so much stock, an unauthorised but ample security for so much money, became responsible for any future loss traceable to that first error. Upon consideration it appears to me, that solicitors who knowingly procured this to be done for their own benefit, ought to be considered as partakers in the breach of trust; but the case should be proved, and not founded on uncertain and perhaps altogether untrue inferences.

[569] Blunt Roy, & Blunt, by the position in which they placed themselves in relation to the borrower and lender of this trust money, have exposed themselves to this investigation, which I own does not appear to me to have been unreasonably instituted; but I think that the charge against them is not established; and that they are not answerable to the Plaintiffs for the breach of trust which was committed in 1825, or for the unauthorised investment of the trust money which was then made. The ample security which was taken in 1825 was, in 1827, exchanged for other security, part of which ultimately proved to be deficient, and occasioned the loss which has occurred. Blunt, Roy & Blunt were also employed in this transaction, by means of which their guarantee ceased, and this interest has again, I think not unreasonably, subjected their conduct to investigation; but in this case also, Mr Thomas Bilcliffe Fyler took on himself the sole care and responsibility of ascertaining the value of the security; and thinking that Blunt, Roy & Blunt are not answerable for the consequences of the unauthorised investment in 1825, and seeing nothing wherewith to charge them in the transaction of 1827 taken by himself, it does not appear to me that they are chargeable for the loss occasioned by the deterioration of the house in Upper Grosvenor Street.

Though the direct allegations of fraud against Blunt, Roy & Blunt are unfounded, yet seeing that, by involving their own personal interests in the transactions, they have rendered an investigation into their conduct not unreasonable; I must, in dismissing the bill against them, do so without costs.

As to Mrs. Fyler, an inquiry must be directed as to her concurrence.

[570] COLVILLE v. MIDDLETON. Dec. 18, 19, 21, 24, 1840.

[S. C. 4 Jur. 1197.]

A testator devised his estate X. to trustees, for sale, for payment of his debts and legacies, in exoneration of his personal estate; and after reciting that he became entitled on his marriage to a sum of £7442 of which he had received £2442, and the £5000 remained due, he bequeathed £2442 to be paid out of the produce of the estate X., and the sum of £5000 when and if the same should be received or got in, but not otherwise, to A., B., C. and D. equally; and in case the £5000 should be received by him in his lifetime, he directed the same to be raised out of the estate X. The testator received the £5000. Held, that the legacy was demonstrative, and that it was a charge upon the general personal estate as well as on the estate X.

Personal estate held, upon the context of a will, not exonerated from the payment of debts and legacies; where a real estate devised for the payment thereof, in exoneration of the personal estate, proved to be insufficient.

The testator, Nathaniel Lee Acton, being possessed of several estates, distinguished by the names of the Claydon estate, the Bamford estate, and the Baylham estate, his will dated in 1823, devised his Claydon estate to trustees to sell the same, or so part thereof, as would, in exoneration of his personal estate, raise money sufficient to pay the mortgages thereon, and the legacies payable under his father's will, and the interest thereon, and all his debts due on simple contract, and the several legacies and sums by his said will given and directed to be paid, not charged upon any of his said real estates; together with such costs and charges as should be necessarily incurred by his said trustees and his executors, by reason of or in any manner

incident to the sale, or the execution and performance of his will and the trusts thereof; and should apply the same in payment thereof accordingly; and the residue was to be laid out in land, to be settled to the uses declared concerning his manor of Baylham.

The testator also devised his Bamford estate, subject to the payment of the mortgages thereon, to trustees for 500 years, for payment of his bonds not connected with any mortgage or mortgages; with remainder to Sir Philip Broke and issue, in strict settlement.

[571] The testator then devised the Baylham estate to Sir William Middleton for life, with remainders in strict settlement; and after reciting that by the settlement made previous to his marriage, he became entitled to the sum of £7442, being the residue of the portion or fortune of Susannah, his first wife, of which sum of £7442 he had then received only the sum of £2442, and that the remaining sum of £5000 was still due to him, for which he received interest, the said testator N. Lee thereby gave and bequeathed the sum of £2442 to be paid by and out of the monies to arise by the sale of his estates devised to be sold as aforesaid, and also the sum of £5000 when and if the same should be received and got in, but not otherwise, to Hannah Elizabeth Gillman, Emily Gillman, and Francis Gillman, equally to be divided between them, share and share alike; and in case the said sum of £5000 or any part thereof should be received by him the said testator in his lifetime, then he directed that the same or so much thereof as should be so received, should be raised and paid out of the monies to arise by the sale of his real estates devised to be sold as aforesaid. He then gave several general and specific legacies; and after directing the sale of certain specified chattels, he devised the residue of his real estate and all the residue of his personal estate and effects, of what nature or kind soever, which he should die possessed of, or entitled to, or have any power to dispose of, and also the monies lastly thereinbefore mentioned, and which should remain after payment of his funeral and testamentary expenses, and all charges incident thereto, as to one moiety in trust for Lady Middleton, and as to the other moiety in trust for Caroline Middleton.

By a codicil he devised his Crowfield and other estates to trustees, in fee in trust to sell and to pay all [572] such principal monies and interest as he might happen to be due at the time of his decease, either upon mortgage bond, or simple contract; also such charges as should be then payable under his said late father's will, with any interest due or to accrue due for the same, and the several legacies and sums in and under the said testator's will given and directed to be paid, and not charged upon any of his real estates, together with such costs and charges as should be necessarily incurred; it being his will and desire, that his own hereditary estates and property should, if in his power, be left unincumbered, and that, unless it should be necessary, any part of the said hereditaments, which in and by the first thereinbefore recited was in his said will, or those comprised in the said term of 500 years respectively, should be sold or mortgaged by his said trustees.

The testator died in 1836, having in his lifetime received the £5000 referred to in his will, as being due to him under his marriage settlement.

The personal estate, and the produce of the sale of the real estate charged thereon, were together insufficient for the payment of the debts and legacies of the testator.

The first question was, whether the personal estate had been exonerated, altogether, from payment of the debts and legacies; and, secondly, whether the sums of £2442 and £5000 were specific or demonstrative legacies; in other words, whether they were payable only out of the produce of the Claydon estate, or were also a charge on the personal estate.

Mr. Pemberton and Mr. Wood, for the Plaintiffs the trustees, who were also named as legatees, cited [573] *Hancox v. Abbey* (11 Ves. 179), *Aldrich v. Cooper* (18 Ves. 381), *Page v. Leapingwell* (18 Ves. 463), *Gwynne v. Edwards* (2 Russ. 289, n.), and *v. Greene* (4 Mad. 148).

Mr. C. P. Cooper and Mr. Blunt, for Lady Middleton the residuary legatee, contended that the personal estate was exempted as against everyone, except creditors; and that the testator had charged the Claydon estate with the costs, charges, and expenses of administration, which would otherwise have fallen on the personal estate; and

that this and other circumstances shewed that it was the testator's intention that the residuary legatees should take the personal estate, exonerated from the payment of the debts and legacies, and charged only with the "funeral and testamentary expenses, and all charges incidental thereto;" *Bootle v. Blundell* (1 Mer. 193), *Silk v. Prims* (1 Dick. 384, and 1 B. C. C. 138, n.), *Morrow v. Bush* (1 Cox, 185), *Williams v. The Bishop of Landaff* (Ib. 254).

Mr. Kindersley and Mr. James Parker, for Sir W. Middleton, the devisee of the Baylham estate, contended that the bond debts unconnected with mortgages were payable wholly out of the 500 years' term; so as to leave the personal estate applicable to the payment of the other debts not otherwise provided for; that the mortgage debts on the Claydon and Baylham estates, by the express terms of the will ought to be wholly paid out of the former; that the mortgage debts on the Claydon estate, but not those on the Bamford estate, ought to be paid out of the personal estate, both as against the residuary legatees, notwithstanding the bequest was after payment of funeral and testamentary expenses (Ram on Assets, 44), and as [574] against the legatees unsatisfied by the estates devised for sale; and lastly, that the legacy to the Gillmans was exclusively charged on the Claydon estate.

Mr. Tinney and Mr. Romilly, for Sir Philip Broke and another, the devisees of the Bamford estate, contended that the bonds and mortgages were primarily chargeable on the personal estate, and then on the real estate; and that there ought to be a contribution as between the Claydon and Baylham estates, in those cases in which both estates were included in one mortgage security. They cited *Noel v. Lord Henley* (Dan. Rep. 211).

Mr. Girdlestone and Mr. Shadwell, for the legatees of the £7442, contended that although the legacy was directed to be paid out of the real estates devised to be sold, still it was not less payable out of the general personal estate, it being in the nature of a demonstrative and not of a specific legacy. They cited *Roberts v. Pocock* (4 Ves. 150), *Smith v. Fitzgerald* (3 Ves. & B. 2), *Mann v. Copland* (2 Madd. 223), *Fowler v. Willoughby* (2 S. & S. 354), *Willow v. Rhodes* (2 Russ. 452), *M'Leland v. Shaw* (2 Sch. & Lef. 538), *Savile v. Blacket* (1 P. Wms. 775).

Mr. Coleridge, for a trustee.

Mr. Pemberton, in reply.

THE MASTER OF THE ROLLS was of opinion, that the monies, arising from the sale of the testator's real estate devised in trust for sale, were primarily applicable to the payment of the simple contract debts and legacies, and that the personal estate was then liable to make [575] good the deficiency; and he reserved his judgment on the other point.

Dec. 24. THE MASTER OF THE ROLLS [Lord Langdale]. I have read over the will in this case, and the authorities cited, and I think that these two legacies are demonstrative and not specific. [His Lordship referred to the terms of the bequest and proceeded.] If the expressions of the testator had been, "I hereby give this sum to these persons," it is conceded that the bequests would have been demonstrative, but it is alleged that the particular words which he has used have a different effect. The case of *The Attorney-General v. Parkin* (Ambler, 566) was much stronger; there, the testator enumerated mortgages, bonds, and notes due to him, and gave, out of the interest, an annuity to A. for life, and after her death directed the securities to be vested in trustees for charitable uses. Some of the securities were paid off, and new securities taken after the will, the bequest was held to be demonstrative and not specific.

In *Cartwright v. Cartwright* (2 Bro. C. C. 114) the bequest was, "I give £1400 for which I have sold my estate this day," &c. The testator afterwards received the whole money, paid it to his banker, and drew out of his hands £1100 of that money. Lord Bathurst held this to be a legacy of quantity, and that the receiving was no ademption on the authority of *The Attorney-General v. Parkin*; though Lord Thurlow observed that it was questionable, whether the case of *The Attorney-General v. Parkin* supported the decision in *Cartwright v. Cartwright*, yet he did not state the decision to be wrong.

[576] There are other circumstances in this case which fortify the conclusion which I have come, namely, that this is a demonstrative legacy, and is to be paid in the same manner as the other legacies.

[576] SALT v. CHATAWAY. March 5, 6, 1841.

[S. C. 10 L. J. Ch. 234.]

A testator devised and bequeathed his real and personal estate, in trust to sell, and constituted a mixed and blended fund. He thereout gave J. B. £100 and one-eighteenth of the residue, and he gave the remaining portions of the residue to other persons. J. B. died in the testator's lifetime. Held, that the next of kin and heir were entitled to their proportionate part of the lapsed share of the residue, and that the legacy of £100 fell into the residue and passed by the gift thereof.

The testator Thomas Salt, by his will dated in 1831, having appointed three executors, devised and bequeathed to them all his real and personal estate, "subject to the payment thereof of his just debts, funeral and testamentary expences" upon trust, "as soon after his decease as they should think fit," to sell and receive the purchase-money for the same estates, and all money that might be owing to him at his decease; "and thereout and out of the ready money he might die possessed off," to pay certain legacies, and amongst others to "pay unto his grandson John Blaydon £100, when he should attain the age of twenty-one years," and then to "divide all the residue of the monies to arise as aforesaid into three equal parts," and after paying a certain legacy, to place out or continue at interest the remainder of such one-third share on security, until his six grandchildren, John Blaydon and five others named, should respectively attain the age of twenty-one years, "and when and as each of them should attain his or her age of twenty-one years, should pay him or her an equal part hereof;" the testator then proceeded to dispose of the remaining two-thirds of the residue.

John Blaydon died in the testator's lifetime, an infant, and unmarried, and the principal question was, what [577] was to become of the £100 legacy, and the one-eighteenth of the residue intended for him, but which had lapsed by his death in the testator's lifetime.

Mr. Spence and Mr. Parker, for the Plaintiffs.

Mr. Tillotson, Mr. Tennant, and Mr. T. Parker, jun., for several persons being the next of kin.

Mr. Whitmarsh, for the heir at law.

Mr. Lewis, for Anthony Salt.

Mr. Treslove, for the five brothers and sisters of John Blaydon.

Ackroyd v. Smithson (1 Bro. C. C. 503), *Durour v. Motteux* (1 Ves. sen. 320), *Roberts v. Walker* (1 Russ. & Myl. 752), *Kennell v. Abbott* (4 Ves. 802), *Green v. Jackson* (Russ. 35, and 2 R. & Myl. 238), were cited. And see *Stocker v. Harbin*, 3 Nev. 479.

March 6. THE MASTER OF THE ROLLS [Lord Langdale]. The testator in this case, having appointed certain persons to be executors, devised and bequeathed to them all his real and personal estates (subject to the payment of his funeral and testamentary expences and debts), on trust to sell and convert the whole into money; and having constituted a mixed and blended fund, consisting partly of personal estate and partly of the produce of real estate, he thereout gave certain legacies, and then disposed of the residue. He gave to John Blaydon a pecuniary legacy of £100, and an equal sixth part of one-third share of the residue.

[578] John Blaydon having died in his lifetime, the intentions of the testator, as to him, were disappointed. The gifts to him lapsed, and with respect to the share of the residue, I am of opinion that the heir at law and next of kin are entitled to it, in shares proportioned to the respective amounts of the testator's real and personal estate.

The real estate is by the will directed to be converted into money, i.e., into personal estate, for the purposes of the will; the testator thereby determined the quality of the property which the legatees were to take; but he has expressed no intention to convert it for any purposes, other than those mentioned in the will; and to the extent to which those expressed purposes have failed; that is, as to any part of the property in respect of which no intention of the testator is expressed, the law

is to determine to whom it belongs ; and the two sorts of estate being blended, each contributing, in proportion, to fulfil the purposes which can be accomplished, the share of residue which has lapsed must be deemed to consist of proportionate parts of the two sorts of estate ; and that being so, the proportion of the lapsed share of residue which consists of the produce of real estate, having been directed to be converted for a purpose which is disappointed, belongs to the heir.

It is not easy to reconcile all the cases which are to be found in the books on these subjects ; and the question whether the lapsed pecuniary legacy passes by the gift of the residue, or ought to be considered as undisposed of, appears to me to be attended with more doubt than the other ; but considering, however, that the conversion of the real estate must be deemed to have been made for all the purposes of the will ; that, besides the [579] intention to give a legacy of £100 to John Blaydon, there was also an intention to dispose of the residue after payment of the legacies ; that the testator had determined the qualities of the property which his legatees were to take ; and that the gift of residue is made in terms to give the residuary legatees of personal estate the benefit of lapsed legacies—it appears to me that the proper course is to follow the decisions of *Durour v. Motteux* (1 Ves. sen. 320 ; 1 Sim. & St. 292), and *Green v. Jackson* (5 Russ. 35, and 2 Russ. & Myl. 238), and in conformity with those cases, I am of opinion that the lapsed legacy of £100 must be held to have fallen into the residue, and to have passed by the gift of the residue.

[579] *JEW v. WOOD.* March 17, 19, 1841.

[S. C. Cr. & Ph. 185 ; 41 E. R. 461 ; 10 L. J. Ch. 261 ; 5 Jur. 954.]

Upon the death of a landlord, the tenant, in ignorance of the rights of the parties, attorned and paid rent to A., who claimed as devisee. The right of A. to the property was afterwards disputed by B., the heir. Held, that the tenant might maintain a bill of interpleader against A. and B.

This was a bill of interpleader filed by a tenant against the alleged devisees and co-heirs of his deceased landlord, under the following circumstances. The Plaintiff, Mr. Jew, was the tenant from year to year under James Wood, of a freehold house in Gloucester. James Wood died in April 1836, leaving certain testamentary papers, under which the Defendant, Sir M. Wood and the other executors therein named, claimed to be entitled to his real estate.

Immediately after the testator's death, the executors represented to the Plaintiff that they were entitled to the estate under the alleged will ; and the Plaintiff, believing such representation, attorned to the Defendants, the executors, and paid his rent to them down to [580] September 1837, the last payment being made in February 1838. In the meantime, the validity of the testamentary papers being impugned, a suit was instituted in the Ecclesiastical Court, which proceeded until the month of February 1839, when judgment was delivered against the propounded papers, and the title of the executors, as regarded the personal estate, was thereby displaced. (Some of the facts are stated in 2 Beavan, 289, and *ante*, p. 504 ; and see 2 Moore, P. C. C. 355.)

In March 1839 the alleged co-heirs gave notice to the Plaintiff not to pay his rent to any other person than to the co-heirs or their agent ; and in August 1839 the Defendant, Sir M. Wood, and the other alleged devisees gave a counter notice to the Plaintiff.

On the 15th of June 1840 the Defendant, Sir M. Wood, levied on the Plaintiff's goods for the rent in arrear ; the Plaintiff replevied, and on the 19th of December 1840 declared in an action of replevin ; on the 17th of December the Defendant Wood avowed, &c., and on the 27th of January 1841 the Plaintiff pleaded *non tenuit*, and on the 3d of February 1841 issue was joined and notice of trial given.

On the 9th of March the Plaintiff filed this bill of interpleader against the alleged heirs and devisees ; and upon bringing his rent into Court and on making the usual affidavit, the Plaintiff obtained an injunction.

The Defendant Wood, having filed his answer, now moved to dissolve the injunction.

Mr. Pemberton, Mr. G. Turner, and Mr. Walker, for Sir M. Wood, argued, first, that the Plaintiff had by his [581] delay disentitled himself to relief; secondly, that the Plaintiff was colluding with the co-heirs for the purpose of turning the devisees out of possession; and thirdly, that this was not a proper case for interpleader, for the settled rule was, that a tenant could not dispute his landlord's title, and that the tenant, against whom the devisees had a personal equity by reason of his attornment, did not stand in the situation of a party indifferent to the claims of the Defendants whom he called upon to interplead; and that, therefore, according to the decision of *Crambly v. Thornlon* (7 Sim. 391, and 2 Myl. & Cr. 1), the Plaintiff had no right to maintain a bill of interpleader. They cited on the point that a tenant could not dispute his landlord's title, *Hall v. Butler* (10 Ad. & E. 204); and that a tenant could not maintain a bill of interpleader against his landlord and a person claiming adversely, *Dungey v. Angove* (2 Ves. jun. 304), *Smith v. Target* (2 Anst. 529), *Johnson v. Atkinson* (3 Anst. 798).

Sir F. Pollock, and Mr. S. Sharpe, for the co-heirs, were indifferent as to what might be done on the present motion, provided the rights of the co-heirs to recover the rents or *mesne profits* were not prejudiced. They objected, however, to try their title in an action of replevy, as it would bind nobody, and would extend only to the small part of the real estate of James Wood occupied by the Plaintiff.

Mr. Kindersley and Mr. Chapman Barber, for the Plaintiff, proposed that the rent should be paid over to the devisees, unless the heirs would undertake to defend the action, *Stevenson v. Anderson* (2 Ves. & B. 407), or that the [582] matter should be put in a train of investigation, as in *Townley v. Deare* (3 Beavan, 213).

They contended, that there had been no improper delay, and that it was no objection that the bill had been filed on the eve of trial, *Vicary v. Widger* (1 Sim. 15); that there was no collusion between the Plaintiff and the co-heirs, although they employed the same solicitor.

On the third point they argued, that the rule that a tenant could not make his landlord interplead, did not apply to a case in which the difficulties arose out of the act of the landlord, as in the present case, *Clarke v. Byne* (13 Ves. 383); and that although, by the general rule, a tenant could not dispute his landlord's title, yet that he might dispute the title of a party to whom he had attorned in ignorance that his title was in dispute, *Gregory v. Doidge* (3 Bing. 474), *Gravenor v. Woodhouse* (1 Bing. 38); or where the tenant had not originally received possession from such person, *Beggs v. Pitcher* (6 Taunt. 202), *Cornish v. Searell* (8 B. & Cr. 471).

Mr. Pemberton, in reply.

THE MASTER OF THE ROLLS reserved his judgment.

March 19. THE MASTER OF THE ROLLS [Lord Langdale]. In this case the Plaintiff is tenant from year to year of a portion of the estates of the late James Wood. His [583] tenancy began in the year 1831. The landlord died in April 1836, leaving a will, the validity of which is in dispute; so that it is not now known, whether he died testate or intestate. The rent which is due from the Plaintiff, and which he admits to be due, is now claimed both by the devisees under the alleged will and by the co-heirs under the alleged intestacy. The devisees have levied distresses, and the co-heirs have appeared and declared their intention to hold the Plaintiff answerable to them; and the rent reserved by the lease from James Wood being in demand from both parties, and the right to the land (in which the Plaintiff has no interest) being the only subject of contention, the case is a proper case for interpleader, unless there be some special circumstances to make it otherwise; and the Plaintiff is entitled to relief, if he be not precluded by some act or omission of his own.

It has been argued, that the Plaintiff is not entitled to relief, because of his delay in filing the bill after he had notice of the conflicting claims, and because of his attempts to defend himself at law, by his action of replevin; and still more, because of his alleged collusion with the Defendants, the co-heirs, to whose purposes, it is argued, he has lent himself in these proceedings.

It does not appear to me that there has been any improper delay; and though I had some hesitation at first, I think, that the defence set up at law ought not to preclude the Plaintiff from relief in this Court. I have felt more difficulty as to the supposed connection between the Plaintiff and the co-heirs.

It seems that the expediency of instituting this suit was suggested to the Plaintiff

by the solicitor of Wilkins, the tenant of another portion of the lands in dispute between the devisees and the co-heirs of James Wood, [584] who had filed a bill for the like purpose, and obtained an injunction. The solicitor of Wilkins, being the attorney of the co-heirs in actions of ejectment brought by them to recover the lands in question, and the effect of the interpleader being, if successful, such as to answer an alleged purpose of the co-heirs, it is said, that some connection at least, if not collusion, must necessarily be inferred from the conduct which is pursued.

The devisees naturally desire to avoid anything which may bear the appearance of their being turned out of possession; and it is their avowed object to procure, as speedily as possible, an examination in open Court of the witnesses who are to prove, as they suppose, the validity of the will; and not being able to force on a trial of the ejectment, in which they do not deny the title would be better proved, they insist upon their right, and allege it to be an important object to them to proceed upon the avoweries in the Plaintiff's action of replevin; and they impute to the co-heirs a desire to turn them out of possession, and to postpone the examination of the same witnesses in open Court, till some proceedings elsewhere have been brought to a conclusion.

The co-heirs do not deny their intention to postpone the trial of the ejectment, but they assign a totally different motive; and if it is true that their only object is such as is stated, it does not appear to me to be unreasonable.

Upon these points I have no means of forming any opinion; the circumstances are such as, of themselves, to lead to a conjecture that the Plaintiffs may be aiding the purpose of the co-heirs; but I think that the affidavits are such as to make it impossible for me to come to that conclusion.

[585] The continuance of the injunction, therefore, depends on the question, whether this is a proper case of interpleader.

The special circumstances relied upon, are those which tend to shew, that after the death of James Wood the Plaintiff attorned to, and commenced a new holding under the devisees; and it is argued, that however doubtful it may be, whether, under the circumstances, a new holding commenced or not, yet that it is a question raised upon a case subsisting between the Plaintiff and the devisees, independent of the question of title subsisting between the devisees and the co-heirs, and is to be determined on the Plaintiff's behalf by the establishment of the case for himself against the devisees; and that the mere existence of such a question, precludes the Plaintiff from the right to bring a bill of interpleader.

I cannot, however, think that the mere suggestion of a question between the Plaintiff and one of the Defendants to a bill of interpleader is a sufficient bar to any relief being given by the bill.

It is evident in this case that the question of title between the devisees and co-heirs is the only substantial, if not the only existing question between those parties. The answer, though it states the transactions said to amount to an attornment, does not insist on them as affording a distinct subject of contest with the Plaintiff. In argument, indeed, the point has been strenuously brought forward; but, under such circumstances, I consider it to be my duty to look at the facts out of which the question arises, for the purpose of considering whether there is such a question to be tried, as will preclude the Plaintiff from seeking the relief he now asks for.

[586] In the case of *Clarke v. Byne* (13 Ves. 383) an attornment was relied on as disentitling the Plaintiff to maintain a bill of interpleader, but the demurrer was overruled; and being of opinion that the attornment in this case, if such it were, could not give to the devisees against the Plaintiff any claim or title independently of that which they claimed as devisees, it does not appear to me that there is any fact to be tried any question but that of the title between the devisees and the co-heirs; and, thinking this a proper case of interpleader, I must refuse to discharge the order for the injunction. (Affirmed, 1 Craig & Ph. 185.)

NOTE.—The cause was heard by Sir J. L. Knight Bruce, on the 17th of March 1842, when the injunction was continued: the Plaintiff was ordered to pay his rent into Court, and was awarded his costs of suit out of the fund in Court. The other costs were reserved.

[587] ELLIS v. MAXWELL. March 19, 21, 26, 1841.

[S. C. 10 L. J. Ch. 266; 12 Beav. 104. See *Weatherall v. Thornburgh*, 1878, 8 Ch. D. 271.]

A party, whose interest in a fund had not vested, Held, under the terms of a power in a will, entitled to maintenance, even after attaining twenty-one.

The Thellusson Act (39 & 40 G. 3, c. 98), does not permit accumulation during a minority, and any time to elapse between the death of the testator and the commencement of the minority, or in favour of any person who would not, for the time being, if of full age, be entitled to the annual produce of the fund.

A testator directed the accumulation of the whole of his personal estate for the benefit of his grandchildren; and he gave to his wife "anything which he might not have sufficiently disposed of." Held, that the accumulations of the fund, which were void under the Thellusson Act, belonged to the widow, notwithstanding the grandchildren took vested interests.

A testator devised his freeholds to pay certain annuities, and accumulate the surplus rents so as to become part of his personal estate: and, subject to the charges, to the use of the first and other sons of his son A. in tail, with remainder to his daughter B. for life, with remainder to her first and other sons in tail, &c.; and he directed that no person should, under the limitations, become entitled in possession while any antecedent limitation remained in contingency. And he gave his personal estate to the children of A. and B., "except the eldest son," to be transferred to all his younger grandchildren, equally to be divided between them as and when the sons attained twenty-one, and the daughters attained that age or married, it being his will that each of their several shares and interests should become *vested* at that age, or the previous marriage of daughters, though such shares should not become *payable* or *transmissible* till after the demise of both his son and daughter; but, in the meantime, he empowered his trustees, though the parents of his grandchildren should be living, to apply the interest of each grandchild's "*presumptive* share, even including an eldest son's share, in their maintenance and education;" and the surplus was to accumulate and be payable along with their respective original shares when the same became *vested* and transmissible, and the payments were to be allowed to the trustees, though such grandchildren should not gain a *vested* interest. And the testator declared, that after the death of A. and B., as well as during their lives, his trustees should, in the meantime, and until the share or shares of all his grandchildren of and in the trust funds should become *vested* and assignable, transferable or payable, apply the dividends of the trust funds towards the maintenance and education of every such child and children respectively, including even the eldest.

A. and B. were still living; A. had no children, but B. had an eldest son and other children. Held, first, that the eldest son of B. had not a vested interest in the personal estate; secondly, that the other children took vested interests, subject to be divested partially by the birth of other children; and, thirdly, that all the children of B., including the eldest son, who had attained twenty-one, were entitled to have maintenance.

The testator William Maxwell by his will, dated 25th of March 1818, after referring to the insanity of his son John Maxwell, devised his freehold estates to his wife the Defendant Jane Maxwell, and to the Plaintiffs in fee, to the intent that his wife might receive an an-[588]-nuity of £1000 for her life out of the rents and profits if sufficient, but if not then out of his personal estate; and to the further intent that his son John Maxwell might receive or have applied for his benefit, an annuity of £1000, which might be increased under circumstances in the will mentioned; and the testator directed the residue of the rents, so charged, to be invested and accumulated, to the end that the same might become part of his personal estate. And, subject to the charges, the testator directed his trustees to stand seised of his freehold estate, to the use of the first son of the body of his son John in tail male, with remainder to the other sons of his son John, successively in tail male, with remainder to his daughter Ann Lyte for life, with remainder to the use of the first son of the body of

Ann Lyte in tail male, with remainder to the other sons of the body of Ann Lyte, successively in tail male, with remainder to the daughters of his son John and daughter Ann Lyte as tenants in common in tail, with other remainders over. And the testator directed, that no person should under the limitations and trusts aforesaid become entitled to the lands in possession, or to the rents and profits thereof during such time as any antecedent limitations remained in contingency.

The testator then disposed of his leasehold estates; and he gave his personal estate to his trustees and executors desiring them to pay his debts and certain legacies; and he directed that after payment of his debts and legacies, his trustees should stand possessed of his personal estate, upon the trust after mentioned, for the benefit of all the sons and daughters of his son John Maxwell and his daughter Ann Lyte, "save and except a first born or eldest son, or such other son as by the death of an elder brother might become an eldest son, and as such would be entitled to a considerable portion of his [589] fortune under the limitations of his will, whether such eldest son should be the son of John Maxwell or of Ann Lyte, but the son of his said son John Maxwell was to be preferred before the son of the testator's said daughter; and to that end, he directed the trustees to transfer the trust funds unto all his younger grandchildren equally to be divided between them, as and when being sons they should attain the age of twenty-one years, or being daughters they should attain that age or be previously married, it being his will, that each of their several shares and interests should become *vested* at that age or the previous marriage of daughters, though such shares should not become *payable or transmissible* until after the demise of both his son and daughter;" and he directed, that if only one grandchild should live to attain such *vested* interest, the whole fund should go to such only grandchild.

But in the meantime his will was, that although the parents of his grandchildren, or either of them should be living, it should be lawful for the trustees to apply the interest of each grandchild's *presumptive* share, even including an eldest son's share, or such portion thereof as in their discretion they should think fit, in the maintenance and education of all his grandchildren, or in aid thereof; and the surplus, if any, was to be laid out and accumulate, and be payable and paid along with their respective original shares when the same should become *vested and transmissible*, together with all such benefits of survivorship, amongst his younger children as after mentioned; and such several applications and payments by the trustees were to be allowed in their accounts, even though such grandchildren so maintained and educated should not afterwards live to gain a *vested interest* under his will. The will then provided for [590] giving to surviving grandchildren the benefit of the original or accruing share of any who should die without having acquired a *vested* interest. And the testator then expressed his will to be, that from and after the decease of both his son John Maxwell and his daughter Ann Lyte, as well as during the lives of both, or the life of one of them, his trustees should in the meantime and until the share or shares of all his grandchildren of and in the trust funds should become *vested and assignable*, transferable, or payable to him, her, or them respectively, pay, apply, and dispose of the dividends, interest, and annual proceeds of the trust funds, or any part thereof, in and towards the maintenance and education of every such child and children respectively, including even the eldest, in such manner as the trustees should in their discretion think fit. The testator afterwards directed, that if there should be anything which he might not sufficiently have disposed of, the same should go and belong to his wife Jane Maxwell as his residuary legatee.

At the date of the will the testator's son John Maxwell was, and still remained, a lunatic and unmarried.

The testator died on the 8th of September 1818.

The daughter Ann Lyte had no child born at the time of the testator's death. She has since had four children, the eldest of whom was born on the 29th of September 1818, and consequently attained his age of twenty-one years on the 29th of September 1839. The youngest was born on the 10th of January 1828.

The term of twenty-one years after the testator's death expired on the 8th of September 1839.

[591] The will was very inaccurately expressed, and was in some respects contradictory; and several questions were raised upon the construction.

Mr. Pemberton and Mr. Purvis, for the Plaintiffs, who were two trustees.

Mr. Lewin, for Jane Maxwell, the widow and residuary legatee, contended that the bequest of the residuary estate amounted, in effect, to a trust for accumulation during the lives of the testator's son and daughter, and the survivor of them; that it was void for the excess above twenty-one years; and that the widow was entitled to the income which could not lawfully be accumulated. He further contended that the trustees had no power to apply any part of the income towards the maintenance of any grandchild who had attained the age of twenty-one years.

Mr. Kindersley, for the Defendant Henry William Maxwell Lyte, who was the eldest son of Mrs. Lyte, and had attained his age of twenty-one years, contended, that although he was now the eldest grandson, yet that as he might be excluded from all benefit of the limitations of the real estate by the birth of a son of John Maxwell, and was, during that contingency and the life of his mother, excluded from any interest in possession in the lands, he ought to be considered as a younger grandchild, and as having acquired a vested interest in a share of the personal estate; and he claimed either to have such share now paid to him, or, at least, to have his right thereto declared; and if he should not succeed in establishing that claim, he contended, that even as eldest grandson he was entitled to have an allowance for his maintenance and education, until the shares of the younger grandchildren became payable.

[592] Mr. Tinney and Mr. Morley, for the younger grandchildren, contended that Henry William Maxwell Lyte, being, at this time, eldest grandson, entitled in expectancy to the freehold estate, could not, whilst he held that character, be entitled to a share of the personal estate, though he might become so, if, by the birth of a son of John Maxwell, his expectancy should be further postponed; and they submitted to the Court, whether he was entitled to an allowance for his maintenance out of the income.

For the younger grandchildren, it was further contended, that the trust for accumulation, whether expressed or implied, was a trust during the minorities of children, who, under the uses of the will, would, if of full age, be entitled to the income; that such accumulation was lawful under the statute. It was also insisted on their behalf, that when they respectively attained the age of twenty-one years, they would become entitled to vested interests, subject only to partial divestment, in the event of other grandchildren coming into existence; but that until such grandchildren should be born, each of the present younger grandchildren would, on attaining twenty-one years of age, be entitled to receive the income arising from his or her presumptive share.

The following authorities were referred to:—39 & 40 G. 3, c. 98, *Mills v. Norris* (5 Ves. 335), *Haley v. Bannister* (4 Mad. 275), *Shaw v. Rhodes* (1 Myl. & Cr. 135), *O'Neil v. Lucas* (2 Keen, 313), *Macdonald v. Bryce* (Ib. 276), *Eyre v. Marsden* (Ib. 564), *Pride v. Fooks* (2 Beavan, 430), *Evans v. Hellier* (5 Cl. & Fin. 114).

[593] April 26. THE MASTER OF THE ROLLS [Lord Langdale], after stating the circumstances and the points argued, observed as follows:—The will is very inaccurately expressed, and is in some respects contradictory, and several questions are raised upon the construction.

As there is not at present any surplus of the rents of the real estates, and as none of the younger grandchildren have attained the age of twenty-one years, some of the questions which arise upon this will do not now require decision. The questions which it is necessary to consider are:—

1. Whether the Defendant, Henry William Maxwell Lyte, the eldest grandson, for the time being, is entitled to a vested interest in a share of the personal estate.
2. If he is not, whether he is, nevertheless, entitled to an allowance for his maintenance and education, or for his maintenance, out of the income of the personal estate, notwithstanding his having attained his age of twenty-one years.
3. Whether the trust for accumulation is void for the time exceeding twenty-one years, after the testator's death.

1. As to the first it appears to me, that the words "save and except a first-born or eldest son, who, as such, will be entitled to a considerable portion of my fortune under the limitations of this my will," the eldest son answering that description is excluded from the class for whose benefit the capital of the personal estate is given; and this construction is, I think, confirmed by the mode in which the testator has taken care to provide for the maintenance of such eldest son [594] out of the income;

thinking it necessary, on two distinct occasions, to include him specially as one of the grandchildren to be so maintained. It may happen that a son of John Maxwell may be born; such son will, by the express words of the will, be entitled to a prior interest in the real estate; and, in that event, the eldest son of Mrs. Lyte will, I conceive, upon the construction, have the rights of a younger grandchild to a share of the personal estate; but at present, I think, that he is not entitled to a vested interest in the capital.

2. I think that the intention to be collected from the will is, that the shares of the grandchildren should not be paid during the lives of John Maxwell and Mrs. Lyte, or the life of the survivor of them. The testator has distinctly contemplated the two periods of time, the time of vesting and the time of payment; but the will is expressed very inaccurately as to what is to be done on each occasion, and in the meantime. In one place he directs the shares to be paid to the grandchildren, as and when they respectively attain the age of twenty-one years; in the same clause he says, that the shares are to vest at twenty-one, but not become payable or transmissible till after the death of both his son and daughter; and having in one place expressed himself so as to exclude an eldest son from any share, he in another place speaks of an eldest son's share. But, upon the result of the whole, I think, that according to the terms of the will, the eldest son, though excluded from a vested interest in the capital, is entitled to an allowance out of the income for his maintenance and education; and then the question is, whether the trustees have authority to continue this allowance after the eldest son's attainment of twenty-one years of age. And whatever ambiguity there may be in the first clause relating to maintenance, I think that, upon the second, the trustees [595] have such authority. The words are, "that from and after the decease of both his son and daughter, as well as during the lives of both, or the life of one of them, the trustees shall, in the meantime, and until the shares of all the grandchildren shall become vested and assignable, and transferrable or payable to him, her, or them respectively, pay, apply, and dispose of the income or any part thereof, in and towards the maintenance and education of every such child or children, including even the eldest son, in such manner as they shall think fit."

This clause is expressed generally, without distinctly referring to the ages of the children; the words "vested and assignable, transferrable or payable," appear to me to shew, that the testator contemplated a period beyond the time, when, according to the former clause, the shares were to become vested, but not payable or transmissible; and upon the best consideration which I have been able to give to the case, I think that there are no words in the will which lead necessarily to the conclusion, that the operation of this clause, which itself contemplates a longer period, should be confined to the minorities of the children, who are to be maintained in the event of a majority being attained, during the lives of the son and daughter. I am therefore of opinion, that the Defendant Henry William Maxwell Lyte is entitled to an allowance for his maintenance, notwithstanding his having attained his age of twenty-one years.

3. With respect to the question relating to accumulation, the words of the statute permit accumulation for the term of twenty-one years from the death of the testator; or during the minorities of any person who shall be living or *in ventre sa mere* at the time of the death [596] of the testator; or during the minority only of any person, who, under the uses of the will, would for the time being, if of full age, be entitled to the annual produce directed to be accumulated.

Mrs. Maxwell admits the accumulation to be good for twenty-one years; she has scarcely suggested that it may not be good during the minority of Henry William Maxwell Lyte, who was *in ventre sa mere* at the time of the testator's death; but she insists that it can be good no longer; whilst the younger grandchildren insist, that they are persons who under the uses created by the testator, will upon attaining the age of twenty-one years be entitled to the annual produce of the whole fund.

The difficulty of attributing a distinct and efficient meaning to all the words of this Act has frequently been acknowledged. If the accumulation is permitted only during the minority of a person entitled under the uses of the will, and no time is to be allowed, either before the minority commences or after it has ceased, it does not seem that anything is added to the permission to accumulate during the minority of a person living at the death of the testator. But taking the words as they are,

they do not appear to permit accumulation during a minority and any time to elapse between the death of the testator and the commencement of the minority, or in favour of any person who would not for the time being, if of full age, be entitled to the annual produce of the fund; and accordingly, in the case of *Longdon v. Simson* (12 Ves. 295), where an accumulation was intended to be made till unborn children attained twenty-one, Sir William Grant decreed an [597] accumulation for twenty-one years only; and in *Haley v. Bannister* (4 Mad. 277), Sir John Leach expressed his opinion to be, that the statute prevents an accumulation during the minority of an unborn child. These cases prevent me from considering that upon the construction of the Act the accumulation would be lawful during the minority of any grandchild born after the death of the testator. Moreover, upon the construction of this will, it will have to be considered whether the younger grandchildren attaining twenty-one will be entitled to the annual produce of the fund, although it may be lawful for the trustees to make them an allowance for their maintenance and education out of it, after they have attained twenty-one.

In the view which I have taken of the case, it does not appear to me that the circumstance of the younger children taking vested interests at twenty-one makes any material difference. They will, as it seems to me, be vested interests, subject to be partially divested by the births of after born children; but in *Eyre v. Marsden* the interests were vested on the death of the testator, subject to be divested in a particular event; and yet the grandchildren were held not to be entitled till the time of distribution appointed by the testator.

It appears, therefore, to me, that the trust for accumulation after the attainment of twenty-one years by William Henry Maxwell Lyte is void; that an allowance ought to be made, out of the annual produce of the fund accumulated up to that time, for the maintenance and education of all the grandchildren, including William Henry Maxwell Lyte; and that the surplus if any of such annual produce belongs to Jane Maxwell as residuary legatee.

[598] BROWN v. SAWER. March 25, 1841.

One of two Co-plaintiffs who had authorised the institution of a suit refused to proceed therein. The other Plaintiff obtained, on motion, an order to amend by making him a Defendant, and to pay the costs.

This bill was filed by William Frederick Brown and Martha Gresham against several Defendants, pursuant to a written retainer given by them to their solicitor.

After the answers had been got in, the Plaintiff W. F. Brown alone disapproved of the suit, and was desirous that the same should be compromised; and by a written notice given to his solicitor, he withdrew from the suit, and forbade him taking any further steps therein. This was stated in the answer of one of the Defendants, and was also proved by affidavit.

A motion was now made, on behalf of Martha Gresham, the other Co-plaintiff in this suit, that she might be at liberty to amend the bill by striking out the name of W. F. Brown as a Co-plaintiff, and by making him a Defendant; and that W. F. Brown might be ordered to pay to Martha Gresham the costs occasioned by such amendment, and also the costs of giving any security for costs, which the Defendants or any or either of them might be declared entitled to, in consequence of such amendment, and incidental thereto; and also the costs of and incident to this application, to be taxed as between solicitor and client.

Mr. Anderdon, in support of the motion, referred to a case of *Miller v. Smith* (1) (before the Vice-Chancellor in 1839) and *Small v. Atwood* (Younge, 407).

(1) He stated this case in the following terms:—A cause being at issue, one of the Co-plaintiffs, for good reasons, refused to proceed; this refusal of one paralyzed the proceedings, and the other Plaintiff gave notice of motion to be at liberty to have the future prosecution of the case, and to name a solicitor to act therein. The only other course would have been to have dismissed the bill. The Vice-Chancellor made an order that the Co-plaintiff making the application should have the future conduct of the cause, and that the other Co-plaintiff should pay the costs of the application.

[599] Mr. Wilcox, for the Plaintiff Brown, and

Mr. Terrell, for the principal Defendant, opposed the motion, and contended that, although a Plaintiff might be made a Defendant where his evidence was required as a witness, still one Plaintiff could not, adversely, obtain such an order as was now asked, merely because he could not agree with his Co-plaintiff in the mode of prosecuting the suit; especially where, as in the present case, the state of the pleadings would be materially altered; *Holkirk v. Holkirk* (4 Madd. 50), *Lloyd v. Makeam* (6 Ves. 145), *Motteux v. Mackreth* (1 Ves. jun. 142), *The Attorney-General v. Cooper* (3 Myl. & Cr. 261).

Mr. Hall appeared for other Defendants, who had no objection.

THE MASTER OF THE ROLLS [Lord Langdale]. I think I must make the order. It is a case in which two Plaintiffs claiming similar rights gave joint authority to institute the suit. The bill was filed, and the answer states that one of the Plaintiffs impeaches the propriety of the suit; by letter also he forbids its further prosecution, and thus compromises the rights of the other Co-plaintiff. If the case stood here, I believe it would be in the same situation as *Small v. Atwood*; but this case goes further; for the Plaintiff, who had, in this case, given written instructions [600] to his solicitor, afterwards revokes the authority, and prevents the other Plaintiff going on with the suit. The case is within the words of the case of *The Attorney-General v. Cooper*, the suit cannot be prosecuted unless the alteration is made, and therefore "justice will not be done unless the alteration is made." I think, therefore, that this order must be made, but on such terms as will be just towards the Defendants, and by securing the costs of suit already incurred; and Mr. Brown, the Co-plaintiff, having, by revoking the authority, made this application necessary, ought therefore to pay the costs.

[600] COLLINS v. COLLYER. March 8, 31, 1841.

[S. C. Cr. & Ph. 262; 41 E. R. 490.]

Under the 1 W. 4, c. 36, a decree, even when there is but one Defendant, cannot be taken *pro confesso* on motion.

The sole Defendant in this cause was taken upon an attachment for want of answer in June 1840, and on the 2d of November following he was turned over to the Fleet.

The Defendant was now brought up by *habeas corpus* under the second rule 1 W. 4, c. 36, in order that the bill might be taken *pro confesso* against him.

The cause had not been set down to be heard.

Mr. Torriano now proposed to take upon motion such decree as the Plaintiff could abide by; he cited *Seagrave v. Edwards* (1), in which it was held a bill [601] might be taken *pro confesso* on motion where there is only one Defendant.

THE MASTER OF THE ROLLS. The Act of Parliament directs that upon the Defendant being brought up in order that the bill may be taken *pro confesso* against him, "such decree shall thereupon be made as shall be just." The cause is to be heard, and the decree pronounced by the Court; and this cannot be so conveniently or satisfactorily done on motion. I think that the case should be set down. (2)

(1) And see *Lewis v. Marsh*, 2 Sim. & St. 220; *Wooliams v. Baker*, 6 Sim. 316; *Baker v. Keen*, 4 Sim. 498. The cause may be advanced to be taken *pro confesso*; *Barwick v. Ward*, 5 Sim. 676; *Hart v. Ashton*, 1 Mad. 175; *Hoyle v. Leveaux*, 1 Mer. 381.

(2) The Lord Chancellor afterwards discharged the Defendant upon grounds not stated at the Rolls, see 1 Cr. & Ph. 262. The Master of the Rolls merely decided that the decree could not be made on motion. See *Haynes v. Ball* [4 Beav. 101].

Reports of CASES in CHANCERY ARGUED and
DETERMINED in the ROLLS COURT during
the time of LORD LANGDALE, Master of the
Rolls. 1841, 1842. By CHARLES BEAVAN,
Esqr., M.A., Barrister-at-Law. Vol. IV. 1843.

[1] FENNINGS v. HUMPHERY. March 27, 29, 1841.

[S. C. 10 L. J. Ch. 251 ; 5 Jur. 455. See *Anglo-Danubian Company v. Rogerson*,
1867, L. R. 4 Eq. 8.]

A. agreed to grant a lease of a vault to B., and also to erect a crane, &c., and do within a given time certain other acts, which this Court could not decree to be specifically performed. A. having made default, B. sued in this Court for a specific performance, but did not pray that the above-stated acts should be specifically performed. Pending the suit, B. also commenced an action at law against A. for damages suffered in consequence of the non-performance of the acts. Held, that the suit and action were not for the same matter, and an order to elect, obtained by the Defendant, was discharged.

A party served with an order obtained *ex parte*, may be guilty of contempt for disobedience thereof, in a case where the order ought not to have been made.

A Plaintiff, served with an order to elect between proceedings at law and in equity, afterwards took a step in the action at law. Held, that he might, nevertheless, apply to discharge the order for election.

Whether an order to elect stays all proceedings, *quære*.

This case came on upon a motion to discharge an order, obtained as of course, whereby the Plaintiff was required to elect, whether he would proceed in this suit, or in an action at law, alleged by the Defendant to be for the same matter; and also upon cause shewn by the Plaintiff, why an order *nisi* to dissolve an in-[2]-junction obtained by the Plaintiff, to restrain the Defendant's proceedings at law, should not be made absolute.

It appeared that on the 13th of May 1837, the Defendant contracted to let to the Plaintiff certain vaults, then in the Plaintiff's possession, for a term of seven years and a quarter, to commence from Lady Day then last, at a rent of £150 a year; and she also contracted to excavate, build, and finish another vault, with certain specified accommodation, and erect a crane, with proper and convenient works and appurtenances, for the sole use of the Plaintiff during the intended demise; and to complete the vault and works, and give possession thereof to the Plaintiff, in eighteen months from the 24th day of June then next. The Plaintiff was to hold the last-mentioned vault, from the day when possession thereof should be given, for seven years, at the yearly rent of £50. The Defendant agreed, that he would, at any time within seven years and a quarter, execute to the Plaintiff a lease of all the premises, for so much of the term as should then be unexpired, containing the usual and proper covenants on the part of the lessee, for the purposes therein mentioned, and covenants on the part of the lessor, to keep the premises in repair and insured, and for quiet enjoyment by the lessee.

The Defendant did not perform the works according to the agreement, and the

rent agreed to be paid by the Plaintiff for the vault in her possession being in arrear, the Defendant brought an action against her for the recovery thereof.

The present bill was filed on the 24th of December 1839; and the Plaintiff thereby prayed, that the agree-[3]-ment of the 13th of May 1837 might be specially performed and carried into execution; and that the Defendant might be ordered to execute a proper lease of the vaults and premises, the Plaintiff offering to perform her part; she also prayed for an injunction to restrain the Defendant from proceeding in his action, and for general relief.

The Plaintiff's bill alleged, that the Defendant had failed to erect the new buildings, to erect the crane, and to keep the premises in repair, according to his covenant; but did not specifically pray that the Defendant might be ordered to do those acts.

The Plaintiff obtained the common injunction to restrain the Defendant proceeding to execution in his action for rent. The answer was filed on the 27th of January 1840, and for more than a twelvemonth no proceedings were taken in this Court; but on the 20th of February 1841 the Defendant obtained the usual order *nisi* to dissolve the injunction; and on the 26th of February 1841 the Plaintiff commenced an action against the Defendant for damages for breaches of the agreement. The declaration in the action was delivered on the 6th of March 1841. It stated the agreement of the 13th of May 1837, and assigned as breaches by the Defendant, 1st, his neglect to excavate, make, build, and finish, the vault agreed to be made, with such suitable and convenient entrance and communication as therein mentioned; 2dly, his neglect to erect the crane agreed to be erected; and 3dly, his neglect to do the necessary repairs; and it was then alleged, that the Plaintiff had lost profits, which she would have made, if the vaults and works had been made as agreed to; and had, at divers times, between the 24th of June 1837 and the [4] commencement of the action, been put to great trouble and expence by reason of the breaches assigned.

This declaration being delivered on the 6th March, the Defendant on the 11th, alleging that he was doubly vexed by the Plaintiff prosecuting him at law and in this Court for one and the same matter, obtained the common order, that the Plaintiff should, in eight days after notice, elect in which Court she would proceed; this order was served on the Plaintiff on the 13th of March. The Plaintiff afterwards made an application to Baron Alderson, in the common law action, to amend her declaration, and leave was given on the 15th of March. The Plaintiff now sought to discharge the order, for election, for irregularity, as having been obtained on a false allegation that the Plaintiff was prosecuting the Defendant at law, and in this Court, for one and the same matter.

The Plaintiff also now shewed cause why the order *nisi*, obtained by the Plaintiff, to dissolve an injunction to restrain the Defendant's proceedings at law, should not be made absolute.

Mr. Pemberton and Mr. Jemmett, for the Plaintiff, as to the order for election, contended, that it had been obtained on a false suggestion; inasmuch as the object of the suit and of the action were distinct, the first seeking to obtain the lease, and the second for damages which the Plaintiff had suffered, up to the time of bringing the action, in consequence of the non-performance by the Defendant of his agreement to repair, &c.

On the second point, as to the injunction, they argued that the Defendant ought not to be permitted to sue the Plaintiff for rent, while he refused to perform his part of the agreement.

[5] Mr. Bethell and Mr. Dunn, *contra*, contended that the subject of the suit and action were the same, and arising out of the same agreement; and that this Court would not permit a party to sue at law for damages, on the same contract which he in this Court sought to have specifically performed.

That the Plaintiff by proceeding at law after she had been served with the order to elect, had thereby made her election to pursue her remedy at law.

That the Plaintiff retaining possession ought to pay her rent; that the contract was for two distinct matters, and that it was no answer to the Defendant's demand for the rent of the vault, to say that the second part of the agreement, for which a distinct rent was reserved, had not been performed by the Defendant.

The following cases were cited as to the Plaintiff's right to proceed at law notwithstanding the present suit; *Mills v. Fry* (19 Ves. 277), *Carrick v. Young* (4 Mad. 437), *Reynolds v. Nelson* (6 Mad. 290), *Frank v. Barnett* (2 Myl. & K. 618), *Orme v. Broughton* (10 Bing. 533), *Trimleston v. Kemmis* (1 Ll. & Goo. 29).

As to the effect of the order to elect; *Mills v. Fry* (Cooper, 107), *Amory v. Brodrick* (Jacob, 530), *Carwick v. Young* (2 Swan. 239).

As to the Plaintiff's relief in equity for damages; *Nelson v. Bridges* (2 Beavan, 239), *Mundy v. Jolliffe* (9 Sim. 413).

[6] THE MASTER OF THE ROLLS [Lord Langdale]. The Plaintiff's bill alleges that the Defendant has failed to erect the new buildings, to erect the crane, and to keep the premises in repair, according to his covenant, but does not specifically pray that the Defendant may be ordered to do those acts; and the acts are of such a nature, that this Court could not order them to be specifically done. Upon this occasion, I have not to consider whether the Defendant may have any equity to restrain the Plaintiff from proceeding in her action, other than that equity which arises from the allegation, that the proceedings at law and in this Court are for one and the same matter. Whatever other grounds for relief the Defendant may have, the order which he has obtained cannot be supported, if the legal remedy which the Plaintiff is seeking at law is consistent with the equitable remedy which she is seeking in this Court.

As by the bill, she asks for a specific performance of the agreement, if, by the action, she sought for compensation for its entire non-performance, one proceeding would allege that the agreement could and ought to be performed, and the other proceeding would allege or imply, that the performance of the agreement, having been abandoned or become impossible, compensation in lieu of performance should be given. The two proceedings would be inconsistent with each other. The Plaintiff would be in one Court, suing for the thing itself, and in the other for compensation in lieu of the thing itself. She would, I think, upon a fair construction of the words of the order, be prosecuting the Defendant at law and in this Court for one and the same matter; in different forms indeed, but still in substance, for one and the same matter, and I should think the order valid.

[7] But considering the allegations in this bill and the relief specifically prayed for; considering the particulars of the agreement, and what parts of it this Court can, and what parts of it the Court cannot, decree to be performed in specie; and considering that the action is brought for damages for the non-performance of particular acts, the performance of which is not specifically prayed by the bill; and which, if they may be conceived to be included in the general words "specific performance," or in the prayer for general relief, are not acts, the specific performance of which can be decreed; and, moreover, that the action is brought only for such damages as were sustained up to the time when the action was brought; it appears to me, that the action was not founded on any implied abandonment or cesser of the agreement, but is consistent with the continued existence of the contract, and of the Plaintiff's title to have it specifically performed, if there be no other objection to its specific performance. Under these circumstances, I think that the action and the suit are not prosecuted for one and the same matter, and I am therefore of opinion that the order of the 11th of March ought not to have been made.

But it has been argued, that even if the order were not originally valid, the Plaintiff by her proceedings at law, after the order was served upon her, has lost the right of applying to discharge it. It is clear, that a party who is served with an order, may be guilty of contempt for disobedience, in a case in which the order ought not to have been made. He is not to determine for himself, but ought to come to the Court for relief, if advised that the order is invalid; and the argument in this case is, that an order for the Plaintiff to elect whether she will proceed at law or in equity, operates as an injunction from the time when it is served, and [8] that any proceedings, either at law or in equity, after service of the order, may be treated as a contempt; but that in another view, it may be considered as an election to abide by the proceedings which have been continued since the service of the order; and that the election having been made, it is too late to apply to discharge the order, under or after which it was made. There are indeed several *dicta*, to the effect, that an order to elect stays all proceedings. The correctness of those *dicta*, and the limitations

under which they must be received, may be the subject of consideration on a proper occasion, but on this occasion, and even on the supposition that all proceedings ought to be stopped on service of the order, and that the Plaintiff is liable to be charged with disobedience on account of her proceedings afterwards, I am of opinion, that the argument that he is not at liberty to move to discharge the order cannot be sustained. No authority for it has been produced. Lord Eldon, indeed, in *Mills v. Fry*, expressed a doubt whether the Plaintiff, having proceeded in equity notwithstanding the order, or to have the benefit of the order; i.e., supposing the order to be valid, Lord Eldon doubted whether proceeding in one Court afterwards, might not be considered an election made, depriving the party of the benefit of future choice. But this is nothing like an intimation, that the party is to be precluded from moving to discharge an order which he is advised is invalid, or that he is to be deemed to have made an election, in a case in which he offers to shew to the Court that he ought not to be compelled to elect at all. The argument is inapplicable to a case, in which the Plaintiff might have proceeded in both Courts, after service of the order; and it appearing to me that, in this case, the Plaintiff is at liberty to move to discharge the order, and that the order itself is not valid, I am of opinion that it must be [9] discharged. But I think it right to observe, that if the question as to the prosecution of the suit, and of the action at the same time, had not been brought forward in this particular form, there are many other circumstances which would have required consideration before it could have been satisfactorily held that the two proceedings might go on together.

With respect to the cause shewn against dissolving the injunction to stay proceedings in the Defendant's action for rent, I cannot agree with the Defendant in considering the agreement as consisting of two distinct and independent parts. It is but one agreement, though several things are agreed to be done; and as the Defendant admits that he has not done the things which he agreed to do, and even says, that for reasons which he states, he is unable to do them, I think that he ought not to be allowed to receive the rents until the right is determined; and as, on the other hand, the Plaintiff ought not to be allowed to keep possession without paying for it, I think that if this part of the case had come on by itself, it would have been proper to continue the injunction, on the terms of the rent being brought into Court; and if no arrangement can be made, that course must be adopted; but if the Plaintiff will undertake not to take out execution, upon any judgment to be obtained in her action, without leave of the Court, and to pay the rent into Court, if and when the Court shall think fit to order it, I will continue the injunction against the Defendant's proceeding, without now ordering the rent to be paid into Court.

The question of costs having been mentioned,

[10] THE MASTER OF THE ROLLS said, I think I should make no order respecting them; there are many serious matters in this case, the consideration of which has been excluded, by the particular form in which the case has been brought forward.

[10] KNIGHT v. FRAMPTON. March 2, 3, 16, 1841.

[S. C. 10 L. J. Ch. 247.]

The legal estate of a property being vested in A., for the benefit of himself and B. in equal moieties, he mortgaged it unknown to B. B. afterwards paid off the mortgage, and had the legal estate conveyed to him, subject to such equity of redemption as the lands were subject to. Held, that there was not such a perfect union of the legal and equitable estate in B.'s moiety of the estate as to give his widow a title to dower.

The facts of this case appear in the judgment.

Mr. Pemberton and Mr. Kindersley, for the Plaintiff.

Mr. Bethell and Mr. Phillips, for the widow.

Mr. K. Parker, Mr. Stuart, Mr. Faber, Mr. Turner, Mr. Lewin, and Mr. Lee, for other parties.

THE MASTER OF THE ROLLS [Lord Langdale]. Mr. Frampton being seised in fee of an estate, to an undivided moiety of which Mr. Knight was equitably entitled,

executed a mortgage in fee of the entirety to Lord Petre and others, to secure payment of a sum which, together with a further charge, amounted to £18,000.

After the death of Mr. Frampton, those who claimed under him disputed the equitable right of Mr. Knight to a moiety of the estate. Mr. Knight filed a bill to enforce his right, and the mortgages made by Frampton being disclosed, Mr. Knight paid them off, and made himself liable to pay a prior charge, and took from [11] Lord Petre and others a conveyance of the estate in fee, subject to redemption.

Mr. Knight died intestate. At the time of his death, such equity of redemption as the legal estate was subject to, was vested in the representatives of Frampton, who being, at the date of the mortgage, entitled to the entirety of the legal estate, executed the mortgage for his own benefit, without the authority of Knight, who was equitably entitled to a moiety of the estate. Under these circumstances, the widow of Mr. Knight, alleging that, in equity the representatives of Frampton were only entitled to redeem the estate as to a moiety, and that there was no right to redeem the other moiety: that consequently, as to that other moiety, Knight held the legal estate free from any equity of redemption, and being at the same time entitled to an absolute equitable interest in the same moiety, the legal and equitable estates therein coalesced: and that this having happened during the coverture, contended that she became entitled to dower.

But neither the legal estate which Mr. Knight had as mortgagee in fee in the entirety, nor the equitable estate which he had in a moiety, gave his widow any right of dower; and although the legal estate could only have been redeemed, as to a moiety, by those who claimed under Frampton—although, as against them, Mr. Knight had a right to have it declared, in this Court, that he was entitled to hold one moiety discharged from any equity of redemption, and had a right to foreclose the equity of redemption of the other, it does not therefore follow, that under these circumstances, there was a simple and entire union of the legal and equitable estates in a moiety.

[12] The object of Mr. Knight, as he stated in his bill, was to simplify the matters in dispute between himself and the Framptons, and to avoid the necessity of making other parties to the suit; and whatever were his rights in equity, he took the legal estate expressly subject to such equity of redemption as the lands were subject to in the hands of the first mortgagees. As to a moiety, I think he was entitled to be relieved from that condition in this Court; but during his life he stood in this situation, that he had the legal estate in the whole, subject to the equity of redemption—an absolute equitable estate in a moiety, and an equitable title to have the legal estate in a moiety freed from the equity of redemption.

On the death of Mr. Knight, his real estate descended to his co-heirs. His widow, as his legal personal representative, became entitled to his personal estate, and to the £18,000 mortgage money and interest, and another charge as part thereof; and, in her bill, praying to have such relief as was prayed by Mr. Knight in respect of the mortgage money and another charge, and also to have it declared, that she is dowable of a moiety of the estate, she also prays, that until the mortgage and charge are fully satisfied, the same may be declared to be charged on Frampton's moiety; and also, if necessary, on the other moiety for the benefit of Knight's personal estate, and that the co-heirs of Knight may be declared to be trustees of the entirety of the estate, for the purpose of securing the mortgage money and charge for the legal personal representative.

This particular relief was not pressed for at the Bar; the state of Frampton's assets may have rendered it unnecessary, or the argument may have been thought not likely to assist the claim for dower.

[13] However this may be, I think that, under the circumstances which I have before stated, there was not a perfect union of the legal and equitable estates, to which Mr. W. Knight was entitled, during the coverture, and that there was not such a seisin as gave his widow a title to dower; I am therefore of opinion, that her claim to dower cannot be sustained. (See 3 & 4 W. 4, c. 105.)

[13] COOKE v. FRYER. Feb. 22, 1841.

[S. C. 5 Jur. 287.]

An infant *feme covert* was, by her next friend, made a Co-plaintiff to a bill against her husband and others. Held, upon her coming of age and disapproving of the suit, that she was entitled to have her name struck out of the record as Co-plaintiff; but the application having been made very soon after her attaining twenty-one, and it being suggested, that it was made under the influence of the husband, the Court postponed making the order for a short period, and ascertained from the lady herself, in the absence of her husband, her wishes on the subject.

In the year 1838 a marriage was agreed upon between the Defendant Mr. Fryer and Miss Turner, the only child and heiress presumptive of Sir G. P. Turner. Miss Turner being an infant, and her father having being found a lunatic, an application was made to the Court, under the 4 G. 4, c. 76, for a reference to approve of the marriage.

The matter was referred to the Master, and a proposal for the settlement of the fortunes of the intended wife and husband in a particular way, having been laid before him, he, on that foundation, reported that the marriage was proper, and the report was confirmed.

Mr. Fryer, being desirous of making some alteration in the terms of the settlement, was advised that it could not be done without a further application being made to the Court; and the day for the intended marriage having been fixed, and there being no opportunity for making an application to the Court in the meantime, a [14] new settlement, varying from that proposed, was executed, in which the Plaintiff Cooke was made a trustee. The marriage was shortly after solemnized before the registrar under the provisions of the 6 & 7 W. 4, c. 85, and independently of the sanction of the Court.

The bill was filed by Mr. Cooke and Mrs. Fryer by Mr. Cooke, her next friend, against Mr. Fryer and the other trustees of the settlement, and prayed the execution of the engagement stated by Mr. Fryer in his proposal before the Master.

Mrs. Fryer attained her age of twenty-one years on the 28th of February 1841. A motion was now made on her behalf, that her name as a Plaintiff might be struck out of the bill; she having attained twenty-one, and objecting to be continued a Plaintiff.

Mr. Kindersley, in support of the motion. Though a bill may be filed on behalf of an infant without his consent, the same cannot be done with respect to a *feme covert* (1 Daniel Pr. 151); and as Mrs. Fryer has attained twenty-one, and now disapproves of this suit, she is entitled to withdraw from it as a Plaintiff, it may nevertheless be continued by Mr. Cooke alone.

Mr. Stuart, *contra*, resisted the application, and contended the application was, in reality, made by the husband of the lady, the notice of motion being signed by his solicitor. That this suit had been properly instituted on behalf of an infant, and that it was right that it should be continued; and that her name ought therefore to be retained as a Co-plaintiff. He argued [15] that the husband, having once submitted to the jurisdiction of the Court, and having obtained its sanction to the marriage on certain terms, had committed a contempt by procuring the marriage to be solemnised in another form, and by such means evading the performance of the terms of his engagement. That this was an attempt, on his part, to prevent the due prosecution of the suit against him, and that the application was improper, being made under marital influence, and by a party who had just attained her age of twenty-one. He cited *Revett v. Harvey* (1 Sim. & St. 502), *Mellish v. Mellish* (*Id.* 138), *Long v. Long* (2 Sim. & St. 119), *Austen v. Halsey* (*Id.* 123, n.), *Hatch v. Hatch* (9 Ves. 292), to shew the continuance of the protection afforded by the Court to infants after they attain twenty-one.

Mr. Pemberton and Mr. Teed, for Mr. Fryer, contended, that as Mrs. Fryer was not a ward of Court, no contempt had been committed. That under the Act of 4 G. 4 this Court had no authority to approve of any settlement. That it was

necessary, in consequence of the lunacy of the lady's father, that the Court should consent to the marriage; but the course at first contemplated had been abandoned, and the parties had married under the provisions of the 6 & 7 W. 4, c. 85, whereby the concurrence of this Court was rendered unnecessary.

Mr. Walford, for Sir W. Trelawney, a trustee.

THE MASTER OF THE ROLLS [Lord Langdale] (without hearing a reply). This is a motion, that the name of a married woman, who, by her next friend, has been joined as a Co-plaintiff [16] in this suit, may be struck out of the record. The substantial question is, whether any person, assuming to be the next friend of a married woman, has a right, against her consent, to make her a Plaintiff in a cause? If it be a clear proposition that he has no right to do so, the only remaining question will be, whether this married lady does dissent, or whether the circumstances in which she is placed are such, that the Court ought to require further evidence of that fact?

A great variety of circumstances have been stated during the argument involving the inculpation of character. Irrelevant as most of them are, it has been my painful duty to hear a long unnecessary defence made against those inculpations; but I have not now to determine any question in the cause, or whether any fact alleged on the pleadings is or is not true; the only question which I have to determine is, whether the circumstances of this case are such, that I ought to feel assured the married woman dissents from the prosecution of this suit.

The general rule of the Court I apprehend to be perfectly clear. You may, in the character of next friend of an infant, prosecute a suit on his behalf without his consent, and even against his strongest remonstrances; subject only to such enquiries as this Court in a proper case will direct, whether it is prosecuted for the benefit of the infant, and subject of course to all the liability of the next friend to costs, if it turns out that he is not acting for the benefit of the infant; but I have never before heard that a person can treat a married woman, and a married woman of full age too, as if she were possessed of no sense or understanding, and can say that he will proceed with a suit on her behalf without her approbation. The difficulty in this case, if there be [17] any difficulty, is, that the suit was instituted during the infancy of this married woman, and this application is made immediately after she has come of age, and under circumstances which render me not perfectly assured that she has deliberately given instructions for this application.

Upon that ground, and that ground alone, I must pause before I dispose of this motion; and I will order it to stand over, in order that I may be better satisfied than I am now, that this lady does deliberately desire her name to be struck off the record. If I am satisfied of that, I shall not hesitate to comply with the motion.

I must see the lady personally in the absence of her husband, but as she has recently come of age, I think I had better let the motion stand over until Easter term, I shall then know whether she does give her consent to having her name struck off the record.

His Lordship afterwards saw the lady in the absence of her husband, and having ascertained her wishes, made the order.

[18] FARROW v. REES. Nov. 17, 1840.

[S. C. 4 Jur. 1028.]

A party entitled to an estate, subject to terms vested in trustees for securing a jointure and portions, mortgaged it; but retained the title-deeds in his possession. Held, that this omission, on the part of the mortgagee, was not sufficient to postpone him, in favour of a subsequent purchaser for valuable consideration.

A general recital in a deed, that there were mortgages on the estate, held to affect parties claiming under the deed with notice of a mortgage not specified therein.

An estate subject to two charges, was devised to the party entitled to the first charge; and by the settlement made on her marriage, to which the second incumbrancer was

no party, it was agreed that the charge should not be raised, and the estate was thereby settled. Held, that the first charge could not be set up against the second incumbrancer.

Where costs are vexatiously and improperly incurred by a successful party, and can be clearly distinguished from the rest, the Court will make a provision for them, otherwise they must be left to the Master.

On a bill for foreclosure, an infant partially interested in the equity of redemption can not adversely insist on a sale.

By the settlement, made on the marriage of Sir Watts Horton, certain estates were conveyed to Sir Watts Horton for life, with remainder to trustees for 500 years, to secure a portion of £800 a year to Lady Horton; with remainder to trustees for a term of 1000 years, to raise £10,000 for the child or children of the marriage, other than an eldest son; with remainder to the first and other sons of the marriage in tail; and for default thereof, as to the estates at Thornton, &c., to Sir Watts Horton in fee; and as to the estates at Chadderton, &c., to Sir Thomas Horton for life, and to his issue in tail.

There was one daughter only of the marriage.

In 1798 Sir Watts Horton mortgaged the Thornton, &c., estates for a term of 1000 years, for securing £1500. The title-deeds were not handed over to the mortgagee, but were retained by Sir Watts Horton.

In 1810 the mortgage was transferred to a gentleman of the name of Lord, when a further advance of £2500 was made. On this occasion, the title-deeds were not handed over to the Lords, but were retained as before. This mortgage became afterwards vested in the Plaintiff.

Sir Watts Horton, by his will, devised his real estates to his wife, with remainder to his only child Henrietta S. A. Horton, and he died in 1811.

[19] After his death, an agreement was entered into between Sir Thomas Horton and the widow and daughter of Sir Watts Horton, whereby the charges on the several estates were apportioned; and it was agreed that £4952, part of the sum of £10,000, should be raised out of that part of the estate limited, by the settlement, in default of male issue of Sir Watts Horton, to Sir Thomas Horton, "and that the remainder of the estate limited for raising the said sum of £10,000 should be freed and exonerated from any liability as to raising or paying the residue thereof."

In 1813, a marriage having been agreed upon between the Defendant Mr. Rees and Miss Horton, a settlement was executed, whereby, after reciting the settlement of 1778, the will of Sir Watts Horton, the agreement with Sir Thomas Horton, and "that the personal estate of Sir Watts Horton was not sufficient to pay his bond and mortgage debts, and the other debts owing from him at his decease, and that there was a considerable sum remaining unsatisfied on that account; and also reciting, that it had been agreed by Lady Horton, for the purpose of enabling her daughter to make that settlement, to give up her life-estate in the property; "and that it had also been agreed, on the treaty of the said intended marriage, that so much of the said sum of £10,000, as remained a charge upon the said estates to which Miss Horton was entitled, should not be raised; but, in consideration of the same being waived by Miss Horton, she, in the event of her surviving her intended husband, should have a jointure of £800 a year;" the estates were conveyed to trustees, in trust, as to part, to sell and pay the debts of Sir W. Horton, and the residue of the money arising therefrom to the Defendant Mr. Rees; and as to the remainder of the estates, to pay £403 a year, the apportioned part [20] of her jointure, to Lady Horton; with remainder to Mr. Rees for life, and then to pay £800 a year jointure to Miss H., with remainder to the issue of the marriage in strict settlement.

Lady Horton died, and her daughter Mrs. Rees afterwards died, leaving issue of the marriage.

Interest was paid on the Plaintiff's mortgage down to 1820 by the agent of the Defendant Mr. Rees, but, as the latter alleged, without his knowledge. The gentleman who acted as the solicitor for Mr. Rees in preparing the settlement, was the family solicitor of the Hortons, and had also prepared the mortgages.

This bill was filed in 1833 against Mr. Rees, his children, and the trustees, to foreclose the mortgage. The defence set up by Mr. Rees was, that under his

marriage settlement, he was a purchaser for valuable consideration without notice of the Plaintiff's mortgage; and that, in consequence of the neglect of the mortgagee to take possession of the title-deeds, they ought to be postponed. He also insisted that the charge of £10,000 had priority over the Plaintiff's mortgage.

Mr. Pemberton, Mr. Hodgson, and Mr. Piggott, for the Plaintiff, cited *Toulmin v. Steers* (3 Mer. 210); and see *Smith v. Phillips* (1 Keen, 694) and *Parry v. Wright* (1 Sim. & St. 369, and 5 Russ. 142).

Mr. Kindersley and Mr. Roupell, for Mr. Rees, cited *Mouniford v. Scott* (Turn. & R. 274).

Mr. Girdlestone, for the children of Mr. Rees.

[21] Mr. Follett, for the Earl of Derby, a trustee.

Mr. Cooper and Mr. Clark, for the administrator of Sir Watts Horton.

THE MASTER OF THE ROLLS [Lord Langdale]. The first objection made to the mortgage to Holt in 1798 is this, that no title-deeds were handed over to the mortgagee, and that therefore, in this Court, the transaction must be regarded as so suspicious as to defeat the Plaintiff's claim. No authority has however been cited for the proposition, that the mere omission to hand over the title-deeds is, in all cases, to be considered as a proof of fraud, as against subsequent purchasers for valuable consideration; but here the estate was vested in trustees, and was subject to a term for securing the jointure of the wife, and the portions of the younger children. I am of opinion, that the omission is not of itself sufficient to invalidate the mortgage, and for this I believe there is ample authority (see *Evans v. Bicknell*, 6 Ves. 183, and the cases there referred to; and *Cootes on Mortgages*, 511); though I admit a mortgagee may omit to take the title-deeds, under such circumstances as to displace his priority, in favour of a subsequent mortgagee.

This mortgage was transferred to Messrs. Lords in 1810, and a further advance was then made; and again it is alleged, that on this occasion there was a great omission on their part in not obtaining the title-deeds, and that this must be considered as evidence of fraud. I am of opinion under the circumstances, and considering what were the previous uses and the duties [22] which the trustees had to perform, that, in this respect, there is nothing to impeach the validity of the mortgage.

In 1811 Sir Watts Horton died, indebted on mortgage bond and simple contract. By his will he devised his estates to his wife for life, with remainder to his daughter in fee. Nothing can be more clear than that they took under the will, subject to all the charges affecting the estate of the testator. In 1813 Mr. Rees proposed marrying Miss Horton, and the settlement then made, recited, that there were mortgage bond and simple contract debts of Sir Watts Horton unpaid. Mr. Rees was therefore clearly informed, that there were some mortgages and debts unpaid, though they were not particularized or stated in the schedule. I am of opinion that Mr. Rees cannot be heard to say, in this Court, that he had no notice of any mortgages affecting the estate. This therefore is not the case of a purchaser for valuable consideration without notice; besides which, the parties who took the estate subject to those charges, could not get rid of them by this mode of dealing. If notice to Mr. Rees were required, I think that notice must be imputed to him, because he had that before him, which made it his duty to enquire into these matters.

The marriage took effect; and it appears perfectly clear, that interest was paid, from time to time to the mortgagee, down to 1820. What further was it possible for the mortgagee to do for the confirmation of his claim? the mortgage was admitted by the agent of the persons interested in the estate, and the interest was paid. The mortgagee was satisfied, and there was no neglect on his part. It is said that these acts of the agents have been disavowed by Mr. Rees. I feel reluctant [23] to refer in detail to the evidence, which establishes beyond controversy, that, although Rees might not have been acquainted with what had been done by the agent at the very time, yet, that when he did afterwards obtain knowledge, he found no fault with what had been done. His letters shew no dispute or denial of the mortgage, but that for his own convenience he was desirous of making a provision for it in a particular way.

Another point raised was, that priority ought to be given to the charge of £10,000; I am of opinion, that, under the circumstances, there is not the least

foundation for that claim; and finding nothing which can call into serious question the claims of the Plaintiff, I have no hesitation in making a decree according to the prayer of the bill. There must be an account of what is due to the Plaintiff, in the usual form, and he must have the costs of the suit, unless there have been some improper proceedings in the prosecution of the suit, which ought to except it from the ordinary rule. If there have been any such lavish and improper expense in the proofs, as is alleged, counsel may address themselves to that point. On a question of costs they may read the answer, which they cannot do as to the merits.

Mr. Kindersley then argued the point as to the costs of the evidence taken in the cause. He contended that it had been very improperly taken, and that the Plaintiff ought to pay the costs occasioned by the useless mass of depositions. He observed, that the evidence amounted to 120 brief sheets, which had been caused by the Plaintiffs having examined numerous witnesses as to a single fact: thus, he said, twelve witnesses proved that Mr. Lee was an attorney and solicitor; seven witnesses proved [24] that Dame Henrietta Horton was the person named in the pleadings; six witnesses proved the loss of the assignment of the mortgage; he mentioned other instances of useless multiplicity of proofs, and argued that the expense of this evidence ought to fall on the Plaintiff. He stated also, that London witnesses had been taken into the country to be examined under the commission, instead of being examined in the usual way by the examiner in London.

THE MASTER OF THE ROLLS (without hearing a reply) on this point, said, if it had been made out that the Plaintiff had occasioned all this useless expense for the purpose of prejudicing the Defendant, I should then go out of the usual course, and make him bear the costs. Here the depositions were taken by Commissioners appointed by both parties to take the depositions, and many witnesses appear to have been examined to the same point. I am not prepared to say that it is the fault of the Plaintiff. If the evidence had been taken in open Court, the Judge would not have permitted such a course; but, as it is, I am by no means satisfied that the fault lies with the Plaintiff.

As to the second point, a difficulty arose in consequence of a deed being lost, and the Plaintiff being put to the proof of the fact, and of the contents, the expense could not be avoided.

If witnesses have improperly been taken down to the country to be examined, I think the Master in the taxation of costs will take notice of any improper charges in that respect; if he does not, it will be open to the Defendant to make an application to the Court. This is not the first occasion in which a similar point [25] has been brought before me. (*Booth v. Booth*, 1 Beavan, 130.) If that part which was improper and vexatious were clearly distinguished from the rest, I would make some provision for the costs of it, in the same way, as where a bill contains unnecessary charges, or where the bill or answer contains allegations which fail in proof, and great expense has been occasioned, the Court, in such cases, makes a special provision for the costs of such portion. I am not now in a situation to determine this point; it must therefore be left to the Master: he will see what proper costs ought to be allowed.

Mr. Girdlestone, for the infant Defendants, asked that a sale of the estate might be directed for payment of what was due to the Plaintiff.

THE MASTER OF THE ROLLS. I am not aware of any case in which an order for sale has been made adversely.

[26] WHITMARSH v. ROBERTSON. Dec. 18, 1840.

On an application for payment of money into Court, it was objected that persons having an interest were not before the Court. The order was made, on the undertaking of the Plaintiff to make them parties.

In 1837 the Defendant Milcham intermarried with Mrs. Milcham, then a widow. At the time of the marriage, a sum of £1757 stood in the names of trustees in trust for Mrs. Milcham for life, with remainder to the children of her former marriage (of which there were seven), and by the settlement of the fund, it was declared, that it should be lawful for the trustees, but with the consent of Mrs. Milcham during her

life, to raise any part of the portions of the children, notwithstanding the same should not then have become vested or payable, and apply the same for the preferment, advancement, or benefit of such children, as the trustees in their discretion should think fit.

No settlement was made on the second marriage.

In April 1837 Mr. and Mrs. Milcham, for valuable consideration, assigned the life interest of Mrs. Milcham in the fund, to the Plaintiff, and notice of the assignment was given to the trustees.

The Plaintiff, not being able to obtain payment of the dividends as they became due, filed this bill in August 1840 against the trustees and Mr. and Mrs. Milcham, for compelling payment.

By the answer it was stated that Mrs. Milcham requested the trustees by writing, dated November 1840, to raise a moiety of the expectant shares of three of the children for their benefit; and the trustees, by their answer, stated they were desirous of doing so forthwith.

[27] A motion was now made for payment of the funds and the dividends into Court.

Mr. Pemberton, in support of the motion.

Mr. Stuart, *contra*, for Mr. and Mrs. Milcham, contended that the order could not be made in the absence of the children, and that the proviso empowering the trustees to advance the children, being intended for their benefit, could not be defeated by the wife's assignment. (But see *Noel v. Lord Henley*, M'Cl. & Y. 302.)

Mr. Koe, for the trustees.

THE MASTER OF THE ROLLS [Lord Langdale]. One of the objections made to this motion by the lady who has executed the assignment is this. She says, though I have executed the deed and joined in conveying my life-estate to the Plaintiff, yet, as the trustees, with my consent have the power to advance my children, I can defeat my assignment and the rights of my husband, and take away from the Plaintiff that which he had contracted to purchase: and it is broadly stated that she has a right, however fraudulent, to do so. I should be very unwilling to do anything which could in any way affect the rights of the infant children; if they were here, I should have no hesitation in ordering the payment into Court; but they not being here, I think I ought not to make the order at present.

Mr. Pemberton said he would undertake to make them parties.

[28] THE MASTER OF THE ROLLS. If you undertake to make them parties, I shall not have any hesitation in making the order.

NOTE.—The children were made parties, and the cause was heard by Sir J. L. Knight Bruce, on the 15th of July 1842.

[28] HADDELSSEA v. NEVILE. Jan. 21, 1841.

All the Defendants having answered, the Plaintiff obtained an order to amend, and added new Defendants. The answers of the original Defendants became sufficient. Held, that any application for a further order to amend must be made to the Court, and not to the Master.

This was a motion on the part of the Plaintiff, for leave to amend his bill under the following circumstances:—

The bill was filed on the 24th of December 1839, against two Defendants, Nevile and Cartwright, who respectively filed their answers on the 10th and 13th of March following. The last of those answers became sufficient on the 8th of May (4th General Order, 3d of April 1828) (Ordines Can. 6).

On the 10th of June the Plaintiff obtained an order to amend the bill; which he accordingly did, by adding considerably to the statements, and also by making additional Defendants.

The two original Defendants filed their answers on the 31st of October 1840, but the other Defendants had not yet answered.

[29] The Plaintiff having since the last amendment found a letter of the Defendant's, now applied for an order to amend his bill.

Mr. Pemberton and Mr. Wright, in support of the motion. The Plaintiff is right in coming to the Court for liberty to amend. The 13th Order, 3d of April 1828 (Ordines Can. 9), is positive that "no order to amend shall be made after answer and before replication, either without notice or upon affidavit in manner hereinbefore mentioned, unless such order be obtained within six weeks after the answer, if there be only one Defendant, or after the last of the answers, if there be two or more Defendants, is to be deemed sufficient." This refers to the time when the answers of the original Defendants became sufficient, which was on the 8th of May; *Attorney-General v. Nethercoat* (2 Myl. & Cr. 604). After that time, the Master had no jurisdiction to entertain an application for leave to amend under the 3 & 4 Will. 4, c. 94, s. 13; *Lloyd v. Wait* (4 Myl. & Cr. 257).

Mr. James Russell, amongst other objections, contended that the application ought to have been made to the Master first, because the new Defendants had not yet answered, and because when notice of this motion had been given, the answers of the original Defendants to the amended bill could not be deemed sufficient. He also objected that the affidavit in support of the motion was insufficient.

Mr. Pemberton, in reply, contended that the six weeks from the last answer being sufficient, meant six [30] weeks from the last answer to the original bill, so that after the 8th of May the Master had no longer any jurisdiction, otherwise the six weeks might be made to run on at every successive amendment.

THE MASTER OF THE ROLLS [Lord Langdale] thought that the Plaintiff was right in coming to the Court in this case, but that the affidavits were defective. He however said he would make the order on the proper affidavits being produced, but the Plaintiff must pay the costs.

See *Matchitt v. Palmer*, 10 Sim. 241. And as to the cases in which application ought to be made to the Court in the first instance, and not to the Master, see *Strickland v. Strickland*, *post*, p. 146.

[30] WIGGINS v. LORD. Jan. 22, 23, 1841.

[S. C. on demurrer, 2 Jur. 786. See *Edgell v. Day*, 1865, L. R. 1 C. P. 85.]

On a contract for purchase, a part of the purchase-money was paid as a "deposit" to the vendor's solicitor, who paid it away at the desire of the vendor, without the concurrence of the purchaser. This created a difficulty in completing the purchase, as a mortgagee of the estate would not join in the conveyance without payment to him of the deposit. In a suit by the purchaser for specific performance, the solicitors were declared liable to make good the money.

In August 1831 Richard Lord agreed to sell an estate to the Plaintiff, and by the contract it was agreed "that a deposit of £350 should be paid in part of the purchase-money into the hands of Messrs. Harris & Wise," who were the solicitors of the vendor.

The abstract being delivered, it appeared that the estate was subject to mortgages exceeding its value. The mortgagees, however, consented to concur in the sale, on the whole of the purchase-money being paid to the first incumbrance. Messrs. Harris & Wise, [31] without the concurrence of the purchaser, paid over the deposit of £350, according to the order of the vendor, to two of the mortgagees in discharge of interest due to them.

The vendor died. The title was accepted, but a difficulty then arose in completing the purchase, in consequence of the mortgagees refusing to concur, unless the whole of the purchase-money were paid. This was prevented by the circumstance of the deposit having been applied in the manner above stated. It was also alleged by the Defendant that the first mortgagee insisted on a deed being handed over to him which the Defendant Lord (the heir, executor, and devisee of the vendor) stated he was unable to procure.

The bill was filed against Lord alone; but an objection having been taken for want of parties, Messrs. Harris & Wise were made Defendants: the bill prayed a specific performance and payment of the £350.

Mr. Pemberton and Mr. J. Prescott White, for the Plaintiff, asked an inquiry whether the Defendant Lord could procure the concurrence of the mortgagees in the conveyance, and that Lord and Messrs. Harris & Wise might be declared liable to repay the £350.

Mr. Girdlestone and O. Anderdon, for the Defendant Lord.

Mr. Temple and Mr. James Parker, for Messrs. Harris & Wise, contended that the claim as against them was purely legal, and ought to be the subject of an action at law and not of a suit in equity (see *Denton v. Stewart*, 1 Cox, 258; *Greenaway v. Adams*, 12 Ves. 395; *Todd v. Gee*, 17 Ves. 273; *Nelson v. Bridges*, 2 Beavan, 239); that even the return [32] of a deposit was not the subject of equitable jurisdiction when the vendee was Plaintiff; that it did not appear that the Plaintiff had any interest in the £350; for if the contract were to be completed, it would be part of the purchase-money and would belong to the vendor.

Mr. Pemberton, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. The Defendants Messrs. Harris & Wise had clearly a duty to perform, which was, to keep the money in their hands as a deposit for the person ultimately entitled. Instead of doing that, they paid it away, according to the direction of the vendor, without regarding their duty to the Plaintiff. It is argued they are not in any way liable for what they have done, because at present it is unknown whether the contract can be completed. But is the purchase-money to remain in the meanwhile in its present situation? The case is put thus: if the contract is to be performed, the deposit will belong to the vendor, and if not performed, then that they must either pay voluntarily, or an action at law must be brought against them for its recovery. I think they and the estate of the vendee are liable to pay this sum, and it must be brought into Court. There must be an inquiry whether the Defendant Lord can procure a proper conveyance, and on what terms, with liberty for the Master to state special circumstances; and there must be a declaration that Messrs. Harris & Wise, and the estate of Lord the vendor, are liable to make good the £350.

[33] FROST v. HAMILTON. Jan. 28, 1841.

Bill by assignee of a trust fund to obtain payment. The trustees having stated they were ignorant as to the execution of the assignment, the Plaintiff moved, under the 5th General Order, 9th May 1839, for a preliminary inquiry as to that fact. Held, that the case was not within the order.

In 1796 General Christie transferred a sum of money in the funds to trustees, in trust as to a moiety for his daughter Mrs. Tunstall, with remainder to her children. Her children, as was alleged by the bill, sold and assigned their reversionary interests to the Plaintiff.

Mrs. Tunstall and all the trustees were dead, and this bill was filed against the executor of the surviving trustee, who had declined to make a transfer of the fund. His answer stated that he knew nothing about the matter, having left it to his solicitor.

The Plaintiff now moved, under the 5th General Order of the 9th of May 1839 (Ordines. Can. 136), for a reference to the Master, to inquire whether any and which of the children of James Tunstall and Sarah his wife executed the indenture of assignment in the pleadings mentioned to bear date the 28th of May 1832, and when they executed the same.

Mr. Pemberton and Mr. R. Palmer, for the Plaintiff.

Mr. Kindersley and Mr. Keene, *contrâ*.

THE MASTER OF THE ROLLS [Lord Langdale] said that he did not consider that this was such a preliminary inquiry as was contemplated by the General Orders, but was a matter proper for proof in the cause.

[34] DAY v. CROFT. Feb. 9, 1841.

Principles on which it was considered necessary, previous to the General Order of 3d April 1841, to serve all parties interested with an application for a stop order.

Mr. Evans made an application similar to that in *Trezevant v. Fraser* (3 Beavan, p. 283): he cited a case of *Martin v. Drinkwater*, before the Lord Chancellor, on the 24th of December 1840.

THE MASTER OF THE ROLLS said he had communicated with the Lord Chancellor on the subject; and found that the order in *Martin v. Drinkwater* had been obtained without a proper explanation of the facts. He observed that it could not be doubted, where a fund was standing in the names of three persons jointly, and an application was made by one of such persons, for payment of part of the fund, that no order could be made in the absence of the other persons interested. On the same principle, if one of several parties interested came for a stop order on a fund, upon notice to all other parties interested in it, there would be no objection. But in the absence of any provision as to costs it was unjust that a person should obtain an order affecting another party's fund, in his absence; for the latter might afterwards obtain an order for payment of his share; and, on going to the Accountant-General's office, learn, for the first time, that a stop order had been placed on the fund by a stranger. Payment would be refused, and the party would be thus unjustly exposed to delay, inconvenience, and expense. If means could be found of charging the party obtaining a stop order affecting funds in which others were interested with the costs thereby occasioned, it might become proper to grant stop orders, without requiring notice to be given to all parties interested in the fund; but till then no such order ought to be made.

Order refused.

See General Order of April 3, 1841. Ordines. Can. 161.

[35] EVANS v. JOHN. Feb. 13, 1841.

A father, on the marriage of his daughter, agreed to pay, by way of portion, a sum of money to trustees to be held in trust for the husband, daughter, and children of the marriage in succession. The trustees named in the settlement having refused to act, the father paid the money to the husband. Held, that the payment was wrongful; and the money having been lost, the father was held liable, at the suit of a child of the marriage, to pay it a second time.

By the settlement made on the marriage of David Evans with Elizabeth, the daughter of David Griffiths, a settlement, in 1828, dated the 11th of February 1828, was made, whereby, after reciting that it had been agreed that a sum of £300 and other property which David Griffiths had agreed to give as a marriage portion, should be vested in John John and Peter Davies, it was witnessed that Griffiths assigned to John and Davies the sum of £300, in trust for the husband and wife for their lives, with remainder to the children of the marriage.

The deed was never executed by the trustees.

The Plaintiff was the only child of the marriage, and her surviving parent having died in 1837, she filed this bill in January 1838, against John, Davies, and Griffiths, seeking to make them responsible for the £300, which had never been vested in the names of the trustees. Davies had never acted in or accepted the trusts; and John stated that he had never acted or executed the settlement, but that the deed had been delivered to him for safe custody about a week after the marriage, until a proper person should be agreed upon to keep the same; and that it remained in his possession six months, when, no person having been appointed to keep the deed, he delivered it to the wife.

Griffiths, it appeared, paid to D. Evans, the husband, the sum of £260 shortly previous to the marriage; and he paid the remaining £40 on the evening of the marriage [36] to the husband and wife; and he paid the same under the impression

that they were competent to receive the same, and give an effectual discharge for the same. The husband died insolvent, and the money was lost. By his answer Griffiths also insisted on the Statute of Limitations.

Mr. Kindersley and Mr. Rolt, for the Plaintiff, insisted on the liability of Griffiths to make good the money lost; and also on the liability of John, either as an actual or constructive trustee.

Mr. George Turner and Mr. Bevir, for the Defendant John, contended that he had never accepted the trusts, and that the possession of the deed and knowledge of its contents, were not sufficient to charge him.

Mr. Pittman, for the Defendant Griffiths. *Stacey v. Elph* (1 Myl. & K. 195) and *Wilkinson v. Parry* (4 Russ. 272) were cited.

THE MASTER OF THE ROLLS [Lord Langdale]. I take the facts of this case to be these. The trustees of this settlement refused to accept the trusts. They, however, were the only persons entrusted. Griffiths thought fit to substitute the husband of his daughter for the trustees, and he paid him the money. The money was therefore paid to the wrong person: and it appears it has been lost by his insolvency. There can be no doubt that Griffiths is liable to pay the money again.

As to John, I think there is not enough to charge him as with a breach of trust. Looking at the deed [37] which was in his possession, he could hardly fail to see that he was named a trustee; but, on the other hand, he says he never acted; and it is expressly shewn that he received the deed for safe custody only, until someone else could be found to undertake the trust. I think there is not enough to charge him.

[37] FRANK v. MAINWARING. Nov. 12, 1839; Feb. 19, 1841.

Form of issue for trying the validity of deeds, executed by a party found by inquisition to have been a lunatic from a time anterior to the execution of the deeds.

A bill was filed on behalf of an infant, with the sanction of the Master, to set aside deeds, executed by a lunatic at a time subsequent to that, at which he had been found lunatic by inquisition. An issue having been directed, the jury found in favour of the deeds. The bill was dismissed with costs of suit and of the issue.

This case is reported in 2 Beavan, 115.

It was a suit commenced by an infant by his next friend, under the sanction of a report of the Master in favour of the proceedings.

Its object was to set aside certain deeds executed by the Plaintiff's grandfather, the Reverend Edward Frank, in April 1817, at which time it was alleged he was of unsound mind: he having, in August 1825, been found to be a lunatic, and to have been so from the 25th of October 1816.

He continued a lunatic until his death in 1834.

The Court at the hearing, directed an issue to ascertain whether Edward Frank was of unsound mind when he executed the deeds, &c. The minutes of the decree became the subject of discussion. They were as follows:—

[38] "It is ordered, that the parties do proceed to the trial at law, at the sittings of the Court of Common Pleas, in the county of Middlesex, after Hilary term, then next, upon the following issue, that is to say: whether E. Frank, deceased, in the pleadings named, was of sound mind, so as to be sufficient for the management of himself, his manors, &c., goods, and chattels at the several and respective times following, that is to say: when he executed the indenture of feoffment, bearing date the 15th of April 1817, and the other indenture bearing date the said 15th of April 1817; and when the recovery, had and suffered in Easter term 1817, of the freehold parts of the estates in the pleadings mentioned, was had and suffered; and when he executed the indenture of demise on the 8th of March, and made between, &c., in the records of court rolls of the manor of Tanshelf and Carleton in the county of York; and when he executed the authority or warrant of attorney, or warrant in writing in the said records or court rolls; and when the common recovery had and suffered on the 3d of September 1821, one of the copyhold parts of the said estates held of the manor, &c., was had and suffered, or at either and

which of the said times." The Defendant Edward Bacon Frank, who claimed under the deeds, was directed to be Plaintiff in the issue.

Mr. Pemberton and Mr. Lovat, supported the minutes.

Mr. Kindersley, Mr. Koe, Mr. Tinney, Mr. Wright, Mr. Walker, and Mr. Hallett, *contrà*, objected to the minutes, contending that they were too extensive.

The following authorities were referred to: *In re Humpbley* (Shelford on Lunacy, 262), *Jones v. Roberts* (Reg. Lib. A. 1830, fo. 397), an unreported [30] case of *In re Jervis*, before Lord Eldon, and *In re Holmes* (4 Russ. 182).

THE MASTER OF THE ROLLS [Lord Langdale]. An inquiry as to the sanity of an individual at a time, overreached by the finding of an inquisition, is one of great difficulty. Here the Plaintiff undertakes to shew that he was "not of sound mind," &c. I think the minutes right.

On the 5th of December 1840 the issue was tried, and the jury found for the Plaintiff in the issue, thereby establishing the sanity of Edward Frank at the time he executed the deeds.

Feb. 19, 1841. The cause now came on for further directions, when

Mr. Lovat argued that, under the circumstances, the Plaintiff in equity ought not to be made to pay the costs of the investigation, and that part of the costs ought to be paid by the Defendants.

THE MASTER OF THE ROLLS, without hearing the other side, said, if the Plaintiff in equity had succeeded in establishing the allegations of the bill, he would have recovered the estate. Having failed, I see no reason for departing from the ordinary practice; the bill must therefore be dismissed, and the Plaintiff must pay the costs thereof, and of the issue.

[40] TURNER v. WIGHT. *Feb. 25, 1841.*

Injunction, in a suit for specific performance, to restrain a vendor from letting or selling the estate refused.

This was a bill filed by the purchaser of an estate in Herefordshire, against the vendor for a specific performance of the contract for sale. The bill alleged that the Defendant had, since the contract, let the estate, and he threatened to sell it to another purchaser.

Mr. Pemberton and Mr. Stevenson now moved for an injunction to restrain the Defendant from letting the estate, and from selling and conveying the same except to the Plaintiff.

Mr. G. Turner, *contrà*, contended that there was no valid contract, and that the injunction asked would be nugatory.

Mr. Pemberton, in reply.

THE MASTER OF THE ROLLS [Lord Langdale] said that he would not now decide on the validity of the contract; and, as to the injunction to restrain the Defendant from selling or letting, that a purchaser *pendente lite*, would take subject to the rights of the Plaintiff.

His Lordship refused the motion; but ordered the costs to be costs in the cause.

[41] NELSON v. PONSFORD. *Feb. 27, 1841.*

There is no rule, that a Defendant must answer affirmatively or negatively his own recent facts. All that the Court can do, is to compel a Defendant to afford such a discovery as he swears he is able to give.

By an agreement, dated the 3d of January 1835, the Defendant undertook to grant a lease of a house and premises to a Mr. Foskett, who afterwards transferred the benefit of this agreement to the Plaintiff. The Defendant refusing to complete his contract, this bill was filed in November 1839 for a specific performance.

The bill set out the agreement *verbatim*, and, amongst other things, interrogated the Defendant "whether the term was not to commence from the time in the bill

mentioned, or from some other, and what time?" "And whether the memorandum of agreement was or not in the words, or to the purport and effect thereinbefore in that behalf mentioned and set forth, so far as the same was thereinbefore mentioned and set forth; or in some other words and figures, or to some and what other purport and effect."

The answer stated, that by arrangement between the Defendant and Mr. Foskett, the agreement and counterpart had been burned in January 1839. The Defendant admitted he had agreed to let the house for twenty-one years; but he stated that the agreement being destroyed, he was unable to set forth as to his knowledge, &c., whether or not such term, &c. (following the first of the above interrogatories); or whether the memorandum, &c. (following the second of the above interrogatories).

The Plaintiff took exceptions to this answer for insufficiency, which were allowed by the Master. The [42] Defendant took exceptions to the Master's report, which now came on for argument.

Mr. Bethell and Mr. O. Anderdon, for the Defendant. The Defendant's answer is sufficient on both points. The Defendant has given all the information in his power; and the effect of holding the answer insufficient will be to render the Defendant liable to imprisonment for life, unless he admits the terms of the agreement as stated in the bill, which he swears he does not know. In *Farquharson v. Balfour* (Turn & Russ. 204), "The Lord Chancellor repeatedly observed, that it was not the truth or consistency of the examination that he was bound to insist upon. That the examination might be quite sufficient, though it might not be true, and that, in deciding upon the question of insufficiency, the principle of the Court was, that the Plaintiff must be satisfied with what the conscience of the Defendant would allow him to swear, for that the Court could give him no more; that if the Plaintiff wished to try the truth of the examination, he must treat it in a different manner, for that although there might be a probability, that that which was sworn was not true, yet that it must be taken to be true; and it was not within the jurisdiction of the Court to try whether it was true or not."

Mr. Bates (in the absence of Mr. Pemberton), for the Plaintiff, contended, that the finding of the Master was right. That the rule of the Court was, that a man's own facts must be answered in the affirmative or negative without traverse; *Williams v. Lighton*, and *Onsald v. Pennant*, Tothill 9; and an answer to a matter charged as the Defendant's own fact must be direct, without saying it is to his remembrance, or as he be-[43]-lieveth, if it be laid as done within seven years before. Beames' Orders, 28. Here the agreement was in the Defendant's possession from 1835 to 1839, and he could not, therefore, be permitted to say that he knew nothing about it. That as the Defendant had received the rent, he must therefore know whether it was of the amount stated in the agreement set out in the bill.

THE MASTER OF THE ROLLS [Lord Langdale]. It is probable that the Defendant knows more than is stated in the answer. He has not, however, been interrogated, step by step, as to the rent, and the other particulars of the agreement, but is asked whether the agreement was not to a particular effect, or to some other and what effect? The agreement having been destroyed, the Defendant says he is unable to set forth whether it was to the effect stated, or to what other effect. It is possible he may be able to answer some of the particulars in detail if put to him by amendment; but considering the way in which the bill and the interrogatories are framed, I think the answer is sufficient.

With regard to the rule stated, that a man must either admit or deny his own recent facts, it is possible that a Defendant, with the most delicate conscience, may be unable to do so; and I know of no means, by which a discovery can be obtained from a Defendant, as to matters on which he swears he is ignorant. All that the Court can do, is to get from him such an answer as he swears he is able to give; it can do no more than compel him to state the impression on his mind. If his statement can be proved to be untrue, he will be liable to the penalties of perjury.

[44] GREENWOOD v. EVANS. *March 2, April 2, 1841.*

Leaseholds for lives being devised in trust for parties in succession, with a direction to renew out of the rents or by mortgage. The Court sanctioned a reference to the Master to inquire whether it would be for the benefit of all parties that the future fines for renewal should be provided by an insurance on the lives of the *cestui que vie*.

Difficulties in arranging the proportions of the fines which the parties in succession ought to bear in such cases.

The question in this case was, as to the mode in which the fines for the renewal of church leaseholds ought to be provided for and paid, as between the parties entitled thereto in succession, under the will of the testator.

It appeared that the testator, John Bowle, was entitled to a lease of the rectory and tithes of Idminster, under the Dean and Chapter of Salisbury, which was held by him for the lives of himself and two other persons, and for the life of the survivor.

By his will, dated in 1836, he confirmed the settlement made on the marriage of his daughter Anna Maria Evans; and, inasmuch as the Winterborne estate thereby settled was subject to the life-estates of John Templeman and Nathaniel Templeman, he gave to the trustees of the settlement "two-thirds of the clear net proceeds" of the great tithes of Idminster, to be payable during the lives of John Templeman and Nathaniel Templeman, and to be applied in the same manner as the rents of the Winterborne estate would be applicable if J. Templeman and N. Templeman were dead.

And he gave certain specific property, and the impropriate rectory and tithes of Idminster, and all the residue of his real estate, subject to the trusts aforesaid, unto his trustees, "Upon trust to cause themselves to be admitted to the said copyhold premises, and by and out of the rents, issues, and profits, or by mortgage thereof, or any or any part thereof, to levy and raise the [45] fines and fees to become payable thereupon; and at the usual times and periods, or at such other times or periods as the trustees or trustee for the time being should deem expedient, to use their or his best endeavours to procure a renewal of the lease or leases of such of the same premises as were held under any renewable lease or leases; and out of the rents, issues, and profits of the same premises, in the meantime, or by mortgage thereof, if found expedient, levy and raise a sufficient sum or sums of money for paying the fines and other expenses of the said renewal or renewals; and for the purposes aforesaid, to surrender the subsisting lease or leases, for the time being, of the same leasehold premises, and stand possessed of the said freehold and copyhold estates thereinbefore mentioned, to be thereby lastly devised, and also of the said leasehold premises, as well in the meantime until, as subsequently to, any renewal under the trusts aforesaid, upon trust for his daughter Isabella Bowle for life," with power to her to appoint a life-estate to any husband with whom she might intermarry; with remainder to her children, with remainders over.

After the death of the testator the Plaintiffs, the trustees and executors, applied, out of the personal estate, a sum of £1153 in the renewal of the lease of the great tithes of Idminster; and in order to provide a fund for the payment of the fine upon the future renewal of the leaseholds, they effected a policy of assurance on the lives of the *cestui que vie* named in the lease, for the sum of £1150.

In taking the accounts of the testator's estate, the Master had disallowed these payments to the Plaintiffs.

The cause now came on for further directions.

[46] Mr. Pemberton and Mr. Bird, for the Plaintiff.

Mr. Lee, for the trustees of Mr. Evan's settlement.

Mr. Anderdon, for Isabella Bowle.

Mr. James Russell, for the children of Mrs. Evans.

The point argued was, as to the proportions of the fines of renewal which the several parties entitled in succession to the leasehold estate should bear; and in what manner the fines for the future renewals should be provided for. It was contended, that the most equitable and convenient mode for all parties would be by keeping up

an insurance on the lives of the *cestui que vie* out of the yearly rents, and thus, upon its becoming necessary to renew, a fund would be provided for that purpose.

Playfers v. Abbott (2 Myl. & K. 97), *The Earl of Shaftesbury v. The Duke of Marlborough* (Id. 111), and *Nightingale v. Lawson* (1 B. C. C. 441), were cited.

THE MASTER OF THE ROLLS [Lord Langdale] during the argument, observed on the very great difficulty which arose in cases of this description, in arranging the liabilities of the parties entitled in succession to renewable leaseholds. He remarked, that if a tenant for life was bound only to keep down the interest on a mortgage effected for the purpose of renewing, the party in remainder might become entitled to the lease when nearly expiring, and yet have to bear the whole of the principal money raised by mortgage for its formal renewal; that the remainder-man would thus sustain a considerable burthen, [47] without receiving a corresponding benefit. That, besides this, if the tenant for life paid the interest merely, and no fund was provided for ultimately paying off the mortgage, the estate might be wholly destroyed by the accumulation of monies charged on the estate for the purposes of renewal.

On the other hand, that in making the parties bear the burthen in proportion to their enjoyment, great difficulty would arise, in some instances, in arriving at anything like an accurate calculation of the relative liabilities.

His Lordship, however, expressed himself favourable to the mode proposed, of providing a fund by means of an insurance on the lives of the *cestui que vie*, if that could be done consistently with the practice of the Court.

April 2. THE MASTER OF THE ROLLS again mentioned the case, and approved of a principle which was embodied in the following order:—

"Declare, that the sum of £1153, 6s., paid by the Plaintiffs for the fine, fees, and expenses of and attending the renewal by them of the testator's said lease of the tithes of Idminster, &c., is a charge upon the same leasehold premises, and that the interest due, and to accrue due thereon, ought to be paid out of the yearly proceeds of the said tithes, parsonage house, glebe lands, and premises, and ought to be borne by the respective tenants for life of the same premises, under the said testator John Bowle's will, in proportion to the yearly value of their respective shares of such proceeds, and let it be referred to the said Master to apportion the [48] same accordingly. And declare, that the persons interested in the clear net proceeds issuing out of and arising from the great tithes of Idminster, devised by the said testator John Bowle's will to the trustees of the marriage settlement of the testator's daughter, the Defendant Anna Maria Evans, during the lives of John Templeman, Nathaniel Templeman, and the life of the survivor of them, ought to bear a proportion of the aforesaid charge of £1153, 6s. with reference to the benefit derived by them from the aforesaid renewal by the Plaintiffs of the lease of the said tithes, &c. And let it be referred to the said Master to inquire and state to the Court, what is the amount of such benefit, and how the ultimate payment of such amount may be best secured or provided for, and whether the Defendant, Isabella Bowle, derives any benefit from the aforesaid renewal, and, if so, what is the amount of such benefit, and how such amount may be best secured or provided for. And let the said Master also inquire and state to the Court, whether it will be for the benefit of all parties interested, that the said £1153, 11s. advanced by the Plaintiffs out of the residuary personal estate of the testator John Bowle, upon the security of the deed of the 5th of January 1837, in the Master's report mentioned, should be continued on such security. And, by consent, let it be referred to the Master to inquire and state to the Court, whether the effecting the policy of insurance, in the Master's report mentioned to have been effected by the Plaintiffs, in order to procure a fund for a renewal of the lease of the said tithes, parsonage house, glebe lands, and premises granted to the Plaintiffs as aforesaid upon the dropping of any life therein named, was for the benefit of all parties interested, and whether it will be for their benefit that future renewals of the said lease, upon the dropping of any other life or lives, should be provided for in like [49] manner; and that the yearly premiums payable upon the policies effected, and to be effected, for that purpose, and the expenses of effecting the same, should be paid out of the rents and profits of the same leasehold premises; and what proportions, if any, of such premiums and expenses, ought to be borne by the respective tenants for life of the same premises, under the said testator John Bowle's will, or in what other manner it would be most for the

benefit of all parties interested, that the renewals of the said lease should be, from time to time, provided for."

[49] MOUSLEY v. CARR. March 4, 1841.

[S. C. 10 L. J. Ch. 260. See *Cooper v. Laroche*, 1869, 38 L. J. Ch. 592.]

- A trustee wilfully applying trust monies to his own use is chargeable with interest at 5 per cent. ; but where, under the trusts of a doubtful will, the tenant for life, who was also a trustee, neglected to make proper investments, she was held chargeable with interest at 4 per cent. only and the decree was made without costs.
- A testator gave his real and personal estate to trustees, in trust to permit his wife to receive "the annual produce, interest, rents, and profits thereof" for life; and after her death, in trust to stand seised and possessed of the said real and personal estate for A. and B. And he directed his trustees to carry on his partnership trade, in which he was engaged, or such part as they should think proper, for the benefit of his wife and those in remainder. Sir John Leach held that the widow was entitled to any increase in the value of the testator's capital, which took place between the death and the expiration of the partnership; but the decision was reversed by Lord Brougham.

The testator, Thomas Hardcastle, was engaged in partnership with two other persons as a coal merchant, and in working coal mines, of which they had obtained a lease. He was entitled to one-third thereof, and of the plant, machinery, &c., and of the lease of the mines, which expired in 1806.

By his will, dated the 2d of July 1789, he devised and bequeathed his real and personal estate to his wife and Robert Berry, in trust to permit and suffer his said wife to have, receive, and take the use, annual produce, [50] interest, rents and profits thereof, and of every part thereof, for and during the term of her natural life, subject only to the payment of the legacy and annuity thereafter mentioned; and from and after the death of his said wife, in trust to stand seised and possessed of and in the said real and personal estates for the benefit of his nephew John Hardcastle, and his niece Elizabeth Haynes, their respective heirs, executors, and administrators, as tenants in common, and not as joint-tenants; and the testator directed his trustees to carry on his partnership concerns under the firm of Hustler, Hardcastle & Co., or dependent thereon, or so many and such parts thereof as they should think proper, or be obliged, for the benefit of his said wife during her life, and afterwards for the benefit of the persons to whom he had thereby given the residue of his estate. And he declared that his executors should not be, in anywise, liable for any business they might carry on respecting his effects or property, or wherein he was engaged or in anywise connected, or wherein they might be connected by means of his present engagements in business.

The testator died in the same year, and his will was afterwards proved by his widow and by Berry.

The widow principally acted. She received the assets and carried on the partnership business until the expiration of the lease in 1806, when the partnership was dissolved. Upon that event she received the amount of the one-third share of the partnership business. She made no investment on account of the testator's estate, and died in December 1826.

This bill was filed in May 1827 by the representatives of John Hardcastle against the executors of Mrs. [51] Hardcastle and others, simply praying an account of the estate of the testator, but raising the question of construction on the will of the testator, as to the widow's rights in respect of the trade which had been carried on under the trusts of the will.

The cause having come on for further directions in June 1834, Sir John Leach referred it to the Master to ascertain what was the value of the testator's capital engaged in the partnership trade in the pleadings mentioned at the time of the testator's death, or at the next settlement. And His Honor did declare that Mary Hardcastle was entitled to any increase in the value of such capital which might have

taken place between the time of the death of the testator and the expiration of the partnership. (See *Goodenough v. Tremamondo*, 2 Beavan, 514, and the cases in the note.) On the 20th of November 1834 Lord Brougham however held, on appeal, that she was not entitled to the increase, and decreed accordingly; and it was referred to the Master to take the accounts, who found a large balance due from her estate.

In 1836 and 1840 respectively the executors of the widow paid into Court two sums, amounting in the whole to £4319, being the total balance found due from her estate.

The cause now came on for further directions, and the questions were first, as to the mode in which the widow ought to be charged; and secondly, as to the costs of the suit.

Mr. Bethell and Mr. L. Wigram contended, that the widow had committed a breach of trust for her own [52] benefit, by retaining in her hands monies which she ought to have invested, and that she ought to be charged with the stock which would have been produced if the fund had been invested; or at least with the monies and 5 per cent. interest; and that her executors ought out of her assets to pay all the costs of the suit.

Mr. Pemberton and Mr. Lloyd, *contra*, argued that this suit had been rendered necessary by the doubtful construction of the testator's will. That the rights of the parties could not be determined except by a suit; and that as the widow had acted *bona fide*, and had even been held by Sir John Leach to be right in her notion of the true construction of the will, she ought not to be charged with the investments which might have been made; and that if charged with interest, it should be at the rate of 4 per cent. only, and not 5; they contended also that the costs of the suit, which was for the administration of the testator's estate, ought to be paid, as usual, out of the testator's assets.

THE MASTER OF THE ROLLS [Lord Langdale]. The prayer originally was for an account of the testator's estate; but afterwards, questions arose as to the relative rights of the widow, and the parties entitled in remainder, which depended on the construction of the testator's will. Sir John Leach thought the widow was entitled to any increase in the testator's capital; but Lord Brougham reversed that decree. It is not for me to make any observations on that order: it is my duty implicitly to act on it; but I must say this, that the expense of the suit has principally arisen in consequence of the difficulty in construing this will, on which two Judges have entertained different opinions.

[53] If a trustee having trust money in his hands, knowingly applies it to his own use or in his trade, he is charged with interest at the rate of 5 per cent. Here it is admitted that the money was applied by the widow to her own use; but did she know that it was trust money, which it was her duty to invest? She could not have known it, for it depended on the taking of the accounts, the mode of doing which could only be ascertained upon the determination of the true construction of this doubtful will; and this remained a matter of doubt till the decision was pronounced by the Court upon appeal. I should be afraid to say, that if in a case of doubtful construction of a will, an executor makes a mistake, and afterwards it turns out upon the decree, that he was in error, he should be treated as a trustee wilfully committing a breach of trust. I think that this lady's estate must be charged with interest after the rate of 4 per cent. and no more.

The question as to the costs of the suit depends in some degree on the same points. The answer admitted that the widow applied this money to her own use, and states that no balance was due from her; a balance has, however, been found due from her on taking the account. If she had had no personal interest, and had been a mere trustee or executor, I should have thought that she was not only not chargeable with the costs, but entitled to them. That she committed a mistake is now beyond all doubt, according to the decision on the appeal, but, under these circumstances, I think that the decree must be made without costs.

[54] DAVIES v. DAVIES. March 5, 1841.

By marriage articles, a husband covenanted, in consideration of his wife's portion, to settle an estate to his own use, and after his decease to the use of *his heirs on the body of his intended wife*, and for want of such issue *to his own right heirs for ever*. The articles did not express any further intention of providing for the children of the marriage, and made a provision for the intended wife *in lieu of dower*. No settlement was executed; and the husband mortgaged the estate, and at the same time delivered the articles to the mortgagee. Held, on his death, that under the articles, he was entitled to a life-estate only, and that the mortgagee took with notice, and could not therefore hold as against the issue of the marriage.

In 1772 a marriage was agreed upon between John Davies and Elinor Davies, and by articles of agreement made between James Jenkins (the grandfather of John Davies), of the first part; John Davies of the second part; and Mary Davies (the grandmother of Elinor Davies), of the third part, it was agreed, in consideration of £40 to be paid to John Davies, with a good and valuable chamber furniture by Mary Davies, immediately after the said intended marriage should take effect, as the portion of the said Elinor Davies, in consideration of which and of the natural love and affection which the said John Davies bore, and for other valuable considerations him thereunto moving, the said John Davies, covenanted with the said Mary Davies to convey and settle, by feoffment or otherwise, specified freehold estate belonging to him; to have and to hold the said demised lands and premises to the uses, intents, and purposes thereafter mentioned, declared, and expressed; that is to say, "to the only proper use and behoof of the aforesaid John Davies; and after the time of the decease of the said John Davies, and from and after his decease, to the use and behoof of the heirs of the said John Davies, begotten or to be lawfully begotten on the body of the said Elinor Davies, and for want of such issue to the right heirs and assigns of the said John Davies for ever." The articles of agreement also provided for the payment of an annuity to Elinor Davies, in case she should survive John Davies, in lieu of dower and right of dower.

[55] The marriage took effect, but no settlement was ever executed.

In 1817 John Davies mortgaged the premises by demise to Evan Davies, and for better security John Davies and his wife levied a fine of the premises. The articles were thereupon handed over to the mortgagee.

John Davies survived his wife, and died in 1833, leaving the Plaintiff, the eldest son of the marriage. By this bill, filed against the representatives of Evan Davies, the Plaintiff sought to have the estate conveyed to him as tenant in tail, discharged of the mortgage.

Mr. Rolt, in the absence of Mr. Pemberton, for the Plaintiff, contended that the articles being executory and in the nature of heads for a future agreement, the Court, in carrying it into execution, would limit an estate for life only to the parent, and an estate tail to the children as purchasers.

That the mortgagee took with notice of the articles, and was therefore affected by the trusts thereof, and could not retain the estate as against the claim of the Plaintiff.

Mr. George Turner and Mr. Piggott, *contra*. The Court in carrying into execution marriage articles, will mould the words of limitation, and give to the parent an estate for life, only in those cases where it appears to have been the intention of the parties to provide for their issue; but no such intention appears upon the present articles; there is no intention recited of benefiting the children of the marriage; the whole scope of the settlement is to secure a jointure to the [56] widow, in consideration of the £40 paid by her grandmother.

The jointure is given "in lieu of dower and right of dower," and she could have no right to dower in the property unless her husband took an estate of inheritance. It is clear, therefore, that the intention was that the husband should take such an estate as would give his wife a claim to dower thereout, unless otherwise provided for.

On the question of notice, they contended, that a purchaser was not bound to take notice of an equity arising out of the mere construction of words which are uncertain; *Cordwell v. Mackrill* (2 Eden, 344); and that here the mortgagee might well suppose

that the mortgagor was entitled to charge the estate. *Cusack v. Cusack* (6 Bro. P. C. 116) and *White v. Thornburgh* (2 Vern. 702) were cited.

Mr. Blunt and Mr. Evans, for other parties.

THE MASTER OF THE ROLLS [Lord Langdale]. With respect to the merits of this case there is really no reasonable doubt. The Plaintiff is the eldest surviving son of John Davies; and it appears that on the occasion of his father's marriage, articles were entered into on which the question in this case arises. That question is, whether there was an intention to benefit the children of the marriage. I should rather expect that a negative was to be proved by the party who denied it. It is said there is no such intention, because it is not recited: but there is a provision made for the "heirs of John Davies to be begotten on the body of Elinor Davies." I am, therefore, surprised at the inference drawn.

[57] It is then objected that the intention of benefiting the children is inconsistent with the estate of inheritance in the father. But the argument that an estate of inheritance in the husband must be inferred from the fact of the widow taking a provision in bar of dower, may just as easily be turned the other way; and it would be quite as plausible to say, that since the husband does not take such an estate under the settlement as to entitle his widow to dower, therefore another provision shall be made for her in lieu of it. On these articles, I do not think that there is any reasonable ground, for inducing the Court to act at variance with the general principle which is to make a provision if possible for the children of the marriage.

The Court in these cases adopts this principle, that there shall not be such an estate in the parent as wholly to deprive the children of the marriage of every benefit; for this purpose, where an estate of inheritance is, by marriage articles, given to the parent, the Court, in executing the settlement, will cut it down to a life-estate, in order to effect the intention of providing for the issue of the marriage.

When the mortgage was made, the articles themselves were delivered over to the mortgagee; and it is ingeniously argued that these limitations are so difficult to be construed, that the mortgagee might have supposed that the mortgagor was entitled to an estate of inheritance. But here is first an estate limited to John Davies:—this might have misled an ignorant person; but it goes on further; and says that after his decease the estate is to go to the heirs of John Davies on the body of his wife. Here at least there was a clear and distinct intention of benefiting the issue of the marriage, which could not have misled an unprofessional person.

[58] The possession of these articles gave to the mortgagee a sufficient notice of the Plaintiff's title, and the Plaintiff is therefore entitled to the relief he asks, with costs.

[58] TOWNSEND v. WESTACOTT. July 14, 1841.

[See S. C. with note, 2 Beav. 340; 48 E. R. 1212.]

Voluntary settlement, by a party considerably indebted and who became insolvent within three years after, set aside as fraudulent.

Trustee of a voluntary settlement was made a party to a bill to set it aside. The decree setting it aside was made without costs as against the trustee.

This case is reported in 2 Beavan, 340, and now came on upon the Master's report.

The Master reported that debts were due from the settlor at the time of executing the voluntary settlement to the amount of £3500.

Mr. Pemberton and Mr. Chandless asked for a declaration, that the deed was fraudulent and void; for an account of the receipts of Loosemore, the trustee, thereunder, and that he might pay the costs.

Mr. Elderton, *contra*, did not argue that the deed ought not to be set aside; but submitted that Loosemore ought not to pay the costs, for it was not alleged that he was cognizant of the insolvency of the settlor; besides which, he was a mere trustee, and as such a necessary party to the suit and ought rather to have his costs. He observed, that the bill stated, that previous to the institution of the suit, an application had been made to him, to concur in a sale of the estate, for the benefit of the creditors, and that he had refused; his answer however stated, that he consented to comply on

being indemnified. That this was a reasonable requirement, inasmuch as there was an infant and a married woman who claimed under the deed.

[59] THE MASTER OF THE ROLLS [Lord Langdale]. The deed must be declared void. As to Loosemore he claims under a fraudulent party, and has interfered with the right of the proper owners of the property. I will, therefore, neither give him nor make him pay costs.

[59] JACKSON v. COCKER. *March 11, 12, 1841.*

The purchaser of "script certificates" in a proposed railway company which had not obtained any Act of Parliament: Held, after the Act had passed, and in the absence of any special contract, not bound to take a transfer of the corresponding shares from his vendor, or to indemnify him from the amount of calls subsequently made.

In the year 1836 a railroad between Bolton and Preston was projected; and an Act of Parliament being necessary for the purpose of effecting it, the promoters of the undertaking entered into a subscriber's agreement, by which they severally agreed to contribute to the expenses of procuring the Act of Parliament, and to take a specified number of shares. They also signed the subscription contract, required by the Standing Orders of the House of Commons. (Halcombe, Supplement, 8, 78.)

Script certificates were thereupon issued, in the following form:—

"Bolton and Preston Railway certificate.

"£50 Share. No. 1232.

"The holder of this certificate, having signed the subscriber's agreement and executed the Parliamentary contract, is the proprietor of the above share in this undertaking.

"B. DOBSON. } Members of the Committee.
"B. HICKS. }

"Bolton, 19th July 1836."

[60] In August 1836, and before the passing of the Act of Parliament, the Plaintiff sold forty of the script certificates, some of which stood in his own name, to the Defendant for £100. No particular contract was entered into on the occasion, but the Defendant, on payment of the money, received and retained the certificates.

In 1837 the Bolton and Preston Railway Act passed (1 Vict. c. cxxi., *local and personal*) whereby the company was made a corporation: was empowered to raise money in shares, and issue certificates, which were to be *prima facie* evidence of the title to shares; and the shares were to be transferable by writing. The Act also contained the other usual clauses in Railway Acts.

The bill stated, that several calls had been made on the shares since their purchase, and insisted that the Defendant, having purchased and accepted the certificates, was bound to take transfers of the shares, and to pay the calls and indemnify the Plaintiff thereupon; but that he had refused so to do. That the Plaintiff had become exposed and liable to be sued at law and in equity for payment of the amount of the calls; and that he had been called upon, and required to pay the same, and had been threatened with proceedings for the non-payment of the same.

The bill prayed the specific performance of the agreement to purchase the forty shares, and that the Defendant might indemnify the Plaintiff against the calls on the shares, &c., and, if necessary, might be decreed to take a transfer thereof.

The Defendant stated that he bought the certificates on a speculation to sell them at an increased price, [61] but without any idea of having them transferred to him.

Evidence was entered into, to shew what, in the market, was understood to be the liabilities of purchasers of script certificates, in the absence of any special contract. The cause now came on for hearing.

Mr. Tinney and Mr. Walker, for the Plaintiff. The Defendant, having agreed to purchase these particular shares, is bound, in equity, to perform his contract, and

clothe himself with all the liabilities in respect of them. It would be most unreasonable if he were entitled to the benefit of any rise in the shares, leaving the Plaintiff subject to all the liabilities, if the speculation did not succeed. When a party purchases property, though nothing is expressed to that effect, the law will imply a contract to indemnify the vendor in respect of liabilities attached to that property. Thus where a leasehold was assigned, by deed-poll, subject to the covenants, the Court of K. B. held that the assignee, by an implied contract, was bound to indemnify the assignor from the consequences of breaches of covenants in the lease; *Burnett v. Lynch* (5 B. & C. 589). In the same way, where the purchaser of an equity of redemption enters into no personal obligation with the vendor, to save him harmless from the mortgage debt: "yet this Court, if he receives possession, and has the profits, would, independent of contract, raise upon his conscience an obligation to indemnify the vendor against the personal obligation to pay the money due upon the vendor's transaction of mortgage; for, being become the owner of the estate, he must be supposed to intend to indemnify the vendor against the mortgage;" *Waring v. Ward* (7 Ves. 337).

[62] This is properly a case for equitable interference: adequate relief cannot be obtained at law; *Doloret v. Rothschild* (1 Sim. & St. 590).

Mr. Kindersley and Mr. James Russell, *contra*. This is a case of the first impression. The Defendant has fully performed every contract entered into on his part, and if a contract, different from that which the Defendant agreed to enter into is to be implied, the remedy ought to have been by an action at law, and not by coming into equity, for relief on a legal title. The Defendant never contracted to become a shareholder; he became the mere purchaser of a paper called "a certificate," which conferred no rights, and imposed no obligations. It is proved that, by the custom of brokers and persons dealing with such certificates, a purchaser contracts no liability towards the vendor, unless there be a special contract.

The contract, if any, is not such as to be the foundation for relief. Here it was illegal, "inasmuch as it was bargaining about an Act of Parliament to be obtained in future," which Lord Tenterden thought void by the common law; *Josephs v. Pebrer* (3 B. & C. 639).

Mr. Tinney, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. This has very justly been termed a bill of the first impression; for I certainly know of no bill in the least degree like it. The case has been brought forward in great confusion, and very imperfectly; but the Defendant, by waiving the advantage of that confusion, and by agreeing to have this considered as a case founded [63] on the facts as now admitted, has relieved the case from many difficulties which might otherwise have arisen in that respect.

The bill is filed for the specific performance of an alleged agreement for the purchase of certain shares in a railway company. It seems that in the month of July 1836, certain persons proposed to apply for an Act authorizing the construction of a railway from Bolton to Preston. For that purpose they entered into subscriptions; and we may assume they contemplated raising a capital to defray the expenses of applying for promoting the progress of and completing the Act of Parliament, and for executing the necessary works if the Act should be obtained. Two things were important for them to do; one was to come to such an agreement amongst themselves as should provide for a due contribution towards the expenses in all events, whether the project should succeed or not. Another was, that they should comply with the regulations which have been adopted by Parliament in cases of applications for bills of this nature, and which require that a contract which is called a "subscription contract," shall be signed in a particular manner. The common effect of Acts of Parliament of this sort when passed, is, as we know, to incorporate the persons who have subscribed, or shall subscribe, towards the undertaking, and their several and respective successors, executors, &c., to enable them to raise money amongst themselves to a limited amount; and to divide that amount into shares, which are to be transferable; but the transferable shares in the capital are the result of the Act and of the powers and privileges given by the Act. Subscription contracts must be made to a certain amount and in a certain manner, before the bill can be introduced into the house. Now in this, as in all other cases of the kind, the per-[64]-sons who subscribe for the purpose of obtaining the Act and the fruits of the Act, very naturally

proportion their subscriptions to the amount of the shares which they desire either to possess or to have the means of dealing with; and their hopes or expectations of obtaining shares or the right to deal with shares, have been commonly, but very erroneously, called "shares." But the Act alone when passed constitutes shares, and makes them transferable. Here, however, the subscribers have divided their subscriptions into shares, and have taken upon themselves to grant certificates as evidence of the right to shares, or of the right to obtain shares; these certificates have been often considered as evidence of the shares, and to distinguish them from the real title to shares, they have been called as in this case "script certificates." Not only have such certificates been granted, but they have been bought and sold; and as all of us must too well know, they have been made the means of gambling, bribery, and frauds of the most extensive character. Whether they are legal, is a question which might deserve greater consideration than it has received to-day, and I am by no means disposed to treat lightly the suggestions of Lord Tenterden in *Josephs v. Pebrer* (3 B. & C. 644); and nothing has occurred to incline me to think that that question is not one worthy of most serious consideration. It does not however appear to me necessary to decide it on the present occasion; and considering that there is here no imputation of fraud or malpractice of any kind, we are to look to the nature and facts of the transaction, and see if there is any such right as that claimed by the Plaintiff.

The subscriber's contract was entered into on the 13th of July 1836, and, as it is admitted, before the date of [65] one of the certificates which has been produced; and certain persons having subscribed, and made themselves liable to the expenses, having done what was necessary to induce Parliament to entertain the bill, they called these subscriptions "shares," and issued certificates thereof, which were thus expressed, "The holder of this certificate having signed the subscriber's agreement, and executed the Parliamentary contract, is the proprietor of the above share in this undertaking;" that is, a proprietor of a share which could not be constituted or exist until the Act of Parliament incorporating the company and giving them the means of having a transferable joint stock, had passed. The holder, too, "is the proprietor of the above share;" but when is he the proprietor? upon "having signed the subscriber's agreement, and executed the Parliamentary contract." Assuming that which is not proved, that the first holder of this certificate had done this and obtained this certificate, he would not be the proprietor, but the person who, if the Act of Parliament passed, would be entitled to become the proprietor of the share. Having such a certificate, the Plaintiff passes it for valuable consideration into the hands of a third person, who signs no special agreement and does nothing in any way to bind him to indemnify the party from whom he received it from his liabilities in respect of the subscriber's agreement or the Parliamentary contract; and who signs no agreement engaging to become a proprietor in the undertaking, but simply pays a sum of money (£3 a share in this case), and receives what is termed the "certificate." Then here is a certificate in the hands of a person who has done nothing whatever but paid a sum of money, who has neither signed the "subscriber's agreement" nor the "Parliamentary contract;" and who is neither at the present time nor prospectively, "the proprietor of the above share in this undertaking," [66] because he is not the person who has done these things.

The whole argument in favour of the Plaintiff, as I collect it, is this: having possessed himself of his certificate, he must be understood, by law, to have taken with it an obligation to do all necessary things to constitute himself a proprietor, and thereby indemnify the party from whom he has received it; or if he does not become a proprietor before the other party has been subjected to liabilities, then, besides becoming a proprietor, which would exonerate the other party from all future liabilities, he ought also to do some act by which he may exonerate that party from all past liabilities which may have been incurred.

We come, then, to the real question, whether in a transaction of this nature the law will raise such an implied special contract as is contended for? I have listened in vain for any satisfactory reason to convince me that there is any such implied contract. All that the Defendant has done is this: he has obtained a certificate expressed with studied ambiguity, but which tells him that upon doing certain things he will become a proprietor if the Act passes; but all these circumstances must concur to make him a proprietor.

One argument used was rather extraordinary. It is said that brokers who deal in these certificates found that they could not procure so good a sale if they clearly expressed that which the vendor intended; and then the vendor, or the broker acting as the agent of the vendor, intending that the law should raise, by implication, a contract, but not thinking proper to express it, because if he did the purchaser would be put on his guard and would not enter into the engagement, expresses the matter *am- [67] -biguously*; the vendor, it is argued, is afterwards to take advantage of the ambiguity, and fix on the purchaser an obligation, which the contract (if such it may be called), does not import, and which the purchaser did not intend.

This is called a purchase of shares when it is a purchase of mere certificates, and the question is, whether there is a contract on the part of the Defendant to become a proprietor at all events? I cannot find it expressed, and I cannot raise it by implication of law. There is not, in my opinion, any evidence of such an agreement as the Plaintiff seeks to have specifically performed; and the bill must therefore be dismissed, with costs.

[67] ATTORNEY-GENERAL V. THE DRAPERS' COMPANY. (KENDRICK'S CHARITY.)
March 19, 1841.

[S. C. 4 Beav. 305.]

A. B. bequeathed to a company a sum to purchase lands of the clear value of £100 a year, and gave £96 to charity, and "the residue of the said sum of £100, being £4 yearly, to the company for their pains." Held, that all the objects were entitled rateably to the increased rents.

Accounts in a charity case limited to the filing of the bill, where, from the institution of the charity, the funds had been improperly applied, the trustees retaining for themselves more than they were entitled to.

Where charity trustees have, from accident and without wilful default, committed an error, which they take the first opportunity to correct, the Court does not make them pay costs, though a decree is made against them; but the rule does not apply, where they set up their interests adversely in the suit.

The testator, John Kendrick, by his will, dated in 1624, bequeathed to the Drapers' Company "the sum of £2400 to purchase lands and hereditaments to the clear yearly value of £100 for ever over and above all charges and reprises, and with the same to perform the good uses thereafter mentioned, that is to say:—"

[68] The testator then gave ten several sums, amounting in the whole to £96, to several distinct charitable objects, which it is unnecessary to specify; and he then proceeded as follows:—"The residue of the said sum of £100 a year (being £4 yearly) for ever, I entreat the four wardens of the same company to accept for their pains, to be equally divided between them, by 20s. to each of them, for the time being, yearly, for ever."

The testator died in 1624; and the sum of £2400 was paid to the company in January 1625. In the following year the sum of £2500, composed of the charitable legacy of £2400 and a legacy of £100 left by the testator to the company to buy plate, was lent to the East India Company at £6, 10s. per cent.

In 1637 the company laid out £2550 in the purchase of freeholds producing an annual rent of £170. They were burnt down at the Great Fire; but the property was afterwards let out on building leases, and now produced a rental of £311 a year. The company, however, applied £96 only to the charitable objects mentioned in the will; and carried the surplus, after payment of incidental expenses, of about £18 per annum, to their general funds.

This was an information filed by the Attorney-General, praying a declaration, that the whole rents ought to be applied to the purposes of the will; and that the company might make good the amount retained by them.

The Defendants, by their answer, stated, that of the £2550, £150 was part of their own proper monies, and not derived from the charitable gift. The entry in their books, however, stated it to be "advanced by the com-[69]-pany for the mainteyning

of Mr. Kendrick's charitable bequests, which the company is interested with to see performed." The answer also stated, that the surplus, though carried to their general fund, had from time to time been expended in charitable gifts, "and that this course had been pursued for a great number of years."

Mr. Pemberton and Mr. Blunt, in support of the information, contended that this was not a gift, subject to an obligation to apply a fixed sum; but a trust to purchase lands of £100 a year, which was distributed, by the testator's will, amongst different objects, in a way which exhausted the whole. That any increase, therefore, in the revenues, must be apportioned amongst the different objects. They asked that the company might account for the surplus for twenty-four years back, and might pay the costs.

Mr. Kindersley and Mr. E. Lloyd, *contrâ*. The trust was to purchase £100 a year, and the company having performed that trust became entitled to the surplus.

If the company have acted under an erroneous construction of the will, they have followed the usage of their predecessors, practised for years. No application was made to them previous to filing the information. The accounts ought, therefore, to be limited to the time of filing of the information, and the Defendants ought not, under such circumstances, to be visited with costs; *Attorney-General v. Caius College* (2 Keen, 150).

THE MASTER OF THE ROLLS [Lord Langdale]. Upon the construction of the will, I do not entertain the least doubt. I am of opinion that the testator intended the whole income of the property to be applied to the purposes he has specifically stated in his will; and that he did not intend to give to the company any surplus which might exist beyond the £96. It seems the company, having received this legacy of £2400, did not immediately apply it, according to the trusts of the will, in the purchase of lands. There is no imputation upon them, I apprehend, in that respect, because they might not have had an immediate opportunity of doing so; but what they did, was to lend it out upon interest at $6\frac{1}{2}$ per cent., which produced £156 a year. That income stood in the place of the income which would have been received from the rents of the lands to be purchased. That sum the company received, but did not apply it to the purposes of the charity. In the year 1637 an opportunity occurred of making an investment in land; and at that time, I think, they must be considered as accountable for the surplus income which had not been applied to the purposes of the charity. The land they agreed to purchase required a sum of £2550, being £150 more than the charitable legacy; and the next question which is raised upon this information is, whether the sum of £150 ought to be considered as a sum contributed by the company, out of their own funds, towards this purchase, and in respect of which, they are entitled to a beneficial interest in the land which was purchased. If this could really be considered as their own money, and contributed by them, a question might be raised whether they did not, by this mode of dealing, devote it to the purposes of this charity; but without saying whether that could be maintained or not, I think the justice of the case requires that they should be considered as having been chargeable with the surplus interest for twelve years, and that the purchaser ought in equity and justice to be considered as made for the charity. The £150 must [71] be regarded as contributed out of the debt due from them; and therefore the whole land must be considered as belonging to the charity.

There are only two remaining questions, first as to the costs of the suit, and next, as to the time from which the account ought to be carried back. Now here the company have undoubtedly been acting upon the impression that they were right in what they did. They appear to have proceeded upon this impression from the very commencement of this foundation, and to have gone on in that course of proceeding from that time up to the present. The disposition on my part has always been, in such cases, not to carry back the account further than the filing of the information.

Then comes the question as to the costs; there has not, in this case, been a saving of anything; there is no fund to which we can have resort for the payment of the costs, unless we resort to that fund, the whole of which, in my opinion, ought to be applied to the purposes of the charity. The question therefore is, whether the charity shall hereafter be diminished to the extent of the costs of this suit. Are the company then to be considered as entitled to costs at the expense of the charity? It is certainly

my opinion, that parties ought not to be visited with costs, who have, from accident and without any wilful default, been led to commit an error which they have taken the first opportunity to correct; and there are many cases, in which (when I could do so consistently with my duty) I have abstained from charging them with costs, when there was a fund which could be resorted to, and when the Defendants have in fact taken the first opportunity of correcting the error, after it was brought to their notice. But that course has not been extended to cases, in [72] which the Defendants, taking advantage of the suit, have insisted on their individual rights, and have brought the question under the consideration of the Court, and argued it adversely. I do not mean to impute to the Defendants anything more than error; but being informed that the matter was complained of, instead of acknowledging and correcting the error, they state the facts (quite fairly and correctly it must be admitted), and avail themselves of the opportunity offered them by the filing of the information, and say, we will try if we cannot induce the Court to think we are right; we will take the opportunity of insisting, that no error has been committed, and that we are entitled to the benefit we have appropriated to ourselves. By acting in this way, I am of opinion, they have occasioned costs which they must pay. I think, therefore, the Defendants must pay the costs of the suit, but the account ought not to be carried back further than to the time of filing the information.

The Court declared that the increased income ought to be applied to the several objects mentioned in the bill in proportion to their respective amounts. An account was directed against the company from the filing of the information with costs of the Attorney-General, as between party and party up to the hearing of the cause.

[73] ATTORNEY-GENERAL v. CHRIST'S HOSPITAL. *March 20, 1841.*

A testatrix, after reciting that the rent of a property was £10, devised it to Christ's Hospital, a charitable foundation, in trust as to £6 for the poor of three parishes, and as to £4 to A. B. for life, and after her death, in trust for the three parishes. Held, that Christ's Hospital took no interest in the increased rents.

Where trustees of a charity and their predecessors have, for a long course of years, administered the funds erroneously, but being called upon duly to administer them, they insist on their own rights adversely and fail, they must pay the costs, notwithstanding the contrary usage of their predecessors.

Lady Ramsay, by her will dated in 1601, and after reciting, that she was seised in fee of a messuage, &c., in Broad Street, London, of the yearly rent of £10, did make her last will for the devising, and bestowing, and establishing the inheritance of the same messuage, in manner after mentioned; and she did devise the same to the Governors of Christ's Hospital (a charitable foundation) for ever, "upon special trust and confidence," that they should pay to the parsons and churchwardens of the three parishes of St. Peter's, St. Andrew's, and St. Mary, for ever, 40s. a-piece, for the most needy poorest of their parishes, and to pay Elizabeth Worley the sum of £4 yearly for life, and after her decease then the £4 to be divided as follows: 40s. to the parson and churchwardens of St. Peter's parishes in augmentation of the relief of the poor, and 20s. parcel of the above sum of £4 to the parson and churchwardens of St. Andrew's parish in further augmentation, &c., and 20s. residue of the said last-mentioned sum of £4, to be paid to the parson and churchwardens of St. Mary's parish yearly for ever, for the further augmentation of the relief of the poor of the said parish.

The rent of the house in question had increased and now amounted to above £82. The governors had uniformly from the foundation of the charity applied the surplus rents after payment of the specific sums mentioned in the will, to the benefit of Christ's Hospital.

[74] This was an information filed by the Attorney-General, insisting that the whole rents ought to be applied for the benefit of the specific objects mentioned in the will.

The Defendants, the Governors of Christ's Hospital, stated the uniform practice of their predecessors; and they submitted and insisted, that according to the con-

struction of the will, the surplus rents belonged to the Defendants as Governors of Christ's Hospital, and were applicable to the purposes of such hospital.

Mr. Kindersley and Mr. Blunt, in support of the information, contended, that the Defendants were not entitled to the surplus, the whole rent at the date of the will having been given to the specified charities, and the Defendants taking expressly "upon trust." They cited *The Attorney-General v. Skinners' Company* (2 Russ. 435), where Lord Eldon says, "There are several other cases on the subject; and, upon a consideration of them all, I adhere to the same view which I took of them in *The Attorney-General v. The Corporation of Bristol*. In the first place, if a testator by his will gives the whole of the then value of the lands to charitable purposes therein expressed, denoting, upon his will, that he knows what is the whole value of the lands, giving the yearly value is equivalent to giving the rents and profits; and giving the rents and profits is equivalent to giving the lands themselves. The consequence must be that the increase of the rents and profits will belong to those to whom he has given the yearly value, *alias* the rents and profits, *alias* the lands themselves."

Mr. Stuart and Mr. E. R. Daniell, *contrà*. This is not like a gift to a private individual, in trust, [75] for a certain charity; but to the governors of a charitable institution in trust, to a certain extent for other charities. The case cited does not apply. By a gift to Christ's Hospital, some intention to benefit it must have been intended. If the rents had increased in the life of Mrs. Worley, neither she nor the three parishes would have been entitled to it. The same result would take place after her death. They cited *Attorney-General v. Corporation of Bristol* (2 Jac. & W. 294), and *Attorney-General v. Haberdashers' Company* (4 Bro. C. C. 103).

THE MASTER OF THE ROLLS [Lord Langdale] said, the testatrix considered that she had an estate of the value of £10 per annum, the whole of which she exhausted in the several charitable gifts mentioned in her will. That he was of opinion, that the whole rents belonged to the specific objects stated in the will of the testatrix; and that the Defendants must account from the filing of the information, and as they had taken the opportunity of insisting on their rights adversely, they must pay the costs of the information.

[76] FROWD v. BAKER. READ v. BAKER. March 23, April 16, 1841.

Pending a litigation in the Ecclesiastical Court, as to the validity of a will, a creditor filed a bill for a receiver, &c. The alleged will being held invalid, an administrator was appointed; whereupon another creditor filed a cross-suit, and rapidly obtained a decree. The Plaintiff in the first suit was declared entitled to his costs out of the estate.

The Plaintiff Frowd was a creditor of John C. Beckett, who died in April 1839. On his death a will was found, purporting to affect the real and personal estate, which gave rise to a suit in the Ecclesiastical Court.

In February 1840, Frowd filed a creditor's suit against all the parties claiming (fourteen in number), for a receiver pending the litigation in the Ecclesiastical Court, and for an account and administration of the real and personal estate, when a legal personal representative had been appointed. (See *De Feuchères v. Dawes*, 5 Beav. 110.) An order for the appointment of a receiver was made on the 27th of March 1840; but before one had been appointed, and on the 13th of May 1840, sentence was pronounced in the Ecclesiastical Court, declaring an intestacy; and John Smith, the heir at law, was appointed administrator. Frowd, on the same day, filed a supplemental bill against all the parties.

On the 21st of May, Read, another creditor, filed a second creditor's suit against John Smith alone; and having got in his answer, obtained a decree, by consent on the 2d of June. By these means the first suit became nugatory.

Frowd, being threatened by some of the Defendants in his suit with a notice to dismiss for want of prosecution, gave notice of motion that the costs of all the parties to his suit might be paid out of the estate.

[77] Mr. Pemberton and Mr. Piggott, in support of the application.

Mr. Kindersley and Mr. Bacon, *contrà*, for the Defendant Smith, opposed the

application; and contended, that at all events the other parties who failed in their litigation in the Ecclesiastical Court ought not to have their costs.

The other parties did not appear.

THE MASTER OF THE ROLLS [Lord Langdale]. This, in substance, is an application to dismiss these bills with costs of all parties, to be paid out of the estate of Beckett.

It is alleged that the bill was filed by Frowd, acting in collusion with the parties who insisted on the validity of the will in the Ecclesiastical Court, and not for the purpose of administration. If that had been established, it would have been difficult to allow him his costs; but the allegation has not been proved. Where collusion is alleged, it ought to be distinctly proved, or be shewn from circumstances leaving no doubt in the mind of a Judge.

As the sentence in the Ecclesiastical Court could not determine the question as to the real estate, though it afforded an important indication of the validity of the will as to the real estate, I think Frowd cannot be considered wrong, in making the claimants on the real estate parties to the supplemental bill.

The parties to the third suit obtained a decree by so rapid a proceeding, that I think they had no right to stop Frowd's suit except on payment of his costs. The other side say, "There is an intestacy, then why is the [78] estate to be charged with the costs of all the other claimants?" but Frowd was not wrong in bringing them here, though I cannot now say whether they ought or ought not to have their costs.

I must stay all the proceedings in Frowd's suit, giving him his costs out of the estate. I have felt some difficulty in dealing with the costs of the other parties, and I will leave them to make such application as they may be advised, for payment of the costs out of the estate, or by Frowd.

NOTE.—On the 16th of April, the case was mentioned on the minutes of the above order, when the point, by arrangement, having been discussed, costs were given to Baker, a trustee and executor under the alleged will, but refused to Jones and the other devisees, who had insisted on its validity.

[78] THE KING OF HANOVER v. SIR HENRY WHEATLEY AND OTHERS.
March 22, April 1, 1841.

New commission granted to cross-examine Plaintiff's witnesses abroad, upon subsequent discovery of matter material for such examination; but, Held, that the Plaintiff could only be allowed to re-examine on a special case being made, and then only as to matters not comprised in the former interrogatories.

Form of the order in such cases.

On the examination of witnesses before the examiner, new interrogatories may be, from time to time, exhibited, for the examination of the same or other witnesses; but *secus* in an examination before Commissioners, except by leave of the Court.

The bill in this cause was filed in August 1839, but the answers of the Defendants were not filed until November 1840.

The Defendants had notice, in November 1840, that the Plaintiff intended to examine witnesses in Hanover, who the witnesses were, and to what point they were to [79] be examined; and they were asked if they would join in the commission, which they declined.

The commission for the examination of the Plaintiff's witnesses accordingly issued, and was executed. It was closed in December 1840, and was returned into Court in the 1st week in January.

The rule to produce witnesses was given in January; but the rule to pass publication had not been given, nor had the cause been set down for hearing.

On the 18th of March 1841 the Defendants gave notice of motion, that they might have a commission for the examination of witnesses in Hanover or elsewhere, returnable without delay, to take the cross-examination of Mrs. Charlotte Beckedorff and Miss Beckedorff, two of the witnesses examined on behalf of the Plaintiff, &c.

The application was supported by the affidavit of the Defendant's solicitor, stating, that since the execution of the said commission, and the return thereof, he had discovered new matter, which he was advised and verily believed to be material for the cross-examination of the above-named Mrs. Charlotte Beckedorff and Miss Sophia Beckedorff; and that such matter was not discovered or known by the deponent, nor by the Defendant, as the deponent had been informed and verily believed; nor had he, the solicitor, nor the Defendants, as the deponent verily believed, any reason for suspecting its existence, until after the execution and return of the aforesaid commission.

That he was advised that he could not safely go to a hearing in this cause without the testimony of the above-named witnesses on cross-examination.

[80] Mr. Wigram and Mr. Wray, for the Defendants, in support of the application.

Sir Charles Wetherell, Mr. Pemberton, and Mr. Loftus Wigram, for the Plaintiffs.

The following authorities were referred to; Beames's Orders, 30, *Turbot v. —* (8 Ves. 314), *Campbell v. Scougal* (19 Ves. 552), *Carter v. Draper* (2 Sim. 52), *Bond v. Bond* (4 Sim. 518), *Vaughan v. Worrall* (2 Mad. 322), *The Dean of Ely v. Warren* (2 Atk. 189), *The Dean of Ely v. Stewart* (2 Atk. 44), *Smith v. Biggs* (5 Sim. 391).

The points principally discussed were, first, as to the terms of the order; secondly, whether the Defendants might cross-examine on new matter; and, thirdly, whether the Plaintiffs were to be at liberty to re-examine the witnesses.

THE MASTER OF THE ROLLS [Lord Langdale]. Since this case was last mentioned I have caused the registrar's book to be searched, and have obtained copies of several orders, by which new commissions for the examination of witnesses have been directed to be issued.

The order in *Campbell v. Scougal*, as it was at first pronounced, is the only one of the form of which is applicable to the present application. (1)

In *Campbell v. Scougal* the application was by the Defendant, to suppress the depositions taken at Leghorn [81] on the behalf of the Plaintiff. The order as it was at first pronounced was, "That the Defendants be at liberty to sue out a new

(1) EXTRACT FROM ORDER in *Campbell v. Scougal* (19th January 1816):—That the Defendants be at liberty to sue out a new commission for the cross-examination of the Plaintiff's witnesses at Leghorn, returnable without delay; but they are not to examine any new witnesses under the said commission. But in case the said Plaintiff's witnesses shall not attend to be cross-examined, having due notice, the said Defendants are to be at liberty to make or cause to be made affidavits before the proper authorities at Leghorn to prove their refusal, and also to prove that the said Plaintiff's witnesses attended to complete their evidence for the said Plaintiffs under the said former commission in this cause, after notice from the said Defendants that they intended to cross-examine such witnesses, and to prove that the Defendants at that time were prepared to cross-examine them, the said Plaintiffs, by their counsel consenting that such affidavits shall be read at the trial of the action at law; and the Plaintiffs are to be at liberty to make or cause to be made affidavits explanatory or contradictory on their part respecting the same matters, which, by consent, are likewise to be read at the said trial, without the Defendants objecting thereto; and each party, before making any such affidavits, is to give to the other party a copy of the affidavits so to be made; and the Commissioners to be named in such commission are to be at liberty, if necessary, to swear one or more interpreter or interpreters. And it is ordered that the Plaintiff's clerk in Court do, within six days after notice hereof, join and strike Commissioners' names with the Defendant's clerk in Court, in default thereof that the Defendants be at liberty to take out such commission directed to their own Commissioners. And the said new commission is not to be directed to any of the Commissioners named in the former commission, and ten days notice of the execution of such commission to any two of the Plaintiff's Commissioners, in case the Plaintiff join in such commission, is to be deemed good notice to the Plaintiffs. And it was ordered that the depositions of the witnesses already examined be kept close. And the Defendants are to state upon affidavit the names of the witnesses they mean to cross-examine, and to undertake to cross-examine such witnesses.

commission for the cross-examination of the Plaintiff's witnesses at Leghorn, returnable without delay, but they are not to examine any new witness under the said commission; and the [82] Commissioners to be named in such commission are to be at liberty, if necessary, to swear one or more interpreter or interpreters to interpret the oath and interrogatories to be made use of on such commission to such witness or witnesses, as may not be able to speak the English language, and to interpret the deposition or depositions of such witness or witnesses who cannot speak the English language into the English language. And it is ordered, that a clause be inserted in the said commission for that purpose; and it is ordered that the Plaintiff's clerk in Court do, within six days after notice hereof, join and strike Commissioners' names with the Defendant's clerk in Court, or in default thereof, that the Defendants be at liberty to take out such commission directed to their own Commissioners; and ten days' notice of the execution of such commission, to any two of the Plaintiff's Commissioners, in case the Plaintiffs join in such commission, is to be deemed good notice to the Plaintiffs. And it is ordered that the depositions of the witnesses already examined be kept close, and the Defendants are to state upon affidavit the names of the witnesses they mean to cross-examine, and to undertake to cross-examine such witnesses."

Afterwards, on application to vary the minutes of the order, some special clauses were, by consent, ordered to be made, to the effect, that in case the said Plaintiff's witnesses should not attend to be cross-examined, having due notice, the said Defendants were to be at liberty to make or cause to be made, affidavits before the proper authority at Leghorn to prove their refusal, and also to prove that the said Plaintiff's witnesses attended to complete their evidence for the said Plaintiff under the said former commission in this cause, after notice from the said Defendant that they intended to cross-examine such witnesses; and to prove that the [83] Defendants at that time were prepared to cross-examine them, the said Plaintiffs by their counsel, consenting that such affidavits should be read at the trial of the action at law; and the Plaintiffs were to be at liberty to make or cause to be made affidavits explanatory or contradictory, on their part, respecting the same matters, which, by consent, were likewise to be read at the said trial, without the Defendants objecting thereto; and each party before making any such affidavit, was to give the other party a copy of the affidavit so to be made. And further, that the said new commission was not to be directed to any of the Commissioners named in the former commission.

I think that this order as originally made, affords a precedent for the order to be made on the present occasion.

But it is desired, on the behalf of the Plaintiff, that he may have leave to re-examine his witnesses upon the former interrogatories, or upon new interrogatories to be exhibited at the execution of the commission to be now issued.

By Order 68 of Lord Bacon, the examination of witnesses was to be on interrogatories annexed to or inclosed in the commission. (Beames's Ord. 30.) But afterwards it became a general practice, by consent, to examine the witnesses on interrogatories exhibited to the Commissioners on opening the commission. (Curs. Can. 243, Gilb. For. Rom. 126.) And in the oath to be taken by the Commissioners, before acting in the commission, it is expressed that they are to examine on the interrogatories then produced and left with them. (Beames, 328.)

[84] Since this time the practice has been to produce the interrogatories to the Commissioners at the time; and it seems, that in the case of *Campbell v. Scougal* (19 Ves. 554), Lord Eldon was erroneously informed by counsel that it was the practice to feed the Commissioners with fresh interrogatories from time to time. (See *Andrews v. Brown*, Prec. Ch. 387.)

On examination of witnesses before the examiner, new interrogatories may be, from time to time, exhibited before the examiner for the examination of the same or other witnesses, up to time of publication; and for the examination of witnesses before Commissioners, by leave of the Court, new commissions may be issued at the instance, or new interrogatories may be exhibited on the behalf of persons, who might, with proper diligence and attention, have examined their witnesses on the execution of the first commission.

On such occasions the Court may adopt such precautions as may be thought proper according to the circumstances of the case.

In *Coventry v. Coventry* (1 Dickens, 25) it was referred to the Master to settle the interrogatories, and make them extend "so far as naturally and properly arises from the matters in issue, and no further."

In this case, all that is asked is leave to cross-examine witnesses already examined by the Plaintiff; and in the absence of any special case, I do not think it necessary or right to do more than make an order similar to that which was made in *Campbell v. Scougall*.

[85] I do not think that it would be consistent with the practice of the Court, or the principles upon which it acts in such cases, to permit the Plaintiff to re-examine his witnesses-in-chief to the interrogatories already exhibited. But it appears to me, that the Plaintiff is entitled, upon a special case, to exhibit new interrogatories for the examination of other witnesses as to any matters in issue in the cause, and even for the examination of the same witnesses to matters in issue in the cause, which were not comprised in the former interrogatories.

If any such special case were made, the commission would not be merely for the cross-examination of the Plaintiff's witnesses, but for a commission, in which Plaintiffs and Defendants being jointly interested, the object would have to be so stated, and the expenses to be borne in the usual way.

If no such special case be made, I think that the order must be such as was pronounced in *Campbell v. Scougall*, before the special directions were introduced by consent of parties.

FORM OF ORDER.—The following was the order drawn up in this case :—

That the Defendants Sir Henry Wheatley Thomas Wood and Her Majesty's Attorney-General be at liberty to take out a commission for the cross-examination of Charlotte Beckedorff, widow, and Sophia Beckedorff, spinster, in the kingdom of Hanover, returnable in five weeks from the date hereof (the said Charlotte Beckedorff and Sophia Beckedorff having been already examined as witnesses for the Plaintiff under the commission sued out by him), and the Plaintiff's clerk in Court is to be at liberty, in six days after notice hereof, to join and strike Commissioners' names with the said Defendants' clerk in Court, or in default thereof the said Defendants are to be at liberty to take out such commission directed to their own Commissioners. And it is ordered, [86] that the said Defendants, and also the Plaintiff in case he shall join in the said Defendant's said commission, be at liberty to name eight Commissioners on each side, with liberty for each side to strike out four of them. And it is ordered, that the Defendants also be at liberty to take out a duplicate of such commission. And in case the Plaintiff shall join in such commission, he is to be at liberty to take out a duplicate thereof. And it is ordered, that fourteen days' notice of the execution of the said commission to the Plaintiff's Commissioners, or any two of them, be deemed good notice to the said Plaintiff. And the said Commissioners, after they have entered on the execution of the said commission, are to be at liberty to swear one or more interpreter or interpreters upon his or their oath or oaths, solemnly, well and truly to interpret the oath or oaths, and interrogatories which shall be administered and exhibited to such witness or witnesses who do not understand the English language, into the language of such witness or witnesses, and also to interpret their respective depositions taken to the said interrogatories, out of the language of such witness or witnesses into the English language; and to return such depositions in the English language, and to keep such depositions secret until publication shall duly pass in this cause. And the said Commissioners are to certify, in what manner they administered the oath or oaths to such witness or witnesses respectively, that shall be examined under the said commission, who cannot understand or do not speak the English language. And it is ordered, that the Defendants do pay the Plaintiff's costs of and relating to this application, and of the said commission, and the execution thereof, including the costs, travelling, and other expenses of the Plaintiff's Commissioner and solicitor going from this country to Hanover, and returning, attending the execution of the said commission, such costs and expenses to be taxed by the Master in case the parties differ about the same. But this is to be without prejudice to the Plaintiff's right to enter his rule to pass publication, and to set down the cause for hearing in the same manner as if this order had not been made.

[87] *In re CONGREVE. April 1, 1841.*

The Master's certificate on taxation of costs cannot be questioned without the special leave of the Court, to be obtained by petition, setting forth the grounds of complaint, and the charges alleged to be erroneous.

Principles on which the Court acts in permitting a review of such certificate.

The Master, on evidence before him, allowed a few items on the taxation of a solicitor's bill for business, as to which there was a conflict whether the solicitor had authority to perform it. Held, that this was not a sufficient reason for permitting a review of the taxation.

On petition for liberty to file exceptions to the Master's certificate of taxation, the Court will sometimes decide the point in dispute without putting the parties to file their exceptions.

This was a petition, by a client, for liberty to file exceptions to the Master's report on the taxation of his solicitor's bill of costs: on the ground that the Master had allowed certain charges for business, which, the Petitioner alleged, the solicitor had no authority to do.

Mr. Anderdon, in the absence of Mr. Pemberton, in support of the petition, contended that this was a proper case for review, and had been brought forward in a proper form; and further, that the Court seeing the error, would now correct it, without putting the Petitioner to the expense of filing exceptions.

Mr. Bethell and Mr. Bird, for the Respondent, contended that the case of the Petitioner involved no question of principle; and they adverted to the great trouble and inconvenience to which the Court would be subject, if the items of a solicitor's bill were to be gone through in open Court, *Alsop v. Lord Oxford* (1 Myl. & K. 564), *Fenton v. Crickett* (3 Mad. 496), and *Shewell v. Jones* (2 S. & St. 170), were cited.

THE MASTER OF THE ROLLS [Lord Langdale]. If anyone supposes that a Judge sitting here has a right to refuse to entertain a question, because it may be very troublesome and occupy a great deal of time [88] the notion cannot be too soon corrected. The duty of the person sitting here is, to attend to those matters which come under his jurisdiction, with all the attention in his power, and give all the time that is properly required for their due consideration and investigation. I apprehend there can be no doubt in anybody's mind on that point, and I cannot therefore attend to the opposite argument.

I conceive it to be established, as a general rule, that the Master's certificate of costs is final, and not to be questioned without the special leave of the Court. That special leave is to be obtained by means of a petition, setting forth the grounds of complaint, and also stating the particular charges which are alleged to be erroneous. When that petition comes before the Court, it will judge of the grounds of complaint which are alleged; and, as truly stated in argument in this case, if, upon the discussion, the grounds of complaint appear to be sufficient, it is usual for the Court itself to examine and decide upon the items (see 2 Smith's Pr. 353; *Russell v. Buchanan*, 9 Sim. 172; *Attorney-General v. Drapers' Company*, 4 Beav. 305); but this is not an universal course of proceeding, it being quite open to the Court to give the leave which is asked to file exceptions, and to leave those exceptions to the ordinary course of inquiry and determination.

With respect to the grounds of complaint which are held to be sufficient to induce the Court to open the Master's finding (and that is the material matter to be considered here) they are in general language expressed in the case of *Alsop v. Lord Oxford*; and, as far as the general rule is concerned, I have certainly not heard that those grounds have been improperly stated: they [89] are perhaps stated somewhat too minutely, perhaps without those qualifications which it would have been more prudent to add to them; but the general grounds are there stated, in the manner in which I think they are ordinarily acted upon.

What is generally understood of the matter is this, that it must be shewn that there has been an erroneous principle upon which the Master has acted; that he has been guided by some error of law or of equity, or by his notion of some general rule, upon which he thought he ought to act. Now I am not prepared to say that the Court

can refuse attention to a case, merely because it does not come within those general expressions. In any case, not otherwise provided for by Act of Parliament, I should hesitate very much indeed before I laid it down as a general rule, that there was any decision by, or any proceeding before, the Master, which the Court had not jurisdiction and authority to enquire into. Taking it to be so, and that there may be exceptions to a proposition so general as that which was laid down by Sir John Leach, in that case, the Court must be well satisfied that there are sufficient grounds alleged for an exception, before it will deviate from the general rule.

The real question, therefore, is, whether there is anything in this case which ought to take it out of the general rule. Now what is the complaint here? It is simply this, that the Master has allowed charges with respect to business, which the party alleges he did not authorise the solicitor to do; that is, I think, the simple ground of complaint here; there is nothing else. The Master has received evidence upon the point in discussion between the parties, which evidence, from the mere statement of it which I have had at the Bar, [90] may seem to have well justified the conclusion to which he came. But here are a few items in a solicitor's bill charged for business, which it is alleged on the one side was authorised, and on the other side, that it was not. In respect of this the Master has received and decided upon all the evidence produced before him; and, considering the nature of this case, it does not appear to me to form an exception to that which I consider to be the general and established rule of this Court as to these matters; I must therefore dismiss this petition with costs.

[90] STUBBS v. SARGON. *March 25, 1840; Jan. 11, July 30, August 10, 1841.*

A purchaser under the Court not being able to obtain an account book delivered over to him, to which he was entitled under his contract, brought an action of trover against some parties to the cause. He was restrained by injunction.

Motion by purchaser under the Court, for a reference to inquire whether it would benefit the parties that the contract should be rescinded, on the ground that the executor had stated he was unable to comply with the conditions, held irregular.

Order held irregular, first, on the ground of its having been made and passed without due notice to the other parties to the cause; and, secondly, as not specifying the evidence on which it was grounded.

An executor, who was under an obligation to deliver a book to a purchaser under the Court, made an affidavit that it was lost. Held, that the purchaser was not bound by that affidavit, but was entitled to an enquiry before the Master.

John White, having become the purchaser of the book debts owing to the testatrix Elizabeth Ives deceased, was entitled, as a condition of his purchase, to have delivered to him, amongst other documents, the day book and ledger of the testatrix and her late partners; John White having, with the assistance of John James Horner, paid his purchase-money into Court, but being unable to obtain possession of the books, commenced an action of trover against George Sargon and others (the executors) for the recovery thereof.

[91] The purchase had not been completed.

Dec. 5, 1839. Mr. Spence, on behalf of the Defendants at law, now moved to restrain the proceedings in the action.

Mr. James Campbell, *contra*.

THE MASTER OF THE ROLLS said that the proceeding was most irregular, and he granted the injunction restraining White from proceeding in the action. It was also ordered, by arrangement, that the day book and ledger of the testatrix and her late partners should be forthwith given up to White by George Sargon and Sarah his wife, George Fuller, John Henry Padbury, and Edward Ives Fuller.

March 25, 1840. John James Horner, having supplied White with the money which White paid into Court, in respect of his purchase, it was, on the 19th of December 1839, agreed between White and Horner that Horner should become the equitable assignee of White's interest in the debts.

The day book not having been delivered, pursuant to the order of the 5th of

December, and it having been stated by Sargon to have been lost, a motion was made on the behalf of Horner and White that the above order might be rescinded; that the Defendants might be ordered to pay into Court some of the book debts, alleged to have been received by them; and that it might be referred to the Master to inquire, whether it would not be beneficial to the parties in the cause that the contract for sale of book debts should be rescinded.

Mr. C. P. Cooper, in support of the motion.

[92] Mr. Spence, *contrà*.

THE MASTER OF THE ROLLS [Lord Langdale]. The purchaser has been merely informed that the book has been lost: that may be inaccurate. He is entitled to the day-book, and has a right to enforce the order of the 5th of December, and if it cannot be delivered, he may possibly have a right to rescind the contract, and all the proceedings founded on it; but that is not now the question. He asks to set aside the order of December alone, and leave all the other orders standing. This cannot possibly be done.

As to the reference to the Master, nothing can be more extraordinary than that a vendee should ask for a reference, whether it would be beneficial to the parties in the cause that the contract should be rescinded. The purchaser has no right to propose any such thing. The motion must therefore be refused with costs.

Jan. 11, 1841. On the 30th of July in the same year, on the application of Horner and White, and with the consent of the executors Sargon and wife, George Fuller, J. H. Padbury, and Edward Ives Fuller, an order was made that White should be discharged from his purchase; and that out of the sum of £213, 10s. 8d. paid into Court on account of the purchase, the sum of £65, 15s. 5d., received on account of the debts, and £15 agreed to be paid for costs, making together £84, 15s. 5d., should be paid to Sargon and wife, George Fuller, J. H. Padbury, and Edward Ives Fuller; and that the residue of the same sum of £213, 10s. 8d., being £128, 15s. 3d., should be paid to Horner; and the order was to be without prejudice, as regarded the other parties to the cause, to the question [93] how or by whom, their costs of the sale of debts were to be paid.

The order was made with the consent of Sargon and wife, George Fuller, J. H. Padbury, and Edward Ives Fuller; and the money was paid out of Court accordingly. The order was made and passed without due notice to some other parties to the cause, and after others had stated their intention to oppose it, and without making proper provision for their costs. When drawn up no affidavit of service on the other parties, nor any consent on their part was produced to the registrar.

Mr. Pemberton and Mr. Tennant, on behalf of Cookes and wife, one of the thirty-six residuary legatees, moved to discharge the order of the 30th of July 1840. (3 Beavan, 408.)

Mr. C. P. Cooper, *contrà*, contended that executors alone, who were the vendors, had a right to appear at the hearing of the motion of the 30th July 1840.

THE MASTER OF THE ROLLS [Lord Langdale]. I do not impute any intention of obtaining an order by surprise; but when two parties agree on an order, it cannot be drawn up in the absence of other interested parties who have stated their intention to oppose it. This is, of itself, a sufficient ground to discharge the order. There are other irregularities. The order does not state the evidence on which it was grounded; and if it had been taken on the non-appearance of some of the parties, upon production of an affidavit of service of the notice of motion, the order should not have varied from the notice of motion; for a party served may absent himself, not objecting to an order in the terms of the [94] notice, but objecting to any variation in it. The order must be discharged; and the monies paid out of Court be paid back again, and the costs of Cookes and wife must be paid by Horner.

August 10. The money was accordingly repaid; and it was now moved, on behalf of John James Horner, that he might be substituted for John White, as purchaser of the book debts, and that the day-book might be delivered up to him.

THE MASTER OF THE ROLLS. I think that if the contract be a contract which can now be performed, Horner is entitled to be substituted for White as purchaser; but Horner insists that the contract cannot be performed without the delivery up of the day-book, which he accordingly requires. Cookes and wife and other persons interested in the purchase-money insist that the contract ought to be performed; and

agree with Horner in alleging that the executors can and ought to produce and deliver up the day-book; whilst the executors say, that the day-book is really lost, and cannot now be produced, and that the contract cannot be performed unless the delivery up of the books be dispensed with.

The important question is, whether it is not in the power of the executors to produce and deliver up the day-book. If they can, I think that an order ought to be made in conformity with the notice. If they cannot, no order should be made.

Mr. Sargon has made an affidavit stating that the book is lost, and cannot now be found; but I think that the parties are not bound by that affidavit; and that if [95] they desire it, they are entitled to an inquiry, whether the executors are able to produce and deliver up the day-book; with liberty for the Master to state special circumstances.

[95] WARREN v. BUCK. (*Ex relatione.*) April 17, 1841.

A suit was instituted by a husband and wife, and a decree made therein. It afterwards appeared that the property in question was limited to the wife's separate use. Held, upon a petition of the wife by a next friend, that the objection of misjoinder could not be then taken advantage of by a Respondent who was not an accounting party.

The bill was filed in March 1831, by a husband and wife as Co-plaintiffs. A decree was made in the cause in March 1833; and the cause was heard on further direction in March 1837.

A petition was now presented by the wife, by a next friend, stating the testator's will, whereby it appeared that the property in question was given to the wife for her separate use.

Mr. Koe, for the Petitioner.

Mr. Steere, for the Defendant Robert Ballinger.

It was objected that the record was incorrectly framed, inasmuch as the husband and wife were joined together as Co-plaintiffs. *Wake v. Parker* (2 Keen, 59) was cited on the point.

THE MASTER OF THE ROLLS [Lord Langdale] said that he had repeatedly had occasion to consider this point; and, inasmuch as Robert Ballinger, the Respondent in the present case, was not an accounting party, he should make the order.

[96] JONES v. POWELL. April 24, 1841.

Trustees of an under-lease of church property authorised to take steps to obtain a clause for compensation for their tenant right of renewal inserted in an Act pending in Parliament, to make a new street, which would require part of the property.

The testator was entitled, as under-lessee, to some leaseholds, held for three lives, under the Bishop of Winchester, and he devised his interest therein to trustees, in trust for his son, an infant, for life, with remainder over.

A decree had been made for carrying the trusts of the will into execution.

The trustees now presented a petition, stating that it was customary for the bishop to renew the leases, from time to time, on the death of the *cestui que vies*, and for the original lessees thereupon to grant new leases to their tenant on similar terms and covenants as in their former leases; and that the Petitioners were bound by the covenants in the lease granted to their testator to pay their portion of the fines payable by their lessors on renewal to the bishop. It stated also that large sums of money had been laid out on the property in the expectation of a renewal.

The petition further stated that a bill was depending in Parliament for making a new street in the neighbourhood of the property, and that part thereof was comprised in the schedule, and liable to be purchased, and that no compensation was by the bill directed to be given for the tenants' right of renewal; and that the Petitioners were anxious to obtain a clause inserted in the bill, giving the owners of the property liable to be purchased, compensation for their tenant right of renewal.

[97] The bill being now before a Committee of the House of Commons, the Petitioners prayed that they might be authorised to take such steps as might be necessary for obtaining the insertion of a clause of compensation in the bill, and to protect the interest of the parties beneficially entitled to the property.

Mr. Pemberton, in support of the petition.

THE MASTER OF THE ROLLS [Lord Langdale] ordered that the Petitioners should be at liberty to take such steps as they might be advised, in order to obtain the insertion of a clause in the bill for the purposes stated in the petition.

[97] HERCY v. FERRERS. April 27, 1841.

[S. C. 10 L. J. Ch. 273. Cf. *Balls v. Margrave*, 1841, 4 Beav. 119; 49 E. R. 283.]

The Plaintiff was entitled to a legacy which the testator had charged on his estates, not in settlement. The Defendant stated, that the testator was tenant in tail of part of the estate, but did not specify it; and he admitted the possession of a copy of a deed creating the entail, but he stated it did not make out the Plaintiff's case. Held, he was bound to produce it for the Plaintiff's inspection, as tending to shew what estates were in settlement.

The Defendant, being entitled to an estate, subject to a charge thereon belonging to the Plaintiff, mortgaged it, and delivered the title-deeds to the mortgagees, but he retained copies. Held, that he was bound to produce the copies, though the mortgagees were not parties to the suit.

By his will dated in 1795, the testator, who was entitled to an estate called the Baddesley estate, gave the Plaintiff a legacy of £1000 "out of the estates that were not in settlement," and the object of this bill was to obtain payment thereof.

The answer stated, that under a deed in 1763, and subject to certain charges thereon, the testator was at his death tenant in tail of part of the Baddesley estate, consisting of five farms, which the answer, however, did [98] not specify; and it also stated several charges affecting other parts of the estates, of which, subject to considerable charges thereon, the testator was seised in fee; and it stated, that the charges on the Baddesley estate, at the time of the death of the testator, far exceeded the value both of the settled and unsettled part.

The Defendant, who was the grandson of the testator, and who became entitled to the whole estate, subject to the charges, had in 1839 further mortgaged the estate for £12,000, and he delivered over the title-deeds to the mortgagees. By his answer he stated that the deeds were in the possession of the mortgagee; but he admitted that he had in his possession, copies of some of them, including the deed of 1763, the mortgage deed and other documents; but he stated, that they made out the Defendant's title, and did not shew or tend to shew any title in the Plaintiff. He submitted he was not bound to produce them.

The Plaintiff now moved for the production of the copies of the documents. The argument turned principally on the copy of the deed of 1763 and of the mortgage deed.

Mr. Pemberton and Mr. Bates, in support of the motion. Where a Defendant admits the possession of documents relating to the matters in question, *prima facie*, he is bound to produce them. The Defendant must shew a case of exemption. Here the question will be, on what part of the Baddesley estate the legacy is charged. The answer states, that the testator was tenant in tail of a part which is not specified. It is necessary that the deed of 1763 should be produced to ascertain on what [99] part the Plaintiff has a claim, and it may be necessary to apportion the charges among the estates. The Plaintiff is interested in the estate, and is desirous of bringing before the Court, the other parties interested therein. It is therefore necessary for him to see the copies of the deeds shewing the incumbrances thereon.

Mr. Kindersley and Mr. Romiley, *contra*. The Plaintiff has no interest in any but the unsettled estate, and is not therefore entitled to see the copy of the deed of 1763, and the others relating to the settled estates.

The mortgagees are not parties to this suit; and, therefore, the Defendant is not

justified in producing the title-deeds in their absence. *Hardman v. Ellames* (2 Myl. & K. 732) was cited.

Mr. Pemberton, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. The substance of the answer is, that though some estates are charged, they are wholly insufficient to pay this legacy and the other charges; and a question is raised, which of the testator's estates are charged with this legacy, or which of the estates were not settled. This can only be determined by ascertaining what estates were settled. Taking the whole of the testator's estates, you must subtract those which were settled, before you can ascertain the estates charged with the legacy. The Plaintiff asks for a production of the documents relating to the matters in question. The Defendant says that they do not tend to make out the [100] Plaintiff's case. Now first as to the deed of 1763, by which the testator became entitled as tenant in tail. The Defendant says that the Plaintiff has no interest in a document, by which alone he can ascertain which portion of the testator's estate was settled and which was not. I am of opinion he has an interest in it, and is entitled to have the copy produced.

The next question is this: it is said that the estates are vested in mortgagees who are not before the Court, and it is objected, that as the mortgagees have an interest in the estate and in the title-deeds, the copies of the deeds ought not to be ordered to be produced in their absence. If I had found that the Defendant held them as trustee for the mortgagees I should have attended to the objection; but they seem to have been retained by the Defendant for his own purposes, and it does not appear what duty the Defendant has towards the mortgagees with respect to them.

It may be necessary for the Plaintiff to pay off the charges on the estate, and it is therefore important to him that he should have an inspection of the copies of the mortgages.

With the exception of the cases and opinions, the production of which is not pressed for, all the documents admitted to be in the Defendant's possession must be produced. (See *Balls v. Margrave*, *post*, p. 119.)

[101] HAYNES v. BALL. April 29, 1841.

Where, under the 1 W. 4, c. 36, a Defendant in custody becomes entitled to his discharge, he cannot waive that right by acquiescence or subsequent proceedings.

In August 1840 the Defendant was arrested under an attachment for want of answer, and lodged in Gloucester gaol.

In November 1840 he was brought up and turned over to the Fleet.

On the 31st of March 1841 he was brought up by *habeas corpus*, when the bill was ordered to be taken *pro confesso*.

On the 3d of April following, the Defendant, being desirous of putting in his answer, but having been prevented by circumstances, applied to the Master of the Rolls to discharge the above order. His Lordship did so, and gave leave to the Defendant to file his answer, which was done on the 14th of April. The Defendant who was still in custody had not paid the costs of his contempt.

It was now moved on his behalf, that he might be discharged out of custody, on the ground "of proceedings not having been taken in due time."

Mr. C. P. Cooper, for the motion. By the thirteenth rule of the 1 W. 4, c. 36, sect. 15, it is provided, that where a Defendant is in custody for not answering, and shall not "put in his answer within two calendar months after he is lodged in gaol or prison," the Plaintiff "shall, at the expiration of two calendar months, proceed to take the bill *pro confesso*, and shall accordingly obtain an order for taking the same *pro confesso* within six weeks [102] after the period, computed from the expiration of such two calendar months, within which he may be able to take the same *pro confesso*; or in default of so doing," the Defendant shall be entitled to be discharged without paying any costs of contempt.

In this case the Plaintiff not having proceeded to take the bill *pro confesso* within

the time limited by the Act, the Defendant is entitled to his discharge without payment of costs.

Notwithstanding what subsequently took place, the Defendant cannot be considered as having waived his right to be discharged, because in such cases there can be no waiver of rights.

Mr. Prendergast, *contra*, argued that there had been a waiver of any irregularity.

Collins v. Collyer (Cr. & Ph. 262, and 3 Beavan, 600) was referred to.

THE MASTER OF THE ROLLS [Lord Langdale]. The object of the Act referred to was to stimulate the exertions of the Plaintiff, and to prevent him from causing a Defendant to be taken into custody, and then allowing him to linger in prison. Plaintiffs have now an active duty, which they are bound strictly to perform, and in default the Defendant is entitled to be discharged. If a Defendant has once a right to his discharge, he has neither power nor capacity to waive his right. I think I have already decided that point. (*Greening v. Greening*, 1 Beavan, 121.)

As to the case of *Collins v. Collyer*, I think what took place here was very much mistaken. In that case [103] there was a sole Defendant, who being brought up by *habeas corpus*, the Plaintiff insisted he was entitled at the same time to take a decree dictated by himself, viz., such decree as he could abide by. I was of opinion that it could not be done, and that under the Act, the Court being bound to make such decree "as should be thought just," the cause must be set down, and I still remain of that opinion. (See 2d rule, 1 W. 4, c. 36, s. 15.)

[103] REYNARD v. SPENCE. May 1, 5, 1841.

[S. C. 5 Jur. 478.]

A tenant in common agreed to make a partition, and by his will he confirmed the agreement, and devised the estate to trustees to convey the part agreed to the other tenant in common and his heirs, and to receive a conveyance of the other part; and he devised it and all his real and personal estate to his trustees to receive the rents and pay an annuity to his widow, &c., &c. Held, that the widow was bound to elect.

A widow, in a case in which she was bound to elect between her dower and an annuity given by her husband's will, received the annuity for five years. Held, that she had not, under the circumstances, elected.

A widow concurred in a partition of her husband's estate, and released a moiety allotted to the other tenant in common from her dower; the other moiety was conveyed to the trustees of her husband's will. Held, that she was entitled to dower out of the entirety of the latter moiety.

This was a creditor's suit, filed in 1830, under which the real estate of the testator Amos Bake having been ordered to be sold, it was referred to the Master to inquire and state whether Mary, the widow of Amos Bake, was entitled to dower out of any of the testator's estates.

By the Master's report it appeared, that in 1823, the testator Amos Bake and his brother Nathan Bake were seised of an estate in the county of York, in equal moieties as tenants in common in fee; that it was subject to the right of dower of Mary, the wife of Amos Bake, and to a mortgage of £4000, and that in September 1823 [104] Amos and his brother Nathan entered into an agreement to effect a partition of the estate in a particular way.

Amos Bake made his will dated September 1823, and thereby, after referring to his title to the property in question, and to his agreement with his brother to effect a partition, he confirmed the said agreement, and devised the estate to two trustees, in trust to carry the agreement into effect, and to execute conveyances for conveying to his brother, his heirs and assigns, the part agreed to be taken by him, and to take conveyances of the part agreed to be taken by the testator, "which said hereditaments so conveyed and assured unto his trustees; and in the meantime his equity therein he gave, devised, and bequeathed, together with all and whatsoever his real and personal estate," unto his said trustees, upon trust to let his said real estates, and receive the

rents thereof, and thereout to pay his debts, and to invest the residue; and out of the rents, dividends, &c., of his real and personal estate to pay his wife an annuity of £20 half-yearly for life, and then to pay the residue towards the maintenance, &c., of his children; and when and so soon as his youngest child should attain twenty-one, upon trust to divide, convey, and assure the trust premises (subject to his wife's annuity) amongst his children then living, and if they should all die under twenty-one without issue, then to convey to his right heirs, augmenting his widow's annuity to £30 a year.

The testator had other freeholds. He died on the 24th day of September 1823; and in April 1824 a deed for the purpose of carrying the agreement for partition into execution, was executed between Nathan Bake and his wife of the first part, the trustees of the will of Amos of the second part, Mary the widow of Amos of the third part, and a trustee for the purposes of the deed of the [105] fourth part, and thereby, certain parts of the estate were conveyed to Nathan Bake, and the remainder were conveyed to the trustees of the will of Amos and Mary, and it was agreed that the monies, by the will given to Mary, the widow, should be charged only on the part of the estate conveyed to the trustees of the will of Amos, and for the nominal consideration therein, Mary the widow released the portion allotted to Nathan, "of and from the several annuities of £20 and £30, provided or intended to be provided for her, in and by the will of Amos Bake, and all arrears thereof, and of and from all dower, right and title to dower and thirds, free bench, and other estate, &c., of her Mary Bake."

Mary Bake, the widow, married John Wray on the 20th of April 1826.

It appeared that for five years after the testator's death, his widow received from the trustees the annuity of £20 a year. There was conflicting evidence as to the knowledge of the widow of her rights, and as to her intention to elect; the trustees affirming that she was fully informed of the nature and terms of the testator's will, and was fully aware and cognisant of her right to dower out of the testator's freehold estates previous to receiving any annuity; and on the other hand, Mary the widow deposed, that she acted under the guidance of the trustees; and that when she received the annuity, she was not aware that she was entitled to make any election, or that by accepting the annuity she would relinquish any claim to dower; that she had never been made acquainted that she had any right to dower, and that, though she joined in the deed for the purpose of releasing her dower in part of the real estates, she was not aware of the nature of dower, but signed the deed at the request of the trustees.

[106] The Master found that the widow was entitled to dower out of one undivided moiety of that part of the hereditaments conveyed to the trustees of the husband's will, and he submitted whether she was not in equity, if not at law, entitled to one-third of the other undivided moiety during her life in lieu of her dower in the part conveyed to Nathan Bake; and that she was bound to elect to take the annuity or dower; and the Master was of opinion, that under the circumstances she ought not to be considered as having elected.

No exceptions were taken to the report, and the cause now came on for further directions.

Mr. Kindersley and Mr. G. Y. Robson, for the Plaintiff, a mortgage creditor, contended, first, that under the will of the testator, the widow was bound to elect between her dower and the provision made for her by the will, as the provisions made for her by the will were inconsistent with the assertion by the widow of her right to dower. *Roadley v. Dixon* (3 Russ. 192), *Villa Real v. Galway* (1 B. C. C. 292, n., and Ambler, 682), *Miall v. Brain* (4 Mad. 119), *Birmingham v. Kirwan* (2 Sch. & Lef. 453), for that the trustees alone were to convey, and the portion of the estate held by the testator with his brother was comprised in the general devise.

Secondly, they contended, that she had elected to take under the will. On this they cited *Brice v. Brice* (2 Molloy, 21), and argued that the mortgagee would be prejudiced, if the widow were not held to have acquiesced and elected.

Thirdly, they contended, that if the Plaintiff was wrong on the second point, then that the widow was [107] not entitled to dower out of the whole moiety of the hereditaments allotted to the trustees of the will, but out of a moiety only; for though, by the deed of April 1824, the widow gave up her right over the portion allotted to the

other tenant in common, yet she acquired no new rights over the remaining moiety, but retained her right to dower out of the moiety of that moiety only.

Mr. George Turner and Mr. Bloxam, *contra*, cited *Rumbold v. Rumbold* (3 Ves. 65).

Mr. Pemberton and Mr. Atkinson, for trustees.

Mr. Stuart, for a purchaser.

THE MASTER OF THE ROLLS considered that the widow's claim for dower was inconsistent with the provisions contained in the testator's will, but that under the circumstances he could not hold that she had elected. (And see *Dowson v. Bell*, 1 Keen, 761.)

The widow by her counsel having elected to take against the will,

THE MASTER OF THE ROLLS said, I should have thought that some more direct authority on the remaining point might have been found. I will not, therefore, decide until I have looked at the authorities.

Before the execution of the deed of April 1824, the widow was entitled to dower out of the undivided moiety of the whole estate. By the partition deed in which she occurred, she expressly released her from [106] her annuity and any right of dower, the moiety allotted to the other tenant in common, but no proviso was made in lieu thereof. It is clear that there was a substitution made of an entirety of a moiety for the undivided moiety of the entirety of the estate, and the question is, whether the widow was not, after the execution of the deed, entitled to the same rights against the entire moiety which, by means of the arrangement, the trustees obtained, as she previously had against the undivided moiety of the whole.

May 5. THE MASTER OF THE ROLLS [Lord Langdale]. In the year 1823 Amos Bake and Nathan Bake were entitled to a certain estate as tenants in common in fee. The share of Amos was subject to the dower of his wife, and the whole estate was subject to a mortgage in fee for securing to Thomas Shaw Banscroft Reade the payment of £4000 and interest.

In September of the same year Amos and Nathan agreed to divide the estate between them; a partition seems to have been their only object. Amos made a will, whereby he directed his trustees to carry the agreement into effect; and then devised his real estates to trustees on various trusts, amongst which was a trust to pay to his wife an annuity of £20, in an event to be increased to £30 a year.

Amos soon afterwards died, and on the 20th of April 1824 a deed was executed between Nathan Bake and Elizabeth, his wife, of the first part; Joseph Spence and William Spence, the trustees of the will of Amos, of the second part; Mary Bake, the widow of Amos, of the third part; and Edward Spence, a trustee for the purpose of the deed, of the fourth part. The sole object [109] of this deed appears to have been, to carry into effect the agreement for a partition which had been entered into by Amos and Nathan in the lifetime of Amos, and to apportion the charges, Nathan, for himself, and his wife, covenanted that they would levy a fine of the moiety conveyed to the trustees of the will of Amos, with a view to discharge the same from the dower of Elizabeth, the wife of Nathan; and it being agreed, that the annuities given to Mary by the will of Amos should be exclusively charged on the moiety conveyed to the trustees of the will of Amos, Mary, the widow, for a nominal consideration, released Nathan, and the share or moiety conveyed to him, from the annuities, and from all dower, right, and title of dower, and other estate of her the same Mary, of, in, to, and out of the same premises.

Being of opinion that Mary Bake the widow, who is now Mary Wray, was entitled to dower out of her husband's estate, and bound to elect between her dower and the annuities given to her by her husband's will, and her counsel having in Court elected to take her dower, a question remains, whether she is entitled to dower out of the moiety conveyed to the trustees of her late husband's will, or out of one half only of that moiety.

The estate in severalty, which is acquired by the partition, if within the description, may pass by the words intended to apply to an undivided share.

I have found no case in which the point now raised has been decided. In the case of *Sutton v. Rolfe* (3 Lev. 84) it was contended that the widow of a tenant in common was not entitled to sue dower against the other tenant [110] in common before partition, and the contrary was decided. The argument is now that the widow is not

entitled to dower out of the whole of her husband's share after partition; but I own that I see no good reason for it. There was clearly no intention in any way to alter any right which the widow had to dower out of the moiety allotted to her husband's estate; and it appears to me, that, for this purpose, the husband must be considered to have had an estate such as to entitle his widow to dower in the divided share, which, on the partition, was allotted to his trustees in substitution for the undivided share to which he was previously entitled.

In the case of *Webb v. Temple* (1 Freeman, 542), it was adjudged that a will was not revoked by a partition, because there was no intent to revoke, nor any material alteration of the estate, for before the partition the deviser had a third part in the manor, and after the partition he had a third part of the manor.

[110] *SIDEBOTHAM v. BARRINGTON. May 6, 1841.*

[For subsequent proceedings, see 5 Beav. 261. See *Fraser v. Wood*, 1845, 8 Beav. 342.]

Assignees of a bankrupt agreed to sell a part of his estate, and filed a bill for specific performance. It turned out, that the estate was vested in an assignee under a previous insolvency. After the Master had made his report, upon a reference as to title, the assignee in insolvency offered to concur in the sale. Held, that a good title could be made.

This case is reported, 3 Beavan, p. 524.

The cause now came on again for further directions, and on a petition stating that the assignee under the insolvency was willing to concur in a conveyance to the [111] Defendant; and praying that on the Plaintiff's procuring the assignee under the insolvency to join in the conveyance to the Defendant, which the Plaintiff undertook to do, the Defendant might be ordered to perform his agreement, or that it might be referred back to the Master to enquire whether a good title could now be made.

Mr. Pemberton and Mr. Teed, for the Plaintiff, cited *Paton v. Rogers* (6 Mad. 256), where it was held, that "If on a bill for specific performance by the vendor, a good title can be made before or when the cause comes on for further directions, a specific performance will be decreed;" and *Esdaile v. Stephenson* (6 Mad. 367), where Sir J. Leach observed, "That if the Master should report against the title, and at the hearing upon further directions, the vendor had cured the defect, the Court would then compel the purchaser to take the title, although it would not suspend the contract, with a view to a future proceeding to perfect the title; that if the fact, whether the vendor could at the hearing cure the defect, were in question, it must be then sent back to the Master to review his report, with the additional circumstances." So in *Egerton v. Jones* (1 Russ. & Myl. 694; and 3 Sim. 392), where an exception to a report in favour of the title having, on argument, been allowed, leave was given to the Plaintiff, some time afterwards, to go again before the Master, for the purpose of bringing evidence to shew, that the objection which the Court had sustained was in the circumstances immaterial; they also cited *Portman v. Mill* (1 Russ. & Myl. 696; and see *Dalby v. Pullen*, 1 Russ. & Myl. 296; and *Andrews v. Andrews*, 3 Sim. 390).

[112] Mr. Kindersley, *contra*. The Plaintiff is not entitled to any further indulgence, and this bill ought now to be dismissed. The whole controversy between the parties has been, from the beginning, whether the assignees under the bankruptcy could make a good title. That was the question raised by the pleadings, and discussed in the Master's office and on the exceptions; and it is now asked, not that the assignee under the insolvency may execute the contract, but that a further reference may be made to the Master. The general rule is, that a case must stand on the circumstances existing at the time of filing of the bill (*Byrne v. Byrne*, 1 Drury & W. 71, and *Connor & L.* 189); the question of specific performance is a deviation from the rule, and if a party can make a good title at the hearing on further directions, the Court has compelled a purchaser to take it: but the Court has frequently regretted this deviation. Cases have certainly occurred where the only question has been whether a party will join in the conveyance, and it being found, on further

directions, that he will join, the Court has decreed a specific performance. But in *Lechmere v. Brasier* (2 J. & W. 287, and see *Magennis v. Fallon*, 2 Molloy, 561; and *Chamberlain v. Lee*, 10 Simons, 444), Lord Eldon observes on this practice, "I must say, that I will not extend the rule, which the Court has adopted, of compelling a purchaser to take the estate where a title is not made till after the contract, to any case to which it has not already been applied. The rule has in many instances been productive of great hardship." If then the Court will not extend the rule, has any such a case as the present ever occurred? This is not a case in which, if the insolvent assignee by agreement joins, the title will be perfect, for he can only sell in the form prescribed by the Act; *Mather v. Friedman* (9 Sim. 352). Nor [113] is it a case in which the points have been overlooked by the Master; but this very point has been the sole subject of discussion. This is not a case similar to that of a dowress who agrees to release her right to dower; here the assignees have duties to perform under the Insolvent Act, over which this Court has no jurisdiction. In any event there must be an application to the Insolvent Court, which may be opposed, and this will be inconsistent with what is said in *Esdaile v. Stephenson*, that "the Court will not suspend," &c.

After all this litigation on a single point, it is asked that the case may stand over, and not that the assignee may execute, but that the Plaintiff may go before another jurisdiction and see if he can patch up the defect. The petition ought, therefore, to be dismissed with costs, and the cause immediately disposed of on further directions.

Mr. Teed, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. The only doubt I have in this case is about the form of the order. I certainly think the Plaintiff is entitled to relief here; but as to the costs of the suit, that raises another and quite a distinct consideration.

It appears, under the circumstances stated, that now the Plaintiff can probably make a good title, but I must hesitate before I declare that at present.

The question discussed before me on a former occasion, was whether the want of the concurrence of the assignee under the insolvency was an objection to the title or to the conveyance. I considered it to be, and [114] I think it now, an objection to the title; but the cause coming on for further directions, it is represented to me that the Plaintiff can now make a good title by the concurrence of the assignee. It is however suggested that something more than the concurrence of the assignee in the insolvency is required; and the question is, whether I ought to assume in this case that the assignee in the insolvency can and will do his duty. If the objection was, that there was not proof of his offering to concur, I would direct the matter to stand over for further enquiry upon it. But the parties have admitted before the Master that there are assets, arising from the purchase-money, sufficient to pay all the debts of the insolvency; and if it be clear that the assignee has offered to join in the conveyance, I think I should be justified in assuming that he will do his duty when he concurs in the conveyance; and that if he cannot do it of his own authority, he will procure any further authority which may be required. I ought, however, to have his undertaking not only that it shall be done, but that it shall be done within a limited time. If there be any question whether his joining in the conveyance, if properly made, would, together with the other circumstances, make a good title, then I think the second, and not the first part of the prayer, ought now to be granted; namely, the reference to the Master. If the parties desire to have this matter further investigated, then I will refer it to the Master, to enquire whether the fact of the assignee of the insolvency joining in the conveyance, together with the other facts of the case, will enable the vendor to make a good title.

[115] SAUNDERS v. VAUTIER. May 7, 1841.

[S. C. affirmed on appeal, Cr. & Ph. 240; 41 E. R. 482; 10 L. J. Ch. 354. See *Lister v. Bradley*, 1841, 1 Hare, 14; *Leeming v. Sherratt*, 1842, 2 Hare, 20; *Festing v. Allen*, 1842, 5 Hare, 578; *Curtis v. Lukin*, 1842, 5 Beav. 155; *Pearson v. Dolman*, 1866, L. R. 3 Eq. 321; *Hilton v. Hilton*, 1872, L. R. 14 Eq. 475; *Weatherall v. Thornburgh*, 1878, 8 Ch. D. 269; *In re Wrey*, 1885, 30 Ch. D. 510; *In re Bevan's Trusts*, 1887, 34 Ch. D. 718; *In re Jobson*, 1889, 44 Ch. D. 160; *Wharton v. Madernan* [1895], A. C. 192.]

When a legacy is directed to accumulate for a certain period, or where the payment is postponed, the legatee, if he has an absolute indefeasible interest, is not bound to wait until the expiration of that period, but may require payment the moment he is competent to give a valid discharge.

The testator Richard Wright, by his will, "gave and bequeathed to his executors and trustees thereafter named all the East India stock which should be standing in his name at the time of his death, upon trust to accumulate the interest and dividends which should accrue due thereon, until Daniel Wright Vautier should attain his age of twenty-five years, and then to pay or transfer the principal of such East India stock, together with such accumulated interest and dividends, unto the said Daniel Wright Vautier, his executors, administrators, and assigns absolutely." And the testator devised and bequeathed his residuary real, and personal estate to the persons in his will named.

The sum of £2000 East India stock was standing in the testator's name at his death in 1832. A suit was afterwards instituted for the administration of the testator's estate; and Daniel Wright Vautier being an infant, a reference in the cause was made to the Master, to approve of a sum to be allowed for his maintenance. The Master reported his fortune to consist of the East India stock in question, and reported that £100 a year ought to be allowed for his maintenance out of the dividends thereof.

Sir C. C. Pepys, who was then Master of the Rolls, by an order dated the 25th of July 1835, confirmed the report, and ordered the payment of £100 a year out of the dividends of the East India stock, for the maintenance of the infant Daniel Wright Vautier.

[116] Daniel Wright Vautier attained twenty-one in March 1841, and presented a petition to have a transfer of the fund to him.

Mr. Pemberton argued that the Petitioner had a vested interest, and that as the accumulation and postponement of payment was for his benefit alone, he might waive it and call for an immediate transfer of the fund; *Josselyn v. Josselyn* (9 Sim. 63).

THE MASTER OF THE ROLLS. I think that principle has been repeatedly acted upon; and where a legacy is directed to accumulate for a certain period, or where the payment is postponed, the legatee, if he has an absolute indefeasible interest in the legacy, is not bound to wait until the expiration of that period, but may require payment the moment he is competent to give a valid discharge.

Mr. Kindersley, for the residuary legatees, most of whom were infants, was proceeding to argue that the Petitioner did not take a vested interest until he attained twenty-five, but

THE MASTER OF THE ROLLS [Lord Langdale] observed that the contrary must have been decided or assumed when the order for maintenance had been made by the present Lord Chancellor. He did not at present see any reason to doubt the propriety of that order, but the argument must assume it to be erroneous, and call upon him to decide in a different manner, and he thought that it would be inconvenient to argue again in this Court a point on which the Judge of the Court of Rehearing had probably already expressed an opinion.

[117] The cause stood over, with liberty to apply to the Lord Chancellor, when the Lord Chancellor held the legacy vested, and ordered the transfer. (See 1 Cr. & Ph. 240.)

[117] CURRIE v. GOULD. May 7, 1841.

[S. C. 10 L. J. Ch. 304.]

Bequest of £500 to A., and in case of her death, either before or after the testator, to devolve to her child or children, or in the event of their being also dead at her decease, to B. There were three children, one of whom only survived. Held, that he was entitled to the whole fund.

The testator bequeathed in the following terms:—"To my sister Ann, the wife of Thomas Currie, near Edinburgh (his exact place of residence may be learned from my brother Henry of that place), the sum of £500 sterling, which sum, in case of her death, either before or after me, is to devolve to her child or children, or in the event of their being also dead at her decease, the balance, after paying her husband £50, to become the property of my daughter Ann," meaning the Defendant Ann Burrell.

The testator died in 1791.

Ann Currie had three children, Jane, William, and James.

Jane died in 1830, William in 1836, and their mother Ann Currie died in 1837. James was, therefore, the only child who survived her; he afterwards died in 1840.

The legacy being in Court, the legal personal representative of James presented a petition praying payment [118] of the whole sum, on the ground that James was the only child who survived Ann Currie.

The petition came on upon a former day, when the Master of the Rolls directed it to stand over, in order that the personal representatives of the other children might appear.

Mr. Moore, for the Petitioner, now contended, that James Currie, as the surviving child, was, by the terms of the bequest, entitled to the whole interest; or if not, then that the gift was to the children of Ann Currie as joint-tenants, and that James Currie had become entitled thereto by survivorship. He cited *Campbell v. Campbell* (4 Bro. C. C. 15).

Mr. Turner, for the representatives of William Currie, *contra*. To constitute a joint tenancy, the shares must all vest at the same time; here they vested in the children from time to time as they were born, and they must, therefore, have taken as tenants in common; *Woodgate v. Unwin* (4 Sim. 129, Co. Litt. 188 a.). He argued also that this was the common case of a gift to A. for life, with remainder to her children, which would let in all her children to take vested interests at their births; and that the gift over, being in case of all the children being dead at the decease of Ann Currie, had never taken effect; that consequently the previous vested gifts to the several children remained unaffected, and the representatives of each child were severally entitled to a third of the fund. He cited *Sturgess v. Pearson* (4 Mad. 411), and *Harrison v. Foreman* (5 Ves. 207).

Mr. Moore, in reply.

[119] THE MASTER OF THE ROLLS considered that the child living at the death of Ann Currie was alone entitled, and he directed payment to the Petitioner accordingly.

[119] BALLS v. MARGRAVE. May 8, 1841.

A bill of discovery was filed by the assignee of the lessor against the assignee of the lessee in aid of an action at law on the covenants in the lease. The latter had the lease and assignment in his possession, but stated that he held the property by way of security, and he objected to produce them in the absence of the party entitled to the equity of redemption. Held, that he was bound to produce them for the Plaintiff's inspection.

This case is reported *ante*, 3 Beavan, 284, 448. The Defendant put in his answer to the amended bill, and thereby admitted he had in his possession the lease from Cheek to Rowland, signed by Cheek alone, and an assignment by way of mortgage from Lady Daniel to the Plaintiff's father, in trust to secure certain monies, and, in

default of payment, in trust to sell. The Defendant, however, refused to produce them, on the ground that the property was vested in him, upon trust and by way of security, and that William Chinn, as executor of Lady Daniel, had a material interest in the lease, which he said might, and in all probability would, be greatly injured or prejudiced by the productions of the documents in question.

It was now moved, on the part of the Plaintiff, that the Defendant might produce these documents.

Mr. Pemberton and Mr. J. H. Taylor, in support of the motion.

Mr. Kindersley and Mr. Evans, *contra*, contended that the production could not be had in the absence of Chinn. They cited *Lambert v. Rogers* (2 Mer. 489).

[120] THE MASTER OF THE ROLLS [Lord Langdale]. The Plaintiff is, no doubt, entitled to the production of both these documents. (See *Hercy v. Ferrers*, 10 B. & C. p. 96.)

[120] STRICKLAND v. STRICKLAND. March 8, 1841.

[Affirmed, Cr. & Ph. 151; 41 E. R. 447.]

Default of six days in obtaining and serving an order for commission, Held, not a want of due diligence as to entitle a Defendant to an order to dismiss under the 17th Order, and a motion for that object was refused without costs.

This was a motion to dismiss a bill for want of prosecution, under the amended 17th General Order of April 1828 (Ordines Can. 12), by which it is ordered: "That where the Plaintiff files a replication without having been served with a notice of motion to dismiss the bill for want of prosecution, he shall serve the *subpoena* to rejoin, and in case he requires a commission to examine witnesses, shall obtain and serve an order for such commission within three weeks from the filing of the replication; and such commission shall, at the latest, be returnable on the first return of the second term then next following; and the Plaintiff shall give his rules to produce witnesses and pass publication at the latest in the same term, and shall set down the cause for hearing, and duly serve the *subpoena* to hear judgment, returnable in the succeeding term; and if the Plaintiff shall make default herein, then, upon application by the Defendant upon notice of motion, the Plaintiff's bill shall stand dismissed of Court, with costs, unless the Court shall make special order to the contrary."

On the 27th of January the Plaintiff filed a replication, without having been served with a notice of motion to dismiss.

[121] On the 17th of February the three weeks mentioned in the order expired. On the 20th of February the Plaintiff served a *subpoena* to rejoin and obtain, *ex parte*, a commission to examine witnesses; and

On the 23d of February he served the order for the commission.

The Defendant thereupon on the 1st of March gave notice to dismiss for want of prosecution.

Mr. L. Shadwell, in support of the motion. The Plaintiff requires a commission, and therefore the case falls within the 17th Order. He cannot now abandon the order for a commission; *Rayson v. Lees* (1 Keen, 14). The Plaintiff has failed in serving his *subpoena* to rejoin, and obtain and serve the order for a commission within the three weeks after the replication, according to the exigency of the 17th Order, and the Defendant is therefore entitled to have the bill dismissed, with costs. The case is like *White v. Smith* (1 Keen, 381); there the replication was filed on the 4th of November, the three weeks expired on the 25th, and nothing was done pursuant to the order; the Court considered, that as the case did not fall within the exception of *Williams v. Janaway* (6 Sim. 77), the Defendant was entitled, under the 17th Order, to move to dismiss. There has been no delay on the part of the Defendant to deprive him of the benefit of the order, as in *Fernes v. Hutchinson* (1 Russ. & M. 22); and the Court will not relieve the Plaintiff from the consequences of his neglect to comply with the exigency of its order; *Walmsley v. Froude* (1 Russ. & M. 303); *Whalley v. Pepper* (8 Sim. 203).

[122] Mr. Bethell, *contra*. The Plaintiff has not been guilty of any culpable negligence; the only ground of complaint is, that he took a step three days too late.

The meaning of the words "if the Plaintiff shall make default herein," used in the 17th Order, is not if he make default in taking one of the steps, but if he make default in all. The *subpoena* to rejoin having been served before notice of the motion was given, and the cause being at issue, it is now competent for the Defendant to take all the subsequent steps: he therefore cannot move to dismiss, but must prosecute the suit himself; *Anon.* (5 Sim. 497). If the commission be not duly prosecuted, the Defendant may obtain one, and proceed under the 17th Order.

Mr. Shadwell, in reply, referred to *Carden v. Manning* (1 Keen, 380); *Earl Ferrers v. Shirley* (7 Sim. 484); *Smith v. Oliver* (3 Myl. & Cr. 165); *Crooke v. Trery* (3 Myl. & Cr. 168); *Padmore v. Bodfield* (1 Beavan, 367).

THE MASTER OF THE ROLLS [Lord Langdale]. The object of the 17th Order is to secure due diligence on the part of the Plaintiff, in the prosecution of his suit. The replication was, in this case, filed on the 27th of January; and it seems the Plaintiff required a commission; but of its necessity he did not for some time after give any intimation to the other parties. He did not comply with the terms of the 17th Order, because he did not serve the order for a commission within the three weeks; the Defendant could not, immediately upon the expiration of the three weeks, move to dismiss under the 17th Order; for though we may infer from the result [123] that the Plaintiff required a commission, yet that did not then appear; and consequently it did not appear that the case came within the 17th Order. The commission was obtained on the 20th, and not served until the 23d. A *subpoena* to rejoin has been served, and the cause is at issue; and this act of diligence is supposed to have the effect of giving the Defendant the right to dismiss the bill out of Court, as if there had been a total want of diligence. Unless the words of the order are so strong that it is not possible to escape them, I would not make such an order.

It may be made a question, whether, after the expiration of the three weeks, the Plaintiff could sue out a commission. He has, however, done it, and I am asked to consider it such a neglect of duty that I ought to order the bill to be dismissed.

The Defendant it is true is in no default in not giving notice sooner; because, until the order for the commission was served, he was not in a position to move to dismiss, either under the 17th Order or the old practice; but it does not appear to me that this motion can be sustained. As the Defendant came in consequence of the Plaintiff's failing to obtain the commission within the time, I must refuse the motion without costs. (Affirmed, Cr. & Ph. 151.)

On the 24th of March an application was made by the Plaintiff to discharge the *ex parte* order for commission, and for a new commission, which, after some opposition, was granted.

[124] WALLER v. PEDLINGTON. May 8, 1841.

Where a Defendant's title to dismiss is intercepted by a step taken by the Plaintiff between the notice of the motion and its being heard, the Plaintiff must pay the costs of the application.

A bill was filed against several Defendants, and amongst them against the Attorney-General; and it was now moved, on behalf of some of the Defendants, that the bill might be dismissed with costs for want of prosecution.

The dates of the several proceedings in the cause were as follows. The *subpoenas* were served in June 1840, and in December 1840 the Defendants, who now moved, filed their answers; but the Attorney-General's answer was not filed until the 26th of February 1841, and there were still some Defendants who had not answered the bill.

The Defendants gave notice of this motion on the 26th of April 1841; and on the 28th of the same month the Plaintiff obtained an order to amend his bill.

Mr. Pemberton, in support of the motion, after adverting to the great delay in getting in the other answers, asked, that if the order to amend prevented the dismissal of the bill, then that the Plaintiff might pay the costs of this application.

Mr. Stone, *contrâ*.

THE MASTER OF THE ROLLS [Lord Langdale]. Where a party, entitled to have

a bill dismissed as against him for want of prosecution, makes an application to this Court for that purpose, and is prevented [125] from obtaining the order, by some step taken by the Plaintiff after service of the notice of motion, the usual course is, to order the Plaintiff to pay the costs of the application. Here the Plaintiff can only excuse the great delay in the prosecution of the suit by shewing that he has used due diligence in getting in the answers of the other Defendants.(1) There has been considerable delay in getting in the answer of the Attorney-General; but even now, the cause cannot go on, in consequence of the answers of the other Defendants not having been put in. If, however, the Plaintiff could shew, that using due diligence he could not have got in the answers of the other Defendants, that would be an answer to this application.

The Court made no order on the motion, but ordered the Plaintiff to pay the costs of the application.

Reg. Lib. 1840, B. 621.

[126] NICKLIN v. PATTEN. May 8, 1841.

Where a Defendant, in contempt for want of answer, files it without paying or tendering the costs of the contempt, but which are afterwards accepted by the Plaintiff, the time to accept under the 4th Order.(1828) runs from the filing of the answer, and not from the acceptance of the costs.

The Defendant, who was in contempt for want of an answer, filed his answer on the 20th of February, without paying or tendering the costs of the contempt. The Plaintiff being about to move to take the answer off the file, the Defendant, on the 27th of February, paid the costs of the contempt, which were accepted by the Plaintiff.

On the 21st of April the Plaintiff took exceptions to the Defendant's answer for insufficiency, and referred them on the 4th of May.

Under the 4th General Order of April 1828 (Ordines Can. 6), the Plaintiff is to be allowed two months to file exceptions, and which, in this case, if reckoned from the filing of the answer, expired on the 18th of April; but, if reckoned from the time of the acceptance of the costs, had not expired at the time when the Plaintiff delivered the exceptions.

Mr. Pemberton and Mr. Heathfield now moved to discharge the order referring the exceptions, on the ground that time ran from filing the answer, and not from the time of clearing the contempt; that by force of the above order the answer became sufficient on the 18th of April. They cited *Sidgier v. Tyte* (11 Ves. 202).

Mr. Girdlestone and Mr. Elmsley, *contra*, contended that as the Defendant had no right to file his answer [127] until he had cleared his contempt, time was to be computed from the acceptance of costs, for before that time it was competent to the Plaintiff to move to have the answer taken off the file for irregularity.

THE MASTER OF THE ROLLS [Lord Langdale]. I must be governed by the 4th Order. I cannot introduce a new term into it, and say that time is to be reckoned not from the filing of the answer, but from the acceptance of costs. The Plaintiff might have moved to take the answer off the file, but instead of this he accepted the costs and waived the irregularity: seven days were thereby lost. If the Plaintiff found that he had not time to file his exceptions, he ought to have applied to the Court to be at liberty to file them, but he has thought proper to file them without regard to the terms of the General Order. The motion must be granted with costs.

(1) NOTE.—See the following General Orders: 13th and 16th of April 1828, and the 26th of December 1833, Ordines Can. pages 8, 10, and 52.

[127] PEARCE v. GRAY. May 28, 31, 1841.

Though a Defendant may put in a further answer before the certificate of the Master as to the insufficiency of his former answer has been filed, yet the Plaintiff cannot refer the second answer until after the filing of the certificate.

A party who has served and proceeded on an irregular order of course is not at liberty to abandon it, upon tender to his adversary of the costs. The order must be considered as a valid and subsisting order, until it is disposed of in some regular course, and when costs are due to a party, the amount must be ascertained in a regular course.

Where an irregular order has been obtained, no subsequent order to the same effect can be had until the former has been discharged.

The Plaintiff took exceptions to the Defendant's answer, some of which the Master on the 23d of April allowed: on the following day the Defendant filed a further answer.

[128] On the 28th of April, and before the Master's certificate had been filed, the Plaintiff obtained an order of course to refer the bill, answer, exceptions, and further answer. This order was served on the Defendant on the following day, and a warrant to proceed before the Master was taken out and served. On the 4th of May the parties attended before the Master, when an objection was raised that the certificate had not been filed, and which was admitted to be good. On the 5th of April the Defendant gave notice of motion to discharge the order of the 28th of April for irregularity, and the Plaintiff on the same day filed the certificate, and gave notice to the Defendant that he abandoned the order of the 28th of April, and he tendered at first 6s. 8d. and afterwards £1, 6s. 8d. for costs.

On the 5th of May the Plaintiff took out another order of reference similar to that of the 28th of April, and he served a warrant to proceed thereon before the Master on the 8th; and he also gave notice to the Defendant, that if he persevered in his notice of the 5th of May he would ask for costs. On the 8th of May there was an attendance *ex parte* before the Master, and exceptions were allowed on the order of reference of the 5th of May.

On the 10th of May an order was obtained by the Plaintiff for leave to amend his bill, and that the Defendant might answer the amendments and exceptions together.

Two motions were now made on behalf of the Defendant: the first to discharge the order of the 28th of April and the second to discharge the orders of the 5th and 10th of May.

[129] Mr. Bethell, for the Plaintiff.

Mr. Pemberton and Mr. Dunn, for the Defendant.

See Beames's Orders, 292, *Wynne v. Jackson* (2 S. & S. 226), *Rushton v. Troughton* (3 Sim. 33), *Frisby v. Stafford* (7 Sim. 365), *Ingham v. Ingham* (9 Sim. 363; 2 Dan. Pr. 317).

May 31. THE MASTER OF THE ROLLS [Lord Langdale]. It is not denied that the order of the 28th of April was inadvertently and irregularly obtained, before the Master's certificate was filed; but it was contended that the Plaintiff had a right to abandon the order, and that upon payment of costs properly incurred by the Defendant the order thus abandoned might be considered as not having been made; and that in this case a proper sum was tendered to the Defendant for his costs. The argument appears to me to be unfounded on both points. A party who has obtained an order of course, and served and proceeded upon it, is not at liberty to abandon it upon his own terms. The order must be considered as a valid and subsisting order, until it is disposed of in some regular course; and when costs are due to a party, the amount must be ascertained in a regular course.

The Plaintiff, I have no doubt, made the mistake through mere inadvertence; but the mistake could, I think, be corrected only by discharging the order of the 28th of April: and I am, therefore, of opinion, that the first of the motions now before me must be granted. And as it further appears to me, that until the order [130] of the 28th of April was discharged, no second order to the same effect could regularly be obtained, I am of opinion, that the order of the 5th of May, the proceedings under it,

and the order of the 10th of May, are all irregular; and the Defendant never having acquiesced in it, was not bound to attend before the Master on the 8th of May.

Motions granted with costs.

[130] *HILTON v. LORD GRANVILLE*. Jan. 24, May 24, 26, June 8, 9, 14, 1841.

[S. C. Cr. & Ph. 283; 41 E. R. 498; 10 L. J. Ch. 398; and at law, 5 Q. B. Rep. 701. For subsequent proceedings, see 5 Beav. 263. See *Hall v. Byron*, 1877, 4 Ch. D. 676.]

Where a Plaintiff, upon an application for an *ex parte* injunction, suppresses material facts, the injunction will be dissolved on that ground alone; and the Plaintiff will not be allowed, on a motion to dissolve, to maintain it on the merits then disclosed. Where the rights of the Plaintiff and the Defendant are legal, the Plaintiff, in asking for an injunction to protect him from a violation of his alleged legal rights, ought to shew that the right has been established, or that, having had no means of establishing it but the right being *prima facie* well founded, the interference of this Court is necessary, to prevent that species and extent of mischief which this Court calls irremediable, before the right can be established by legal proceeding.

Whether a custom for a lord to prosecute mining operations under the soil, so as to destroy the buildings of the copyholders, without making any compensation is a valid custom. *Quære*.

The Plaintiff was a copyholder, holding two houses in the manor of Newcastle-under-Lyne. The Defendant was the lessee under the Crown of the mines of coal and ironstone in that manor. Considerable damage having been done to the neighbouring houses, by means of the mining operations carried on in the vicinity, and great apprehension being entertained for the safety of those belonging to the Plaintiff, he filed a bill for an injunction to restrain the Defendant from so working his mines as to injure or endanger his house. The Plaintiff had, in January 1841, applied *ex parte* to the Master of the Rolls for a special injunction, which he obtained, and a motion was now made to dissolve it. The facts of the case are fully stated in 1 Craig & Phillips, 283, and the judgment of the Master of the Rolls, *post*, p. 136.

[131] Mr. Pemberton, Mr. George Turner, and Mr. Purvis, without going into the merits, insisted that the injunction ought to be dissolved; on the ground that the Plaintiff, in applying *ex parte*, had omitted material facts, and that he had not come with promptness, and immediately upon his apprehending an injunction was necessary to prevent an alleged irremediable injury.

Mr. Kindersley, Mr. Bethell, and Mr. Hardy, *contra*, contended that there was no suppression; secondly, that under the peculiar circumstances, the Plaintiff had come with due diligence; and, thirdly, that inasmuch as if the technical objection raised by the Defendant prevailed, it would become necessary again to discuss the merits on another motion for an injunction, the more convenient course would be to enter at once into the merits, and then for the Court to deal with the objection as to suppression upon the consideration of costs.

Mr. Pemberton, in reply, insisted on his right to have the case decided on the technical points raised.

THE MASTER OF THE ROLLS [Lord Langdale]. I have some regret in deciding this case on such narrow grounds. Whatever may be the value of the property, the Plaintiff is entitled to the utmost protection of the law; but he must bring forward his case consistently with the rules of the Court, one of which is, that an *ex parte* injunction cannot be maintained, if on the *ex parte* application any material facts have been suppressed. Granting *ex parte* injunctions is always a very arbitrary proceeding; it is making an order against a party in his absence; but it is most important that this jurisdiction of the Court should be maintained, in order to prevent the commission of irremediable mischief.

[132] When the application was made for this injunction, it appeared from the Plaintiff's own statement, that he was acquainted with the damage in March; and the application for the injunction not having been made until May, I should, accord-

ing to a practice which I have constantly acted on, have refused to grant the injunction *ex parte*; and I should have appointed an early day to hear the case in the presence of both parties. This objection was, however, met by a statement, that it was only within seven days that the Plaintiff had been made acquainted with the damage which threatened his house, and that he had, in the meantime, trusted that the mining operations would have been so carried on as not to injure it.

The only question is, whether, under the circumstances, and having regard to the facts now newly stated, the Plaintiff and his advisers were justified in trusting in that way: and on hearing the affidavits it is impossible to say they ought, or to doubt that Lord Granville and his agent intended proceeding towards the Plaintiff's house. My opinion on this motion is, that if I had known the facts, now brought forward for the first time, I should not have granted the injunction *ex parte*. The consequence is, that this, as an *ex parte* injunction, cannot be maintained, and it must be dissolved with costs. I give no opinion on the merits; it is open for the Plaintiff to move on notice for an injunction, and then the merits will have to be considered.

June 8. The Plaintiff now moved for a special injunction.

Mr. Kindersley, Mr. Bethell, and Mr. Hardy, for the Plaintiff. [133] The right insisted on by the Defendant cannot be maintained; it shocks common sense; for not only does the Defendant claim the right of destroying the Plaintiff's houses by his mining operations, but he insists that he has a right to undermine and engulf all the buildings on the manor, including the parish church, the infirmary, and the extensive potteries, without even making the slightest compensation for the damage. It appears from the affidavits, that to such an extent has the injury been carried, that 77 out of 150 houses have already been damaged. This claim on the part of the Defendant is very different from a reasonable custom to sink a shaft on the copyhold land to enable the lord to obtain the material.

The way in which the Defendant puts his case does not, however, amount to a custom; he says, that for a series of years he, and the former lessees, have been accustomed to damage houses and buildings on the manor, without making any compensation. The times, the places, and the names of the parties injured, are not stated. This does not amount to a custom. It is true occasional and accidental damage may have accrued, but here the lessee boldly claims the right to effect a premeditated intention of wholly destroying the Plaintiff's copyhold estate.

To establish a valid custom there must be, first, an immemorial usage; and secondly, it must be good in point of law. That is, it must be defined, certain, and reasonable. If such be the requisites, the right claimed is bad, and void in law, and no usage could make it good. Such a custom might utterly annihilate the property of the tenant, and would be inconsistent with the estate granted by the lord. In *Bradburn v. Wilks* (Willes's Rep. 360) a [134] custom was claimed by the lord, when he had sunk pits on the freshhold lands, part of the manor, to cast the rubbish, &c., on the customary land, near such pits, there to remain. The custom was held void as unreasonable, the Court observing, "The true objections to the custom are, that it would be uncertain and likewise unreasonable, as it may deprive the tenant of the whole benefit of the land; and it cannot be presumed, that the tenant, at first, would come into such an agreement." This decision was affirmed in the Exchequer Chamber (2 Strange, 1224). In *Badger v. Ford* (3 Barn. & Ald. 153) it was held that a custom for the lord to grant leases of the waste of the manor, without restriction, was bad in point of law. The observation of Lord Tenterden strongly applies to the present case, "I think it is too much to suppose a reservation of a power by the lord, at the time of the original grant, the effect of which would be to enable him to annihilate the right of common altogether. Such a custom cannot exist." The same point was held in *Arlett v. Ellis* (7 B. & C. 346), where a similar sort of alleged custom was held bad, "because it would go to the destruction of the rights of the common altogether." The rights are wholly inconsistent; and although one custom may qualify another, it cannot entirely subvert it. Supposing the Defendant, by custom, to have a right to the minerals, he is bound to work the mines in a reasonable manner, as seems to have been formerly done, and leave proper support for the surface. In *Harris v. Ryding* (5 M. & W. 60) there was a grant of the surface in fee, with a reservation of the mines, with liberty of ingress, and to dig and sink shafts.

It was held that the grantor was not entitled to take all the mines ; but only so much as he could get, leaving a reasonable support for the surface.

[135] There is this further ground for equitable relief : the Defendant and his father have stood by and allowed the houses to be built by the copyholders ; so that if the lessee had the right contended for, the Plaintiff would be still entitled to the injunction. If a party build a house near the boundary, the Court would not permit his neighbour, after a lapse of years, so to deal with his own land, as to destroy the house of his neighbour.

The plea in Paddock's action (Cr. & Ph. 2881) admitted the liability to make a reasonable compensation to the tenant. If, then, the Defendant be liable to make compensation, he ought to be prevented committing an injury which is incapable of compensation. The right of the Defendant has never been established, and ought to be put in a train of investigation ; in the meantime, the Plaintiff ought to have his property protected from being thrown down by the Defendant's mining operations. They also cited Gilbert's Tenures, 327, 425.

Mr. Pemberton, Mr. George Turner, and Mr. Purvis, *contra*. The copyholder's rights are limited by the grant from the lord, in whom the freehold is vested. Where, by custom, the mines and the rights to work them are reserved, the buildings erected by the copyholders are subject to all the incidents to which the land itself is subject ; for the copyholders cannot, by erecting buildings on the land, infringe on the lord's right to get the minerals under it, or compel him to deviate from the line of his mining operations. By the general custom of copyhold tenures, if a tenant build on the copyhold land, it is waste ; unless it be sanctioned by the custom, or be authorised by the permission of the lord ; Comyn's Digest (Copyhold, 181, M. 3, Forfeiture), 1 Coke's Inst. 53 a. The [136] custom in this manor to grant leases of coal and iron is carried back so far as 10 Rich. 2. There is sufficient usage to support this right. There is nothing so unreasonable in the custom as to invalidate it in point of law. In *Bateson v. Green* (5 Term Rep. 411) a custom for the lord to dig clay pits, to an unlimited extent, where the herbage was insufficient for the tenants, and where four out of ten acres of the herbage had been destroyed, was supported ; and see *Clarkson v. Woodhouse* (5 Term Rep. 412, n.), *Folkard v. Hemmett* (5 Term Rep. 417, n.). If, as the Plaintiff contends, the Defendant is liable to make compensation, then such is the custom, and there his claim is at law, and not in equity, and there is no ground for an injunction.

The Court will consider the inconveniences on both sides in granting an injunction ; *Grey v. The Duke of Northumberland* (13 Ves. 236 ; and 17 Ves. 281). Here the lessee has expended more than £100,000 to enable him to work these mines. If they were stopped, it would be productive of the greatest injury to the Defendant, and 300 men would be put out of employ. On the other hand, the whole value of the Plaintiff's property is less than £200. If the Court were to restrain the works, and the lessee's rights were afterwards established, it would be impossible to set him right and afford him compensation for the damage he had sustained by the act of the Court. The Plaintiff is a person of humble circumstances, put forward by a combination of the other copyholders ; who, if they had been Plaintiffs, would, from their conduct, have been held by the Court disentitled to the injunction. The Plaintiff ought, therefore, to be in no better situation.

[137] Mr. Kindersley, in reply.

June 14. THE MASTER OF THE ROLLS [Lord Langdale]. The Plaintiff, being entitled to two copyhold houses in the manor of Newcastle-under-Lyne, prays for an injunction to restrain the Defendant, who is lessee of the mines of coal and ironstone within the same manor, from so working his mines as to injure or endanger the Plaintiff's houses.

The rights asserted on the part of the Plaintiff and of the Defendant are legal rights ; and the Plaintiff, asking for the assistance of a Court of Equity to protect him from a violation of his alleged legal right, ought to shew that the right has been established, or that, having had no means of establishing it, but the right being *prima facie* well founded, the interference of this Court is necessary, to prevent that species and extent of mischief, which this Court calls irremediable, before the right can be established by legal proceedings. In this case, it appears that the Plaintiff, personally, has not had any opportunity of establishing his right at law ; and, therefore, the

question is, what is the result of the evidence now adduced, as to the right which he claims, and as to the nature and extent of damage, with which he is threatened, if his claim of right appears to be well founded.

The Queen, in right of the Duchy of Lancaster, is lady of the manor; Crown leases of the mines of coal and ironstone within the manor, have been granted, distinctly from the manor itself, from an early period; and the lessees have, from time to time, obtained coal in considerable quantities, and some ironstone.

[138] The houses now belonging to the Plaintiff, together with many other houses, were built about the year 1797, in the immediate neighbourhood of several shafts and pits, which were then open; and two of the witnesses state their belief, that before the houses were built, the Cannell Row coal had been obtained from under that part of the field on which the houses now are.

At that time, the Defendant's father, the late Marquis of Stafford, was lessee of the mines. The Defendant became entitled to the lease in 1803; and renewed or additional leases have since been granted to him. The mines have been constantly worked, and there being houses on some parts of the surface, it is stated by William Jervis, that in working for coal under houses, certain supports were left to prevent injury to the houses; and that in working for coal under the open ground, as no damage to houses was apprehended, instructions were given to clear all out. In the progress of the works, however, damage was occasionally done, or was expected to be done, to buildings on the surface; and so early as 1801, some of the copyholders endeavoured to obtain enfranchisements, so that their estates might be discharged from the mines, the working of which, was, or was likely to be, injurious to buildings. The endeavour was not successful, and the mines continued to be worked. It appears from the evidence, that the coal and ironstone lie to some extent in alternate strata, the vein of ironstone being sometimes above and sometimes below a bed of coal; and sometimes between two veins, or beds of coal. And although the mines were principally worked for coal, ironstone in some though not in large quantities has, so far as the evidence goes, always been obtained. Mr. Forrester, the resident mining agent for the Defendant, had proposed to obtain ironstone for smelting about the [139] year 1813; an increased demand for coal prevented the proposal being carried into effect, at that time. Afterwards, in the year 1826, the working of the mines having, as it would seem, occasioned considerable damage to buildings, a memorial to the Defendant was presented by several copyholders who complained of the injury, and claimed a right to compensation; it does not appear that, at that time, any question was raised as to the Defendant's right to work the mines under houses; what was claimed was, that if in working the mines, damage was done to the houses, the Defendant should make compensation for such damage. He denied his liability, refused to make any compensation, and no attempt was then made to enforce the claim. About the year 1832 the ironstone began to be obtained for smelting; and it has ever since been obtained, on an extensive scale, and in much larger quantities than before. An attempt has been made to distinguish the Defendant's right to work the ironstone, from his right to work the coal; but, upon the evidence before me, there does not appear to be any difference. The Defendant being lessee of the mines of both minerals, appears to have as much right to get one as the other; and to be subject to no greater liability as to one, than he is as to the other.

In the progress of his extended operations as to the ironstone, and in the year 1839, the Defendant caused to be made a new level, which runs under and across three streets of the houses built about the year 1797. This level is about sixty-five yards below the surface; and the workings have been continued from it, under the houses. The Plaintiff's houses are at the distance of sixty-seven yards from the level; the Defendant's works have advanced from the level towards the Plaintiff's houses; and many houses, situated between the level and the Plaintiff's houses, have been damaged. [140] According to the evidence adduced by the Plaintiff, the damage has arisen from the Defendant's working for ironstone. Some of the witnesses for the Defendant raise a doubt, whether the injury would have arisen from working for ironstone, if the Cannell Row coal, obtained, as is supposed, before the houses were built, had not been improperly worked. It does not appear, that all the houses under which the mining has been carried on, have been injured; but it is not denied, that many houses have been considerably damaged; and although the Plaintiff's houses

are yet sound, it seems, at least, very probable, that they will be damaged in the progress of the works, if continued.

The Defendant insists that he has a right to work the mines in the manner most advantageous to himself; that his lease and the custom of the manor enable him to do so, and that the building of houses, even if authorised by the custom, and by the grant of houses to be held according to the custom of the manor, cannot interfere with his right; and he, therefore, claims to be entitled to work the minerals, even at the risk of damaging the houses, without being liable to make any compensation, if damage should be actually done; and the Defendant has been at all times desirous to facilitate the trial at law of the question, which, in this respect, has arisen between him and the copyholders.

The Plaintiff has, by his bill, in somewhat ambiguous terms, stated a claim more extensive than the relief he prays; and in the argument, it has not been denied, that the Defendant is entitled to work the mines, and it is not alleged, that the Defendant is working the mines in an improper manner for the purpose of winning the minerals; but it is sought to enjoin him from winning them in such a way as to damage the Plaintiff's houses.

[141] Upon the evidence now produced, I find no reason to conclude that the Defendant is not entitled to work the mines in a proper manner, for the purpose of obtaining the minerals which may lie under houses. It must be, and indeed is, admitted, that in prosecuting such works the houses may be damaged. Whether the Defendant is answerable for such damage and liable to make compensation, is not a question which can be determined here or by anticipation. The facts proved shew, that the copyholders have, for a long time, sought for compensation, without adopting any effective measures for enforcing their claim. Upon the merits of the question, it is not my intention to give any opinion; but it appears to me, that the view most favourable to the Plaintiff, which, upon the evidence before me, I can take, is, that the Defendant, though entitled to work the mines, is liable to make compensation for any damage which he may do to houses on the surface; and in this view of the case, I think, that I ought not to grant the injunction, but to leave the Plaintiff to his legal remedy, if the Defendant, in continuing his work, does the damage which is expected to the Plaintiff's houses.

The opinion which I have thus formed, has made it unnecessary for me to consider the effect of the mode in which the suit is prosecuted, at the instance and at the request of persons, who, having had rights similar to those of the Plaintiff, have, by their own conduct and *laches*, deprived themselves of the right to an injunction. I incline to think that in the consideration of the Plaintiff's right, I could not have noticed those circumstances.

[142] PULLAN v. RAWLINS. June 1, 14, 1841.

A will, proved abroad and retained there, established on production of a copy certified under the hand and seal of the proper officer, &c., which had been admitted to probate in the Ecclesiastical Court here.

This was a creditor's suit, and it sought (amongst other things) to have the will of the testator established. It appeared that he died in America in 1795, possessing a plantation in the Island of St. Christopher, out of which the bill sought to obtain payment. The original will was not produced in Court, it having been proved in America, and deposited there, but a copy was produced from the Prerogative Court in England, where it had been admitted to probate. To this was affixed a certificate, under the hand and seal of the registrar of wills in Baltimore, in America, that such copy was a true copy of the original, which had been proved by the oaths of the three subscribing witnesses.

The clerk of the council of the State of Maryland, under the Great Seal of the State, certified, that the party signing the certificate was the duly appointed registrar.

Mr. Temple and Mr. Heathfield, for the Plaintiff, submitted, that as the original will could not be produced, the present secondary evidence was sufficient to enable the Court to establish the will.

THE MASTER OF THE ROLLS hesitated in establishing the will in the absence of the original, but took time to consider the point, and requested the registrars to search for authorities in the meantime.

June 14. THE MASTER OF THE ROLLS [Lord Langdale] said he found, on enquiry, that such orders had been made by Sir Joseph Jekyl and [143] Lord Eldon, and that, therefore, he should make the order on the production of the proper legalized transcript.

The Court declared the will well proved, and that the same ought to be established and the trust thereof performed and carried into effect.

The following notes of authorities were produced by the registrars :—

Gardner v. Myra. M. R. June 13, 1738.

Will established on secondary evidence, the original being in the colonies.

The bill was to have an execution of the trusts in the will of John Gardner. An order for the clerk in Court to attend with the record of the depositions read. The will of John Gardner, as set forth in the record of the Plaintiff's interrogatories . . . read. *Cur.* It appearing to the Court that the original will of John Gardner, the Plaintiff's grandfather, is in Jamaica, and that other persons than those before the Court claim real estates under the said will, so that it is not in the power of the Plaintiff to procure the will to be brought hither, and the Plaintiff, and the Defendant the heir at law, and the surviving trustee named in the said will, residing in England, Declare, &c.

Bayley v. Bayley. L. C. 1802.

Will proved in the West Indies, established on production of attested copy and prerogative probate.

Declare this will to be well proved, and declare the will proved in the West Indies, decreed to be established, &c., upon the production of the attested copy and probate in the Prerogative Court.

Reg. Lib. A. 1801, A. fol. 994.

[144] Ellis v. Medlicott. M. R. Feb. 20, 1810.

A lost will of real estate established by means of a copy.

Bill by executors and trustees of W. Medlicott, deceased, against William Medlicott the heir at law, to establish the will of their testator. One of the executors, W. Goode, attended at Doctors' Commons with the original will to prove the same, and a commission was issued to take the oath of Ellis the other executor; the commission was executed, and with the original will, inclosed in a parcel sent up to London by a coach which was robbed on the way and the parcel abstracted, and has never since been found. The executors then exhibited for proof in the Prerogative Court, a parchment copy of the will, which had been previously made and examined with the original will; on which the Court granted probate. The trustees subsequently contracted to sell the testator's real estates, but the purchaser refused to complete unless the copy of the will was established by the decree of this Court. A bill was filed by executors and trustees against heir to establish will. Whereupon, and upon debate of the matter and hearing, an exhibit marked A., *purporting to be a copy of the will of W. Medlicott, dated the 3d day of February 1807*, and the proofs taken in this cause read, and what was alleged by the counsel on both sides. His Honor doth declare that the copy of the will of W. Medlicott, the testator in the pleadings named, proved by the Plaintiffs in the Prerogative Court in the Archbishop of Canterbury, and in this cause, is a true copy of the will of the said testator, and ought to be established as his will, and doth order and decree the same accordingly by the Plaintiffs, the trustees, to pay costs of suit to Defendant the heir.

Reg. Lib. 1809, A. fol. 252.

Harrison v. Weale. *August 8, Nov. 7, 1840.*

Will established on production of official transcript, and of prerogative probate thereof.

The will was not produced in Court; but a transcript of the will produced in Court on the 7th day of November 1840, and entered in the decree as follows:—
“An official transcript of the will of William George Harrison, the testator in the pleadings named, proved in the Prerogative Court of Canterbury by the executor in England, probate of the will read.”

[145] RAMSBOTTOM v. FREEMAN. *June 23, 1841.*

[S. C. 10 L. J. Ch. 362.]

An injunction may be obtained before appearance upon personal service of the notice of motion; but a receiver cannot, except leave be given to serve the notice personally.

Such leave will not be granted, unless it appear that the Plaintiff has used due diligence to compel an appearance.

This was a bill by an equitable mortgagee against the mortgagor. A *subpoena* had been served, but no appearance had been entered by the Defendant to the bill.

A notice of motion for an injunction and receiver having been served on the Defendant personally,

Mr. Lovat now moved for an injunction and receiver. He stated that the Defendant not having appeared, it was impossible to serve his clerk in Court with the notice of motion in the usual way.

The Defendant did not appear on the motion.

THE MASTER OF THE ROLLS [Lord Langdale] said that the motion for a receiver could not, except by special leave of the Court, proceed, on a notice of motion served personally. (1)

Mr. Lovat then moved, *ex parte*, for the injunction, and asked for liberty to serve a notice of motion for a receiver on the Defendant personally, for the next motion day.

THE MASTER OF THE ROLLS [Lord Langdale] granted the injunction, but said he could not give the leave asked, until he had been satisfied that due diligence had been used by the Plaintiff to compel an appearance.

[146] STRICKLAND v. STRICKLAND. *June 3, 1841.*

A simple application to enlarge publication, involving no specialty, should be made to the Master in the first instance, and not to the Court.

Cases stated, which though they come within the letter of the 3d & 4th W. 4, c. 94, s. 13, yet the applications ought to be made to the Court in the first instance, and not to the Master.

Mr. Girdlestone and Mr. L. Shadwell moved, in this case, to enlarge publication. They argued, that the application had properly been made to the Court in the first instance, and not to the Master. In *Carr v. Appleyard* (1 Keen, 725, and 2 Myl. & Cr. 476), the Defendant moved that he might be at liberty to examine his witnesses in the cause notwithstanding publication had passed, and that publication might pass accordingly, and it was held by the Master of the Rolls and the Lord Chancellor that the case did not come within the statute 3 & 4 W. 4, c. 94, s. 13. By the 18th

(1) The practice has been, to some extent, altered by the 3d General Order of April 1842; see Ordines Can. 198; and see also the 17th, 19th, 20th and 21st Orders of October 1842, Ordines Can. 213, 214, 215.

General Order of 1828 (Ordines Can. 14), publication is not to be enlarged except upon *special application to the Court* made upon notice, &c.

Mr. Bethell, *contra*. This application ought to have been made to the Master, for by the statute referred to, the Masters are to hear and determine all applications for enlarging publication. There is a difference where the time for passing publication has passed; but here it will not pass until the last day of the present term.

THE MASTER OF THE ROLLS [Lord Langdale]. It is not in consequence of any doubt that I entertained, but because of the peculiar construction which the Court has put on this Act of Parliament in particular instances, that I have required this case to be [147] argued. This Act has received what is called a liberal construction; and has been construed with reference to the established rules and practice of the Court, and with a view to carry into effect, and not defeat, the intention of the Legislature. Though the Act says, that certain things are to be done by the Master, and by the Court upon appeal only, yet it has been held, that in some cases, convenience and the interests of the suitors require, that the order should be made by the Court in the first instance. Thus where the order is of course, and requires neither hearing or argument, as in the case of an order of course to amend, the Court holds it unnecessary to make an application to the Master. (1) So where the practice is regulated by the General Orders of the Court, and it becomes necessary in particular cases to relax or dispense with them, it is held that the Act does not apply, for the Master has no power to relax or dispense with the General Orders of the Court. Thus where the General Orders direct, that no order to amend the bill shall be made, except within a stated time, the Master has no power to grant leave to amend after that time has expired, but the party must come to the Court. (2) It would be highly absurd to go to the Master, for that which he has not authority to give, and then come to the Court by way of appeal from the Master's decision.

Another instance is where a party requires something which he may obtain on an application to the Master, but which is essentially connected with something else [148] which the Master has not power to grant. In such a case the application is properly made to the Court. It would be a grievous hardship, and an unnecessary expense to make a party separate the two things, and be required to make two applications, one to the Master and the other to the Court. (*Rees v. Edwards*, 1 Keen, 465.)

And, again, where the cause is before the Court at the hearing or on any occasion, and the whole facts having been necessarily brought before the attention of the Court, it is suggested that an amendment, or something else, is necessary (*Waterton v. Croft*, 6 Sim. 438; *Milligan v. Mitchell*, 1 Myl. & Cr. 433; *Biedermann v. Seymour*, 2 Myl. & Cr. 117): in such a case the Court will itself make the order; for nothing would be more useless than to send the matter for adjudication to an inferior jurisdiction, when the Appellate Court has, already, cognizance of all the facts necessary for a decision.

I have stated the grounds on which the Court acts in such cases. These are, to be sure, somewhat strong constructions of the Act; but they have been made for the sake of the parties, and in order to carry into effect the real intention of the Legislature.

The present case, however, falls within neither of the exceptions. It is a simple case of an application to enlarge publication without any specialty. I think that the application ought in the first instance to have been made to the Master, and not to the Court: I must therefore refuse it with costs.

(1) *Cullingworth v. Grundy*, 2 Myl. & K. 359, and 20th Order of December 1835, Ordines Can. 50.

(2) *Smith v. Webster*, 3 Myl. & Cr. 244; *Lloyd v. Wait*, 4 Myl. & Cr. 257. So, where exceptions had not been referred within the limited time; *Smith v. Webster*, 3 Myl. & Cr. 244. And see *Haddelsey v. Neville*, *antè*, p. 28.

[149] TARBUCK v. TARBUCK. June 10, 29, 1841.

In October 1839 a client obtained an order to tax his solicitor's bill. He commenced the taxation in January 1840, and proceeded therein to a very considerable extent. A year and a half after, and before the report, the client applied to vary the order. Held, that, after his acquiescence, he came too late to alter the order, and too early to correct any erroneous principle acted on by the Master.

Whether, where after the taxation of a particular bill of costs as between solicitor and client, a general taxation is directed, a solicitor can include items included in the former taxation, but not allowed, or ought, for the purpose of explanation, to introduce items taxed and paid on the former taxation, *Quære*.

This cause came on upon a petition presented by Hannah Tarbuck, Henry Tarbuck, and Francis Tarbuck, the executrix and executors of John Tarbuck, deceased.

This suit, it appeared, had been instituted for the administration of the estate of James Tarbuck, deceased, in which John Tarbuck was a Defendant, and the Petitioner Henry Tarbuck a Plaintiff.

John Tarbuck in his lifetime, and the Petitioners after his death, having employed Mr. Croudson as their solicitor, the Petitioners, on the 30th October 1839, obtained two orders for taxing his bills of costs. The first was obtained on the petition of the Petitioners describing themselves to be executrix and executors of John Tarbuck, deceased; and it was thereby ordered that Mr. Croudson should, within fourteen days, deliver to the Petitioners all such bills as he claimed to be due to him from the estate of John Tarbuck, deceased, in that and all other causes, suits, and matters in which he had been employed by the said John Tarbuck. The second order was obtained by the Petitioners, not therein describing themselves as representatives of John Tarbuck; and it was thereby ordered, that Croudson should, within fourteen days after notice, deliver to the Petitioners all such bills as he claimed to be due to him from the [150] Petitioners, in that and all other causes, suits, and matters, wherein he had been employed by them. The orders contained the usual submission to pay what should appear to be due, and the usual orders to tax the bills.

June 29. The orders having been served, Mr. Croudson delivered to the Petitioners not less than eighteen bills of costs, some of them of great length, and containing charges to a large amount.

The Petitioners carried the bills into the Master's office, and proceeded in the taxation to a very considerable extent. But before the same had been concluded, or the Master had made his certificate, they presented this petition, praying that Mr. Croudson might be ordered to strike certain items out of his bill of costs, and to bring in certain bills already taxed and paid, and that the Master might be directed, not to retax the bills which had been taxed; that the undertakings entered into by the Petitioners in the orders for taxing the bills might be discharged, and new undertakings substituted; and that the two orders, dated the 30th October 1839, might be discharged or varied, so far as might be necessary for the purposes of the petition.

It seemed that, in a cause and in a lunacy, several bills of costs, charges, and expenses due from John Tarbuck to Mr. Croudson had been taxed as between solicitor and client, and paid or ordered to be paid. And the principal complaint now was, that under the orders of 30th October 1839, Mr. Croudson delivered to the Petitioners bills of costs, in which many items were the same identical items in words and amounts and in effect as were comprised in the bills of costs, charges, [151] and expenses before taxed and paid, or ordered to be paid.

The fact was not denied; but it was said, that in a taxation of the nature directed by the orders of 30th of October 1839, some charges might be allowed, which were not allowed as costs, charges, and expenses between solicitor and client, to be paid out of a general fund; and that when such items of charges which might be allowed against the party, though not against a general fund, were submitted for taxation, it was the practice not to deliver a bill of those items only, which would not be intelligible, but a bill of all the business done, including those particular items which became intelligible by being seen in connection with the rest.

Mr. Pemberton and Mr. Rogers, in support of the petition.

Mr. G. Turner, *contra*, for Mr. Croudson.

Mr. Rogers, in reply.

THE MASTER OF THE ROLLS, after observing on the facts, said, that the Petitioners might be held bound by acquiescence, in acting so long under the order; but that the point so raised was of so much importance to the practice of the Court, that he should make inquiries before he decided it.

THE MASTER OF THE ROLLS [Lord Langdale] stated the above circumstances, and proceeded.

The Petitioners now say, that these bills were not delivered pursuant to the order, or pursuant to the [152] understanding subsisting between the Petitioners and Mr. Croudson before the orders were obtained; but, instead of making any complaint at the time, instead of applying to the Court to set the orders right if they contained more than the Petitioners intended to apply for or were bound to abide by, they carried the bills of costs in the Master's office for taxation; and the proceedings upon such taxation, which commenced in January 1840, have been carried on to a very considerable extent; and it is, whilst the proceedings are in progress, and before any finding of the Master, that this petition is presented.

The fact is not denied; but it is said, that in a taxation of the nature directed by the orders of 30th October 1839, some charges may be allowed, which are not allowed as costs, charges and expenses between solicitor and client, to be paid out of a general fund; and that when such items of charges which may be allowed against the party, though not against a general fund, are submitted for taxation, it is the practice not to deliver a bill of those items only, which would not be intelligible, but a bill of all the business done, including those particular items which became intelligible by being seen in connection with all the rest. Upon inquiry, I find that many experienced practitioners consider this to be the practice. There is, however, some difference of opinion; and if this point were now to be decided, it would have to be considered what reasons and under what limitations the supposed rule of practice could be sustained. It probably may appear, that under some circumstances, and under certain limitations, the alleged practice may be perfectly right; whilst, in other circumstances, it would not. It may be true, that the extra items would be unintelligible, if the only items in [153] the bill; and yet it may not be necessary to retax the whole of the bills previously taxed and paid, in order to see the connection of the extra items meant to be taxed with the rest of the business; but I think that this point is not to be decided on the present occasion, as the Petitioners come too late or too early. If they had reason for the complaint they now make, I think that they ought not to have carried in the bills for taxation, and proceeded with the taxation, but to have made a proper application for relief; and having carried in the bills, and proceeded, so far as they have done, with the taxation, and restrained the solicitor so long from bringing his action, I think that they ought now to await the Master's certificate, and apply for relief, if they are advised that they are entitled to it, in a proper manner, if upon the certificate it should appear that the Master has acted upon an erroneous principle. The acquiescence of the Petitioners, for so long a period, is without sufficient excuse, and appears to me to deprive them of all title to the relief which they pray at this time and in this manner.

[154] GARLICK v. JACKSON. June 12, 23, 1841.

[*Cf. National Permanent, &c., Society v. Raper* [1892], 1 Ch. 54.]

A mortgagee received rents between the Master's report and the day fixed for payment. Default being made: Held, that the mortgagee was not then entitled to an order absolute.

In this case, a decree for foreclosure had been made, and the Master had fixed a day for payment of the amount due on the mortgage, in default of which a foreclosure was ordered.

Between the date of the report and the day fixed for payment, the mortgagee

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received some rents of the mortgaged property. Default having been made in payment by the mortgagor,

Mr. Elderton applied to make the order for foreclosure absolute.

Mr. Wilbraham, on the part of the mortgagor, resisted the order, on the ground, that by receiving rents between the report and the day fixed for payment, the mortgagee had altered the amount as found due by the Master.

THE MASTER OF THE ROLLS [Lord Langdale] thought that the case must have frequently occurred before, and after taking time to consider the point, he refused the order absolute for foreclosure, observing that as the amount due had been varied by the intermediate receipt of the rent, another day must be fixed for payment.

[155] **HOLMES v. THE MAYOR, &C., OF THE CORPORATION OF ARUNDEL and GEORGE BALCHIN.** *April 23, June 21, 1841.*

An order of course, obtained by the Plaintiff to examine a Defendant against whom a replication has been filed, is irregular.

An order of course, obtained by the Plaintiff to examine a town councillor of a corporation, Defendants to the suit, and to whose answer a replication has been filed, is irregular, for if he be considered a party, the order is improper when there is a replication; and if he be not a party, the order is unnecessary.

This was a bill filed against the above corporation and against Balchin, the town clerk, and their answers having been put in, the Plaintiff filed a replication to them. John Halliday happened to be one of the town council, and the cause being at issue, the Plaintiff obtained an order of course for the examination of Balchin and Halliday as witnesses.

Mr. Pemberton and Mr. Rogers now moved to discharge that order for irregularity. As to Balchin, they argued that it was a settled rule that a Defendant could not be examined as a witness, after his answer had been replied to, for the Plaintiff might thereby attempt to make the Defendant falsify his own answer; *Winter v. Kent* (2 Dick. 595; 1 Smith's Pr. 345; and see 2 Daniel's Pr. 454).

That as to Halliday, he was a member of the corporation, whose answer had been replied to; and if the Plaintiff waived all relief against Halliday, he could have none against the corporation of which he was a member, and must pay their costs; *Harvey v. Tebbutt* (1 Jac. & W. 197). On the other hand, if he were to be treated as no party to the cause, the order to examine him was unnecessary and irregular.

Mr. Wray, *contra*. Balchin is not strictly a party against whom any relief is prayed: he has been made a Defendant according to [156] the usual practice, as clerk of the corporation, merely for the sake of discovery. He may be examined as to matters in which he is not interested, as was the case of a Defendant in *Nightingale v. Dodd* (Ambler, 583). In *Crookhall v. Smith* (2 Fowler's Pr. 101), an executor was ordered to be examined as a witness to prove the execution of deeds, &c., his answer having been replied to.

Halliday is no party to the suit; the Plaintiff could not have withdrawn the replication as against him, and by the 6 & 7 W. 4, c. 104, burgesses are not to be deemed incompetent witnesses by reason of their being members of the body corporate.

The witnesses ought to demur to the interrogatories; the objection to the evidence ought to be taken by the Defendants at the hearing of the cause; *Murray v. Shadwell* (2 V. & B. 401).

Mr. Pemberton, in reply. If no relief be sought against Balchin, and if discovery only be sought, he should have been dismissed upon his answer coming in, and his costs should then have been paid. *Crookhall v. Smith* was an order made upon special application, and not an order of course as in the present case; and as to the statute referred to it removes the disqualification of interest which would otherwise exist, as in the case of parishioners; but it does not enable you to examine a party to a suit, the objection to which course of proceeding is founded on very different grounds from that of interest.

THE MASTER OF THE ROLLS said he would take an opportunity of further considering the case.

[157] *June 21.* THE MASTER OF THE ROLLS [Lord Langdale]. In this case, the Plaintiff having filed a replication to the Defendant's answer, he afterwards, without withdrawing the replication, obtained an order of course, enabling him to examine the Defendant George Balchin and one John Halliday as witnesses, saving just exceptions; and a motion is made to discharge the order for irregularity.

If an answer be not replied to, the whole of it is taken to be true, and the Defendant, having credit for its being true, may be examined as a witness upon matters in which he is not interested, although he may be interested in other matters, in respect of which there may be a decree against him, upon his own statement, in his answer not replied to.

But the replication denies the truth of the whole answer, and shews that the Plaintiff considers the Defendant to be concerned in interest; and whilst the replication remains on the file, and the answer is thus denied to be true, the Plaintiff is not at liberty to allege, that the Defendant is not interested in any of the matters in question, or to examine him in a way which might tend to falsify any part of the answer.

It is not necessary now to consider what might be done between Co-defendants, or between the Plaintiff and Defendant, upon a special application for leave to examine a Defendant for the Plaintiff. This is the case of an order of course, and as regards Balchin, I think that it is irregular.

As to Halliday a question is made whether he is to be considered as a Defendant or not. If no Defendant, [158] the order as to him was unnecessary and improper. If a Defendant, the observations as to Balchin are applicable as to him.

I am of opinion that the order must be discharged with costs.

[158] LANCASTER v. EVORS. *June 21, 22, 1841.*

[S. C. 5 Jur. 525. For subsequent proceedings, see 1 Ph. 349; 41 E. R. 664; 10 Beav. 154. Distinguished, *Yeatman v. Yeatman*, 1877, 7 Ch. D. 214.]

It is a general rule, that a person having a claim on the assets of a testator, cannot in suing the executor make a debtor to the estate a party to the suit; but the rule admits of exceptions.

Case in which a creditor of a testatrix was allowed to sue the executors and persons claiming a fund standing in Court, on which the estate of the testatrix had an equitable demand, for the purpose of obtaining payment thereof, the executors having refused to take proceedings for establishing the demand.

A husband and wife joined in a mortgage of their respective estates, which were already incumbered, for the payment of debts of the husband. The estates were realised in two different suits; and the incumbrances paid. The husband's debt was, however, paid out of the wife's estate, which it exhausted; but there was a surplus of the husband's estate in Court. The husband and wife were both dead, and the only claims upon her estate were those of a mortgagee and a judgment creditor; and her only assets were such as might be realised from her equity against her husband's estate, for which her executors refused to sue. Held, that the judgment creditor might maintain a suit, against the wife's executors, the mortgagee, and a party claiming the fund in Court under the husband, for payment of the wife's two debts out of that fund.

This case came before the Court upon demurrer to the whole bill for want of equity and for multifariousness.

The statements in the bill were very complicated; but omitting those which did not affect the question now before the Court, the facts were as follows:—

In the year 1772 Sir John Pryce was seised of an estate, subject to a mortgage to Earl Temple for £24,000. Lady Pryce, his wife, was entitled to another estate, subject to a mortgage for £5500. The latter estate had been conveyed in trust for sale, and a contract had been entered into for the sale thereof.

[159] By deed, dated in January 1772, both estates and the surplus of the money to arise from the sale of Lady Pryce's estate, were conveyed by Sir John and Lady Pryce to trustees, upon trust to sell and pay the mortgages of £24,000 and £5500; then to secure certain monies due from Sir John Pryce to Jaques; then to pay £5000 to Lady Pryce, for her separate use, and the residue to Sir John Pryce.

Notwithstanding this deed, the Earl Temple filed a bill to obtain payment of his mortgage debt; and in a suit, entitled *The Earl of Buckingham v. Pryce*, Sir J. Pryce's estate was sold. The mortgage thereon was discharged, and £2821, the residue of the purchase-money, was paid into Court, in the cause of *The Earl of Buckingham v. Pryce*. This sum was allowed to accumulate, and now amounted to £20,972 consols.

Sir John Pryce died in 1776; his wife survived him, and died about the year 1805.

In 1832 the mortgage on Lady Pryce's estate was discharged in a suit entitled *Burney v. Scott*, instituted by Burney, a judgment creditor, Morgan, a mortgage creditor of Lady Pryce, and Lady Pryce. Out of the surplus of the produce of this estate the debt due from Sir John Pryce to Jaques, amounting to £5323, was paid, under the provisions of the deed of 1772. What remained was insufficient to satisfy the debts due to Morgan and Burney. The amount of these debts had, however, been ascertained by the Master in the suit of *Burney v. Scott*.

This bill was filed by Lancaster, the representative of Burney the judgment creditor, against Evors (who, as heir or personal representative of Sir John Pryce, [160] claimed the £20,972), and against the executors of Lady Pryce, and the representatives of Morgan. The Plaintiff, by his bill, insisted that as Sir John Pryce's debt to Jaques had been paid out of the estate of Lady Pryce, her estate was entitled to be recouped out of the fund in Court in the cause of *Buckingham v. Pryce*, arising from the estate of Sir John Pryce.

The bill stated that the Plaintiff had applied to the executors of Lady Pryce, to take proceedings to obtain payment of the £5323 out of the sum of £20,972, but that they had refused to do so.

The bill also stated, that there were no debts due from the estate of Lady Pryce, except those due to Morgan and the Plaintiff, and that there were no assets wherewith they could be paid. It prayed for payment out of the £20,972, standing to the credit of the cause of *Buckingham v. Pryce* of the sum of £5323, and interest; and that that sum might be applied, in the first place, in payment of the mortgage to Morgan, and then in payment of the Plaintiff's judgment debt.

To this bill the Defendant Evors demurred for want of equity and for multifariousness, and the demurrer now came on for argument.

Mr. Kindersley and Mr. Keene, in support of the demurrer. This bill cannot be sustained as against the Defendant Evors. It is, in effect, a bill by a creditor of Lady Pryce against her executors and a debtor to her estate, to recover a debt due to her from the representatives of her husband. If any such debt existed, it is the duty of her executors alone to recover it; and the party from whom it is to be recovered is liable only to the legal personal representative of Lady Pryce. The [161] law of the Court on this point is laid down by Lord Eldon in *Alsager v. Rowley* (6 Ves. 749): he there says, "The established rule of the Court is certainly as it has been argued upon *Utterson v. Mair* and the other cases, that in ordinary cases, a debtor to the estate cannot be made a party to a bill against the executor: but there must be, as the cases express it, *collusion or insolvency*." In the present neither collusion nor insolvency is charged by the bill; and the case therefore does not come within the exception. In *Utterson v. Mair* (2 Ves. jun. 95), which was a bill by a creditor against the executor of a debtor and the assignees in bankruptcy of the debtor to recover an alleged surplus, a demurrer was allowed; and Lord Loughborough there points out the great inconvenience of permitting a bill of such a nature. He says (p. 97), "If this suit was to stand, the consequence would be that every creditor would be entitled to such a bill against every individual debtor, and the accounts would be inextricable." On this point they also cited *Benfield v. Solomons* (9 Ves. 77).

The bill charges that the executors refuse to take proceedings; if that be so, the proper course for the Plaintiff to take is pointed out in *Utterson v. Mair*. "If it is necessary to bring actions at law to recover part of the effects, it must be in the name of the executor, and the Court will compel him to allow his name to be used." The

Plaintiff ought to have offered to indemnify the executors, and on their refusal to proceed he might have filed a bill to be permitted to use their names for the purpose of recovering the fund.

It is supposed that *Bowsher v. Watkins* (1 Russ. & M. 277) is an authority for the proposition that a bill may be sustained [162] against the executor and the surviving partner of a testator (who is in the nature of a debtor) without charging or proving fraud or collusion; but it appears "that there were special circumstances in the case which took it out of the rule" (page 280); *Davies v. Davies* (2 Keen, 539).

Another objection to this bill is, that Morgan, a mortgagee, is made a party, and his equities must be determined in this suit. If the other objections do not prevail, it is clear that this suit ought to be confined to the recovery of the debt; *Pearse v. Hewitt* (7 Sim. 471). The Defendant Evors has no concern in the claims on the fund, or the administration of Lady Pryce's estate. The bill is, therefore, on that ground, multifarious.

They contended also that Jaques's debt was one due from Lady Pryce, and that, as a provision of £5000 was made for her by the deed, her husband became a purchaser of the produce of her estate.

Mr. Pemberton and Mr. Purves, in support of the bill. This case does not come within the rule, even as stated by the other side. The bill alleges that there are only two debts due from the estate of Lady Pryce, the amounts of which have been ascertained by the Master; and it further alleges that the only assets out of which they can be paid are those in Court in the suit of *The Earl of Buckingham v. Pryce*, which the executors refuse to get in. What other remedy has the Plaintiff but to file his bill against the executors and all other necessary parties to realize these assets? This is not the case referred to in the authorities cited on the [163] part of the Defendant, namely, of a legal demand recoverable at law, in respect of which the executors might be charged with a *devastavit*, in the event of their not taking proper steps to recover it, and in which therefore a charge of insolvency would support the bill; but this is the case of a doubtful equity, the validity of which can only be ascertained by a suit, and for which the executors could not be charged with a *devastavit*. If collusion be necessary to support this bill, then the refusal of the executors to sue amounts to collusion; and that seems implied in *Benfield v. Solomons* (9 Ves. 82), in a case where a suit is the only remedy.

But this, in reality, is not, as it has been assumed, a suit against executors and a debtor to the estate. Evors is not a debtor; but there are certain funds in Court, the right to which is a matter of dispute between the several persons, and can only be determined by a suit in which they are all parties.

As to the second point, it is clear that no bill could be sustained, having for its object the determination of the rights to the fund, in the absence of Morgan, whose claim has been ascertained to be the first charge thereon. If there had been a greater number of creditors of Lady Pryce, the bill might have been filed on behalf, &c.; and if the executors themselves had sued, Morgan would have been a necessary party.

The debt is alleged to be, and must, on demurrer, be taken to be the debt of the wife, and the equity of the wife to be recouped cannot now be doubted; 1 Roper *Husb. and Wife*, 143.

[164] Mr. Kindersley, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. In this case it is not necessary to consider what defence the Defendant may have to this suit, on the ground that Sir John Pryce ought, under the deed of 1772, to be considered a purchaser of the interest of Lady Pryce, his wife; or on the ground that the debt of Jaques, in respect of which the Plaintiff claims relief, was the debt of Lady Pryce. The Defendant may have a valid defence on both of these grounds; but such a defence cannot be supported on this demurrer, having regard to the facts stated in the bill, all of which the Court must, for the purpose of its decision on the present occasion, assume to be true. The only question now is, whether, looking at all the circumstances of the case, the bill is properly framed, so as to entitle the Plaintiff to relief as against the Defendant Evors.

The general rule admits of no doubt that a person having a claim on the assets of a testator, has no right in suing the executor to make a debtor to the estate a party to that suit. The question in such cases arises on the exceptions to that rule.

The Plaintiff and Morgan have been found to be creditors of Lady Pryce, and are entitled to be paid out of her estate; but it appears that her assets have been exhausted by the payment of her husband's debts, for which her estate was in the nature of a surety. It cannot but be admitted on this simple statement, that her estate was or is entitled to be recouped out of the estate of Sir John Pryce. It is stated that her estate has been exhausted except so far as anything may be recovered by the assertion of this right; and there are assets of [165] Sir John Pryce in Court, which, subject to any claim to be established by the representatives of Lady Pryce, belong to the Defendant Evors. The Plaintiff claims to be paid out of those assets of Lady Pryce, which, as between the two estates, have been improperly applied in payment of her husband's debt.

This suit is not for a general account of the assets of Lady Pryce, nor, as it has been argued, a suit against Evors, as a debtor to her estate; but there being a specific fund in Court, it is sought to establish, as against that fund, a claim for the benefit of Lady Pryce's estate. Evors, who claims the fund, is properly made a party to protect it.

It is not sufficient to say that the executors of Lady Pryce are the only persons to sue in order to realize this claim. If they were, they have expressly refused to do so. I think that if this case did in other respects come within the general rule, the circumstance of the refusal of the executors to recover these, the only assets, would make the case an exception to the general rule.

It is then said that this bill is multifarious, as bringing Morgan before the Court and seeking to establish his claim. If Morgan had not been before the Court, Evors would have said, "there is the report of the Master, by which it appears that Morgan has a prior claim to the Plaintiff; and therefore he is a necessary party." I think the bill is not multifarious, and I must overrule the demurrer.

[166] LINCOLN AND OTHERS v. WRIGHT AND OTHERS. LINCOLN AND OTHERS v. DRURY AND OTHERS. *March 25, June 25, 1841.*

[S. C. on appeal, 10 L. J. Ch. 331; on other points, 4 Beav. 427; 49 E.R. 404.]

It is not irregular to intitle an order for a commission to examine witnesses, or the commission or the return thereof, in a short form, as a suit in which "A. and others are Plaintiffs," and "B. and others Defendants."

A supplemental bill was filed in which a deceased person was named as Co-plaintiff and as next friend of infant Plaintiffs, and in the title of the Plaintiff's interrogatories for the examination of witnesses, his name was mentioned as being still a party. Held, that a Defendant who had acquiesced and intituled his interrogatories in a similar manner, could not, after publication, move to suppress the depositions. Pending the examination of witnesses, a new next friend of the infant Plaintiffs was appointed. Held, that it was not necessary to notice the alteration in the proceedings under the commission.

An interrogatory which asks a witness, whether it was agreed to the effect suggested in the interrogatory, is not leading.

This was a motion, made on behalf of two Defendants Rust and Boughen, that the depositions taken in these causes might be suppressed with costs.

Susanna King, the wife of James King, and their infant children, were interested in the residuary property of the testator in the cause, and in January 1839 James King and Sarah his wife and their children, by James King their father and next friend, together with certain other parties interested, filed these bills to recover the same.

On the 13th of December 1839 James King died; and a supplemental bill, which had become necessary on other grounds, was filed on the 19th of the same month; and therein James King (then deceased) was erroneously named both as Plaintiff and as next friend of his children.

The two Defendants, Rust and Boughen, filed their answer to the supplemental bill; and therein they adopted the same title, and stated their belief that James King was dead.

[167] The cause being at issue, the Plaintiffs, on the 4th September 1840, obtained an order for a commission to examine witnesses, and both Plaintiffs and the Defendants Rust and Boughen commenced examining witnesses thereunder on the 23d of October 1840, and proceeded therein on the 24th, 27th, 28th, and 30th of the same month.

Previous thereto, and on the 5th of October 1840, the Plaintiffs obtained an order to dismiss the bill as against a Defendant, John Andrews Lincoln; and on the 26th of October, and pending the examination, they also obtained an order substituting the Plaintiff, Susan King, as next friend of her infant children.

The questions on the present occasion depended principally on the mode in which the several proceedings had been instituted; it is therefore necessary to state, that the order for the commission, the commission itself, and the return thereto of the depositions, taken thereunder, were all intituled in the following short form:—

Between		
William Lincoln and Others	.	Plaintiffs;
	And	
Smith Wright and Others	.	Defendants.
	And	
William Lincoln and Others	.	Plaintiffs;
	And	
John Henry Druery and Others	.	Defendants.
By original and supplemental bill.		

The titles to the interrogatories exhibited by the Plaintiff and returned by the Commissioners, annexed to the commission and the depositions, stated the names of all the Plaintiffs and Defendants except John Andrews Lin-[168]-coln, but included James King (who was then dead) as a Co-plaintiff, and as next friend to his children, and stated that the several parties "were and are" respectively Plaintiffs and Defendants.

The Defendant's interrogatories only differed from those of the Plaintiff in this, that they included John Andrews Lincoln as a Defendant, and omitted the words "were."

Rules to produce witnesses, and to pass publication, were given, and expired in Michaelmas term; the cause was set down and publication passed on the 21st of December 1840.

The fourth of the Plaintiff's interrogatories, which it was alleged was leading, was as follows:—

"Was it at any, and what, time after the decease of the said testator, arranged or agreed by or between any and what persons, as executors and trustees under the said will and codicil of the said testator, and whether or not for their mutual convenience or how otherwise, that any and which of them should be the chief acting executors and trustees, or the chief acting executor and trustee under and by virtue of the said will and codicil of the said testator; or that they or he should undertake the chief burthen of the execution thereof, and should be chiefly active in collecting and receiving the personal estate of the said testator, and the produce thereof, and in making the necessary and proper payments thereout, and in executing the trusts of the said will; and did any and which of them, severally and respectively, authorise any and which of the others of them to act generally for them or him, or on their or his behalf, in the administration of the estate of the said testator, or confide to [169] them or him the exercise of the duties, and the execution of the trusts reposed in them by the said will and codicil; and did any and which of them, under any and what circumstances, become and were, or was they or he, under any and what circumstances the chief acting executors and trustees, or the chief acting executor and trustee, in regard to the administration of the personal estate of the said testator, or chiefly acted therein, declare," &c.

Mr. Girdlestone and Mr. Steer, for the Defendants, contended that the proceedings were irregular, first, because King, who was dead at the filing of the supplemental bill, was mentioned in the title of the interrogatories to be a Plaintiff, and the next friend of his children.

Secondly, that the name John Andrews Lincoln had been improperly omitted in the title to the interrogatories.

Thirdly, that the order for the commission, the commission itself, and the return thereto, had been improperly intituled in a short form, and did not sufficiently identify the cause.

Fourthly, that the name of the new next friend ought to have been inserted in the title to the different proceedings after such appointment, and

Lastly, that the interrogatories themselves were leading.

They argued that the way to try the regularity of the intituling of the several proceedings, was to see whether an indictment for perjury could be sustained against a [170] witness examined under the commission. They contended that it could not, as the different proceedings, when proved, would not be found in accordance with the record and order, or with the facts themselves. (On this point the following authorities were cited on the appeal:—23 G. 2, c. 11; *Rea v. Roper*, 6 M. & S. 327; and *Rea v. Benson*, 2 Camp. 509.) That if the proceedings were irregular, then the depositions ought to be suppressed. *Pritchard v. Foulkes* (2 Beavan, 133).

Mr. Pemberton and Mr. Jeremy, *contra*, on the first objection, contended, that even if the name of James King had been improperly included in the supplemental bill, still, that until the error had been rectified, it was proper to include it in the title to the interrogatories, so as to make them correspond with the record; and, at all events, that the Defendant, who had acquiesced and adopted that form themselves could not now take advantage of a common error after publication.

Secondly, that John Andrews Lincoln, having been dismissed from the suit, his name had not improperly been omitted, and that advantage of that objection, if any, ought to have been taken earlier.

Thirdly, that intituling the order for a commission, and the commission and return in a short form, was according to the usual course of practice.

Fourthly, that it was not necessary to notice the appointment of a new next friend, which took place pending the proceedings under the commission: a next friend not being a party to the cause, and the change not affecting the issues between the parties.

[171] Fifthly, that the interrogatories were not leading, as they did not suggest to the witness the answer to be given. [THE MASTER OF THE ROLLS. All interrogatories must, to some extent, make a suggestion to the witness. It would be perfectly nugatory to ask a witness if he knew anything about something.]

They argued also, that an indictment would lie in such a case, as the Defendant could not go out of the record, with which the proceedings corresponded; and that the case of *Pritchard v. Foulkes* did not apply, for there the interrogatories and depositions did not correspond with the order for the commission.

Mr. Girdlestone, in reply.

THE MASTER OF THE ROLLS observed, that there was a considerable difference of opinion amongst the officers of the Court as to the correct mode of intituling these matters; and that in the case of *Pritchard v. Foulkes* he had himself been under the necessity of deciding between conflicting opinions as to the practice. That he would not decide this case without further inquiry to see if an order could not be made consistent with the practice of the Court, and the rights of all the parties, which in the present stage of the cause might be seriously affected by any order which might be made.

June 25. THE MASTER OF THE ROLLS [Lord Langdale]. This was a motion to suppress depositions for irregularity.

The first ground stated was, that the depositions were taken in a cause in which it was alleged, that James King was a Plaintiff and next friend to infants.

[172] It appears that the suit was irregularly constituted at its first institution, by naming James King (then dead) as Plaintiff, and as next friend to other Plaintiffs who were infants. This irregularity was, however, known to, and acquiesced in, by the Defendants, who joined in commission, and made no complaint till after publication; and it does not appear to me, that parties who have so proceeded, ought, after publication, to be allowed to suppress the depositions on this ground.

The other irregularities which are insisted on, relate partly to the title of the interrogatories, and partly to the proceedings in the cause, during the execution of the commission.

The order for the commission, the commission itself, and the return to the commission, are all in the usual form, and correspond with one another. The title of the interrogatories is not inconsistent with the titles of the order of commission and return; but expressing the names of the parties at full length, it continues the original error in the constitution of the suit, and names James King as a Plaintiff, and as next friend of other Plaintiffs who are infants. This was wrong, but not only had the error been acquiesced in by the Defendants in all the preceding stages of the cause, but was actually committed by the Defendants themselves, in the title of their own interrogatories.

If the Plaintiffs have been irregular in this respect, so also have the Defendants; and under these circumstances, I think that one party ought not to be allowed to take advantage of the irregularity to the prejudice of the other.

As to the proceedings in the cause, it appears that after the commission was issued, and whilst it was in [173] course of execution, an order was obtained to substitute a next friend in the place of the James King who was dead before the institution of the suit; and it is alleged, that this order, and the amendment consequential upon it, made all the subsequent proceedings under the commission irregular and void. Upon this part of the subject, I thought it necessary to make some inquiries, and in the result, it appears to me, that a proceeding of this sort, the object and effect of which is in no way to alter the matters in issue between the parties, but only to render valid the proceeding in the names of infants, does not interrupt, or make it necessary to obtain any further order to give validity to, the proceedings under the commission.

The last objection to the depositions was, that they were taken under interrogatories which were *leading*, and they are said to be leading, on the ground that they ask the witnesses whether it was agreed to the effect suggested in the interrogatories. In the argument it was contended, that the interrogatories ought to have asked, not simply whether it was so agreed, but whether it was or was not so agreed. Now it has been held, that the interrogatories ought not to be in the form, "was it not so agreed:" that is considered to be leading: but the form, "was it so agreed," does not appear to me to be suggestive of the answer. It is impossible to examine a witness without referring to, or suggesting the subject upon, which he is to answer. If the question suggests a particular answer, it is leading and improper. Questions have also been held to be improper, if suggesting the subject, they are capable of being answered by a simple affirmative or negative without any circumstances; but a question whether such an event happened? does not suggest the answer that it did happen; and having read the interrogatories in this [174] case, I think that they are not capable of being answered in the affirmative or negative without circumstances.

This motion must therefore be refused with costs.

The Defendants appealed from this decision; but Lord Cottenham on the 23d of July 1841 dismissed the appeal with costs, without prejudice however to any application, the Defendants might be advised to make, for referring the interrogatories to the Master as leading.

[174] WOOD v. RICHARDSON. June 25, 1840.

[S. C. 5 Jur. 623.]

A testator devised his real and personal estate to his wife "absolutely, and at her own disposal, for the maintenance of herself and bringing up of his children."

Held, that she could sell the real estate.

The Court will not enforce a contract involving a breach of trust.

The testator, by his will, devised and bequeathed as follows:—"I give, devise, and bequeath all my estate real and personal, whatsoever and wheresoever, and of what nature, kind, or sort soever the same may be, or consist at the time of my decease, unto my dear wife Jane Richardson; to hold unto her my said dear wife and to her heirs, executors, administrators, and assigns *absolutely and at her own disposal for the maintenance of herself and bringing up of my children*; subject nevertheless to the

payment of all my just debts, funeral and testamentary expenses; and I appoint my said dear wife sole executrix of this my last will and testament."

The testator died, leaving his widow and several children surviving him. Jane Richardson, the widow, contracted to sell a part of the real estate to the Plaintiff [175]-tiff; and after the title had been accepted and the conveyances approved of, she refused to complete the contract.

The Plaintiff then filed his bill for a specific performance, which was resisted, on the ground, first, that the contract was unduly obtained, the Defendant not having the benefit of professional assistance; and secondly, that the Defendant was not justified, by the terms of the will, in selling the estate in which the infant children were interested.

Mr. Kindersley and Mr. Purvis, for the Plaintiff. There is no trust in favour of the children; the widow has a right of "disposal" of this property or a power of sale; the purchaser is satisfied with the title, and the Defendant cannot therefore set up the objection of want of title; besides which, the purchaser will take subject to the rights of the children, if they have any; they cited *Pratt v. Church*, *post*, p. 177, note.

Mr. Loftus Wigram, *contra*, contended that the Defendant was a trustee for her children, the gift being for the maintenance of herself and bringing up of his children; and that she could not sell the property without their concurrence. In *Wetherell v. Wilson* there was a gift to a parent, "in order the better to enable him to support, maintain, and educate" his child; and it was held to be a trust for the benefit of such child. In *Woods v. Woods* (1 Myl. & Cr. 401) the gift was to a wife, "towards her support and her family," and the construction was similar; and so in the cases of *Hamley v. Gilbert* (Jacob, 354; and see *Raikes v. Ward*, 1 Hare, 445; *Crockett v. Crockett*, *ib.* 451; and *Wetherell v. Wilson*, 1 Keen, 80), and *Broad v. Bevan* (1 Rm. 511, n.).

[176] That if the Defendant were to complete the contract, she would commit a breach of trust; and that this Court would not decree a party to perform an act which amounted to a breach of trust; 1 Sug. Vendors, 9th ed. 206, *Ord v. Noel* (5 Mad. 438).

THE MASTER OF THE ROLLS [Lord Langdale]. I think that the Plaintiff is entitled to a decree. A contract was entered into in 1836 for the sale of this property; the title has been investigated, the conveyances have been prepared and approved of, and the engrossments have been tendered for execution; but the Defendant having refused to complete, the Plaintiff has been compelled to file this bill against the vendor for a specific performance.

There are two defences, first, that this contract was obtained from the Defendant by surprise, in other words, by fraud; as to this it is alleged, that the Defendant has been unable to obtain any evidence. This ground of defence, therefore, rests merely upon the allegation of the Defendant, who has abstained from filing a cross-bill to examine the Plaintiff upon that subject, and by those means obtain relief against that alleged fraud, if there were any. It is impossible, therefore, for me to take notice of that allegation.

The next ground of defence is more important: it is this, that the Defendant has entered into this contract and obligation, which, she says, the Court cannot compel her to perform, without sanctioning a breach of trust; and that this Court will not order or permit a person to commit a breach of trust. Nothing can be more true than that principle. This Court will [177] not require or order any person to commit a breach of trust, it being the special duty of this Court to compel the due execution of a trust, and by all means to avoid, and, if necessary, prevent, the commission of a breach of trust, and of a fraud, which it would amount to.

It is argued that this would be a breach of trust, because the property was given to the Defendant "for the maintenance of herself and her children;" that is true; but then the property was to be held by her "absolutely and at her own disposal" for that purpose; and how is it in any manner made to appear in this cause, that the disposition of the property and the receipt by the Defendant of the purchase-money are not the best things she could do for the maintenance of herself and her children? Nothing appears one way or the other. It is sufficient for the purpose of this case to say that it does not appear that this sale is any breach of trust. I must, therefore, decree a specific performance of this agreement.

[177] PRATT v. CHURCH. M. R. July 2, 1830.

Testator devised his real estate to his wife, "for her own sole and separate use, to dispose of as she should think proper," and out of his real and personal estate to provide for his children in such manner as to her should seem meet." Held, that the widow had power to sell the real estate.

The testator in this case devised as follows:—"This is the last will and testament of me John Pratt of Bells Hill, in the county of Northumberland, Esq. I order and direct that all my just debts, funeral and testamentary expenses be paid and discharged out of my personal estate and effects. I give, devise, and bequeath all my estates and effects whatsoever and wheresoever, whether real or personal, unto my dear wife Elizabeth Pratt, to and for her own sole and separate use, to dispose of as she shall think proper, and out of my said real and personal estate and effects to provide for my children in such manner as to her shall seem meet, or as she by her last will and testament may order and direct; and I [178] appoint my said wife Elizabeth sole executrix of this my will."

Elizabeth Pratt, the Plaintiff, agreed to sell to the Defendant a freehold property, part of the testator's estate; but some doubt having arisen as to her title, under the terms of the above will, a bill for specific performance was filed by her against the purchaser, in order that the point might be determined.

The Defendant said, he was advised by his counsel that a reasonable doubt might be entertained, whether, according to the true construction of such will, the children of the testator John Pratt, or some of them, had not some estate, right, title, or interest, in or to the estate and premises, or some part or parts thereof; and that by reason of such doubt, the Plaintiff was not able to make such a clear and marketable title to the estate and premises, as, according to the terms of the agreement contained in the aforesaid letters, he, the Defendant, was entitled to require. And he said, that in case it could be made to appear, that the true construction of the testator's will was such as the Plaintiff insisted upon, and the doubts which had been suggested and expressed could not be reasonably entertained, he, the Defendant, in such case, was ready and willing to perform his part of the said agreement.

Mr. Bickersteth and Mr. Purvis, for the Plaintiff.

THE MASTER OF THE ROLLS [Sir John Leach] decreed a specific performance.

[179] PERRY v. KNOTT. June 25, 1841.

[See S. C. 5 Beav. 293.]

A testator bequeathed to A. a legacy in trust for B. for life, with remainder for her children. A. and the three other executors transferred the legacy into the names of A. and B.; and B., having survived A., sold it, and applied it to her own use. After B.'s death, her child filed a bill against the representatives of A. alone, to make them responsible for the breach of trust. Held, that the other executors and the representatives of B. were necessary parties.

A testator gave and bequeathed unto his son Joseph Aldridge, his executors and administrators, the sum of £1000 in trust, for the separate use of Elizabeth, the wife of William Howell, for life, and after her decease amongst her children living at her decease. He appointed Deborah Aldridge, John Pricklow, Joseph Aldridge, and Edward Aldridge, his executors.

The testator died soon after, and his will was proved by his executrix and executors, who (according to the statement in the Defendants' answer), shortly after the testator's death transferred, out of the stock standing in the Bank in the names of the executors and executrix, a sum of 3 per cent. consolidated Bank annuities, which at the current price of such stock at the date of such transfer was worth £1000 sterling, into the joint names of Joseph Aldridge and Elizabeth Howell.

Joseph Aldridge died in 1823, and Elizabeth Howell having survived him,

transferred the fund into her own name, and afterwards sold it out and applied it to her own use. Elizabeth Howell died in 1839, leaving two children, viz., the Plaintiff, Mrs. Perry, and William Howell.

The bill was filed by Mr. and Mrs. Perry against Mr. and Mrs. Knott (the latter being the legal personal representative of Joseph Aldridge), seeking to charge his estate with a breach of trust, for the loss of the £1000, [180] in consequence of the fund having been improperly placed under the control of Mrs. Howell.

The Defendants, by their answer, insisted, "that if any breach of trust was committed touching the said stock, the same was committed by Edward Aldridge, Deborah Aldridge, and John Pricklow; and that they or their personal representatives, as well as the said William Howell, and the personal representatives of Elizabeth Howell, were necessary parties to the suit."

The cause now came on for hearing.

Mr. Kindersley and Mr. Wood, for the Plaintiffs.

Mr. Stuart, for the Defendants, objected that the suit was defective for want of parties, and could not proceed in their absence. First, because the other executors or their representatives ought to be parties; *Munch v. Cockerell* (8 Sim. 219). Secondly, because the representative of Mrs. Howell, who had sold out the fund, was not a party; and, thirdly, because William Howell, who was entitled to half the fund, was not before the Court.

Mr. Kindersley and Mr. Wood contended that a bill might be filed against any or either of the parties to a breach of trust; *Walker v. Symonds* (3 Swan. 75). That if the other executors were made parties there could be no contribution in this suit. [THE MASTER OF THE ROLLS. No, but if they were all present, the amount due would be settled in the presence of all, and in a subsequent suit for contribution the amount would already have been conclusively decided.] They also argued that the Plaintiffs, claiming a given proportion of an ascertained [181] appropriated fund, might proceed for the recovery thereof, in the absence of the parties entitled to the other portion; *Smith v. Snow* (3 Mad. 10), *Hutchinson v. Townsend* (2 Keen, 675).

THE MASTER OF THE ROLLS [Lord Langdale]. I think this case is deficient for want of parties. I must, on this occasion act upon what I conceive to be the established rules and principles of the Court in this kind of cases; but I may, without hesitation, say this, that the difficulties under which parties labour who seek to have relief in such cases, in respect of necessary parties, must be before a very long time considerably alleviated. The matter has been and is now under very serious consideration. (See Ordines Can. 174.)

In this case, by a codicil dated so long ago as March 1781, the executors of the testator in this cause were directed to pay a sum of £1000 to Joseph Aldridge; which was to be in trust for Elizabeth Howell, the testator's daughter, during her life, and after her death the principal was given to her children. This, no doubt, was a very plain and simple direction. According to the statement of the facts now made to me, the four executors, instead of making the payment or transferring the stock to Joseph Aldridge, who was the person appointed trustee by the testator's will, all concurred in making a transfer of the stock into the joint names of Joseph Aldridge and Elizabeth Howell. In that respect they all of them acted contrary to the trust reposed in them by the testator. The result was exceedingly unfortunate; for being in the joint names of Joseph Aldridge and Elizabeth Howell, and Joseph Aldridge having died first, Elizabeth Howell, by survivorship, obtained the [182] complete dominion over the fund, sold it, and applied it to her own use; in consequence of which, the children's rights have been hitherto defeated, and by this bill they claim to have redress, as undoubtedly, according to the facts stated, they are entitled to. The question is, who ought to be made parties to the suit? Now the first breach of trust, in this case, was in the transfer into the joint names of two persons, instead of into one single name. I am asked to conclude, that it was done under circumstances, which would afford no right of contribution to the estate of Joseph Aldridge. There are no circumstances, in the case, to enable me to come to that conclusion; and for anything that appears to the contrary, all the executors may be liable. That being so, then, according to the established rules of this Court, upon which I must now act, all those who are liable must be made parties to the cause.

A great deal of discussion has arisen upon the case of *Walker v. Symonds*, which was before Lord Eldon. It certainly has for some time been considered that the words which are there attributed to him do not afford a ground for that general proposition, which, at one period, they were thought to do; namely, that you might sue one person for a breach of trust in the absence of other parties liable. Yet I may observe, that I well recollect one case, which is not, however, reported, in which I attempted before Sir John Leach to enforce the contrary of what appears to be the effect of the case of *Walker v. Symonds*; but Sir John Leach, after a long controversy, acted upon it. (See C. P. Cooper, 78, note, and 509, 674.) Still upon a complete investigation of that case, without going into the *minutiae* of it, it does not appear to establish the proposition that a *cestui que trust* may proceed, separately, against [183] one trustee implicated in a breach of trust; and the ordinary rule of the Court is known to be otherwise.

I think, therefore, that this cause is deficient for want of parties, in respect of the absence of those other persons who were parties of the original breach of trust.

The other objection made is, that Elizabeth Howell's representatives ought to have been made parties to this suit. She is, in point of fact, the person who committed the second breach of trust, which consisted of the sale and misapplication of the fund.

I quite agree in the argument which has been addressed to me, that where trust money is sold, and paid away to a person who has no notice of the trust, and who has nothing more to do with it than the mere receiving it from a trustee, it would be very improper to make such a person party to the suit; but how is it here? Is it possible to conceive that Mrs. Howell was ignorant of the trust? Is it possible to conceive that she did not undertake, jointly with Aldridge, to perform that trust? I have no doubt, indeed it is almost admitted, that the Plaintiffs would be entitled to proceed against her if they thought fit. Are not the other parties, according to the rules of this Court, entitled to have her representatives here, in order that they may have established, as against her estate, that liability to which they themselves are subjected, in consequence of her wrongful act? It does appear to me, that, according to the rules of this Court, her personal representative is a necessary party to the suit.

One cannot help seeing that in this case the child of Mrs. Howell, who most probably had the benefit of the ultimate breach of trust, is by this suit seeking to call [184] upon the co-trustees of Mrs. Howell alone, for payment of the money, without giving them the opportunity of recovering the amount from her estate which received it. This does not appear to me to be just or equitable, and certainly is not in conformity with the decisions of the Court. I therefore think that this suit must stand over, with liberty to amend. I give no opinion as to the necessity of making the other child a party to the suit, for I have heard no reply on that part of the case.

The cause was afterwards heard and disposed of; the objection for want of parties having been removed by the 32d General Order of August 1841. (Ordines Can. 174.)

[184] HOBSON v. SHERWOOD. June 25, 29, 1841.

[For subsequent proceedings, see 6 Beav. 63; 8 Beav. 486. Cf. *Richardson v. Feary*, 1888, 39 Ch. D. 45.]

A party having a life-estate determinable on his marriage, in one-fifth of an estate, is entitled to a decree for partition.

Where, in a suit for partition, the Defendants are desirous that there shall be no partition of their several shares, the partition may be confined to the aliquot share of the Plaintiff.

This was a partition suit. It appeared that the property belonged to five sisters as tenants in common in tail; and the Plaintiff having married one of them, a disentailing deed was executed, and her share was settled. The Plaintiff's wife died

without issue; and her share then stood limited to the Plaintiff for life in case he should continue a widower, and not marry again, with remainder to the other sisters.

The Plaintiff, being so entitled, filed his bill for a partition of the estate; and the Defendants, who were [185] each entitled to one-fifth of the estate, as tenants in common in tail, and were together entitled to the remaining one-fifth, subject to the Plaintiff's interest therein, resisted the partition.

Mr. Kindersley and Mr. Parker, for the Plaintiff, contended that the Plaintiff had an estate of freehold, and that he was entitled to hold his share in severalty, and to have a partition. They cited *Gaskell v. Gaskell* (6 Sim. 643) and *Baring v. Nash* (1 Ves. & B. 551).

Mr. Stuart, Mr. Bethell, Mr. Elderton, Mr. Smythe, and Mr. Daniel, for the Defendants, contended that the Plaintiff had not such an estate as entitled him to have a partition; for it might determine the day afterwards. That it was discretionary with the Court to direct a partition; and that it would be more beneficial to all to appoint a receiver.

They argued also, that if a partition were decreed, it ought to be of the Plaintiff's share only; and that the four-fifth proportions, severally belonging to the Defendants, ought not, contrary to their wishes, to be divided.

THE MASTER OF THE ROLLS [Lord Langdale]. I cannot help regretting that this suit should ever have been instituted. The Plaintiff alone, who is tenant for life determinable on his second marriage, desires a partition; all the other parties desire to keep the estate together. If, however, the Plaintiff is entitled to the relief he asks, he must have it, however inconvenient it may be to the other owners.

[186] As tenant for life, I apprehend there can be no question but that he is entitled to a partition. The question is, whether the circumstance of his life-estate being determinable on his second marriage makes any difference. As at present advised, I think it does not; but I will further consider it.

The next question is, whether all the shares are to be divided, when all the other parties desire their shares to be kept together. At present I do not see any serious objection to allotting one-fifth to the Plaintiff only; but I am not aware that it has ever been done before, and I must therefore inquire.

June 29. THE MASTER OF THE ROLLS said that the one-fifth alone might be partitioned off; and that if no special directions as to costs were required, the ordinary decree for partition of that portion must be made.

[186] HATTON v. FINCH. June 28, 1841.

[S. C. 5 Jur. 548.]

Bequest "to A. and B. of the sum of £25 per annum, each, for and during the term of their natural lives, or the life of the longest liver of them, for their or her own absolute use and benefit." Held, that on the death of A., her annuity survived to B. for her life.

The question in this cause arose on the following clause in the will of the testator: "And I also further give and bequeath unto the said Jane Franks and Susanna Gifford the sum of £25 per annum each, for and during the term of their natural lives or the life of the longest liver of them, for their or her own absolute use and benefit."

[187] Jane Franks died in December 1839, but Susanna Gifford was still living; and the questions were, first, whether the annuity of £25, given to Jane Franks, ceased on her death, or continued during the life of Susanna Gifford.

Secondly, supposing the same annuity to be still subsisting, then, whether it belonged to Susanna Gifford, or to the representatives of Jane Franks.

Mr. Pemberton and Mr. Prendergast, for the Plaintiffs.

Mr. Kindersley and Mr. Rudall, for Mrs. Gifford, contended that there was a joint-tenancy, and that she was now entitled to two annuities of £25. That the words must be taken *reddendo singula singulis*, and then the gift would be of £25 each, during their natural lives "for their own absolute use," and of the same annuities "during the life of the longest liver of them" "for her own absolute use."

Mr. Tarrell, for the representatives of Mrs. Franks, contended that the word "or" should be read "and;" and that there was a gift of an annuity of £25 each to the annuitants, and its duration was to be "during the term of their natural lives and the life of the longest liver." That, consequently, the representatives of Mrs. Franks were entitled to an annuity of £25 for the life of Mrs. Gifford. He cited *Eales v. The Earl of Cardigan* (9 Sim. 384), in which the testatrix gave E. and C. his wife, "an annuity of £200 each, for their lives and the life of the survivor;" and it was held, on the death of E., that his representatives were entitled to an annuity of [188] £200 during the life of C. He also cited *Jones v. Randall* (1 Jac. & W. 100), and contended that there could not be a joint-tenancy, as the annuities were given to "each."

Mr. G. Turner and Mr. Rogers, for the residuary legatees. The gift is of several annuities to each, to continue during the life of each annuitant. The first part of the gift of "£25 per annum each for and during the term of their natural lives," would have given only an annuity to each during their joint lives: the testator makes this addition, "or" the life of the survivor, and not "and" the life of the survivor; for the latter would give several legacies during their joint lives and for the life of the survivor, which was not the testator's intention. The word "or" is never read "and" except to carry out the intention apparent on the will: here it would defeat it. In *Townley v. Bolton* (1 Myl. & K. 148) there was a gift over after the death of both annuitants.

Mr. Kindersley, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. I am very far from considering this to be a clear case. However, I think the proper construction is that which gives both these annuities to the surviving annuitant. I cannot at all agree with the argument that there is any joint-tenancy here. I think the gift to "Jane Franks and Susanna Gifford, of the sum of £25 per annum each," is the same as if he had said, "I give £25 per annum to Jane Franks, and £25 per annum to Susanna Gifford." Then when we come to apply the following words, which shew the duration, and to whom the benefit is to belong, I think that I cannot [189] construe them in any other way, so as to make them consistent, than in the way I am about to mention. There is, in substance, a gift of £25 per annum to Jane, and a gift of £25 per annum to Susanna, "for and during the term of their natural lives, or the life of the longest liver of them;" that is, these two annuities (and he is speaking with reference to both) are to continue "for and during the term of their natural lives, or the life of the longest liver of them," and then for whose benefit? These two annuities (for the will applies to both all along) are "for her or their own absolute use and benefit."

Now it is quite clear as a rule of construction that you must proceed *reddendo singulis singulis*; but here these two annuities (he is speaking of both in the same sentence) are to be for their benefit, during their joint lives, and to continue during the life of the survivor of them; but then they are to be "for her own absolute use and benefit." I confess there are strong reasons for another construction, but the preponderance in favour of this construction appears to me so great, that I am obliged to adopt it, and hold that these two annuities belong to the survivor for her life.

[190] WOODCOCK v. RENNECK. April 30, May 6, June 21, 28, 1841.

[S. C. affirmed on appeal, 1 Ph. 72; 41 E. R. 558; 11 L. J. Ch. 110; 6 Jur. 138.]

See *Lambert v. Thwaites*, 1866, L. R. 2 Eq. 158.]

Bequest to trustees, to pay the dividends to A. and B. his wife during their lives, and the life of the survivor; and after their decease, in trust to transfer and pay over unto their children, in such shares and proportions as the survivor of A. and B. should by will appoint. At the death of the testator there were three children. A., who survived B., appointed the whole fund to an only surviving child. Held, that there was a gift to children, subject to the power; but that the objects of the power and of the gift were the children living at the death of the surviving parent; and therefore that the representative of a child who died in the life of A. had no interest in the fund.

On the 30th September 1817 William Linton died, having made a will, whereby, amongst other things, he bequeathed his real and personal estate to trustees, on trust to pay the income to his wife for life, and after her decease, upon several trusts, one of which was expressed as follows:—"And as to the sum of £1700 4 per cent. consolidated Bank annuities, part of the said trust monies, in trust to pay the yearly dividends thereof to Joseph Christie and Sarah his wife during their lives, and the life of the survivor; and after their decease, then in trust to transfer and pay over the said stock unto their children, in such shares and proportions as the survivor of them, the said Joseph Christie and Sarah his wife, by his or her last will shall direct or appoint."

At the time of the testator's death, Mr. and Mrs. Christie were living, and had three children, viz., the Defendant Eleanor Renneck, the wife of the Defendant John S. Renneck, Joyce Linton Woodcock, the late wife of the Plaintiff, and William Linton Christie.

William Linton Christie the son died in the year 1818, leaving both his parents surviving him.

Mrs. Christie died in the year 1820; and Joyce Linton Woodcock, the Plaintiff's wife, died in the year 1832, and the Plaintiff afterwards obtained letters of administration of her estate.

[191] In these circumstances, Mr. Christie having survived his wife, and Mrs. Renneck being the only surviving child of Mr. and Mrs. Christie, Mr. Christie made his will, dated the 16th of October 1833; and thereby, after reciting the power given to him by the will of William Linton, he expressed himself as follows:—"I do, by this my will, direct and appoint that the trustees and executors of the said W. Linton, &c., &c., do and shall stand possessed and interested in the said stock or sum of £1700 late 4 per cent., but now reduced to 3½ per cent. annuities, after my decease, in trust to sell, assign, transfer, dispose, and pay the same, and the interest and dividends thereof, after my decease, in such manner as my daughter and only child by my said deceased wife, viz., Eleanor Renneck, &c., &c., shall from time to time, and notwithstanding her present or any future coverture, direct or require; and for which her receipts, for the time being, shall be effectual discharges; and in all respects for her absolute use and benefit, as her own absolute property, as if she was sole and unmarried."

Mr. Christie died in February 1839; and in the following month of December Mr. Renneck became insolvent.

The Plaintiff by his bill prayed a declaration, that, as administrator for his late wife Joyce Linton Woodcock, he was entitled to a share of the fund, and that the trustees might be directed to transfer the same to the Plaintiff accordingly.

Mr. Pemberton and Mr. Roupell, for the Plaintiff. The power was to appoint amongst all the children, and did not warrant the exclusion of any child. The [192] appointment of the whole to one child would therefore be void; *Vanderzee v. Aden* (4 Ves. 770), *Gibson v. Kinnon* (1 Vern. 66).

Again, the power was to appoint by will amongst children in proportion. This required a plurality of objects; and, as the representatives of a deceased child could not be appointees, *Boyle v. The Bishop of Peterborough* (1 Ves. jun. 299), and as only one child was living at the death of the surviving parent, the capacity to appoint was consequently destroyed; *Vane v. Lord Dungannon* (2 Sch. & Lef. 118), *Campbell v. Sandys* (1 Sch. & Lef. 293).

There is a gift to all the children in default of appointment; *Bellasis v. Ulthall* (1 Atk. 426), *Grievson v. Kirsopp* (2 Keen, 653). They therefore took vested interests to some extent in the fund, which could not be wholly defeated by the execution of the power, though the amounts might be thereby regulated. In default of appointment the children take equally; *Casterton v. Sutherland* (9 Ves. 445); and the Plaintiff is therefore entitled to one third. They also referred to *Folkes v. Western* (9 Ves. 456).

Mr. Parry, for the administrator of W. Linton Christie, contended that if the appointment were void, the property would go in equal thirds amongst the three children.

Mr. Kindersley and Mr. Dixon, for Mrs. Renneck, contended that the death of two of the children in the life-[193]-time of the surviving parent, did not prevent the power being executed in favour of the surviving child. *Boyle v. The Bishop of Peterborough* (1 Ves. jun. 299, and 3 B. C. C. 243), *Butcher v. Butcher* (9 Ves. 382, and

1 Ves. & B. 79), *Reade v. Reade* (5 Ves. 749). That the execution of the power in favour of Mrs. Renneck was valid; and if not, then that there was an implied gift to those children only who might be living at the death of the surviving parent, and that the children who died in the lifetime of Mr. Christie could therefore take nothing. That if all the children took in default of appointment, they took as joint-tenants, and that Mrs. Renneck would then be entitled by survivorship. They also cited *Alexander v. Alexander* (2 Ves. sen. 640), *Bray v. Hammersley* (3 Sim. 513, and 2 Cl. & F. 453), *Houstoun v. Houstoun* (4 Sim. 611), *Phipson v. Turner* (9 Sim. 227, 246), *Needham v. Smith* (4 Russ. 318), *Walsh v. Wallinger* (2 Russ. & Myl. 78), *Kennedy v. Kingston* (2 Jac. & W. 431).

Mr. George Turner and Mr. Busk, for the assignees of Renneck, followed the same line of argument. They contended that the Plaintiff had no interest, and that Mrs. Renneck took the property subject to the rights of her husband's assignees. They cited *Brown v. Pocock* (6 Sim. 257), *Crook v. Brooking* (2 Vern. 50, 106), *Campbell v. Campbell* (4 B. C. C. 15), *The Duke of Marlborough v. Lord Godolphin* (2 Ves. sen. 61), *Doc dem. Stewart v. Sheffield* (13 East, 526).

Mr. J. H. Taylor, for the trustees.

[194] Mr. Roupell, in reply.

JUNE 28. THE MASTER OF THE ROLLS [Lord Langdale). The Plaintiff, who is the legal personal representative of his late wife, contends, that the power created by the will of William Linton was a mere power to divide and distribute, and that the objects of the power (the children of Mr. and Mrs. Christie) being reduced to one, the power to distribute became incapable of being exercised. And the power being incapable of execution, he contends, that the will of Linton contains a direct gift to all the children of Mr. and Mrs. Christie; and, therefore, he, as representing his late wife, one of those children, claims an equal third part of the £1700 stock.

The Defendant, Mrs. Renneck, contends, that the power was well exercised in her favour; but even if the power could not be exercised, it is contended, both by Mrs. Renneck and by the Defendants, the assignees of her insolvent husband, that the Plaintiff can have no right to any part of the fund; because they say, that, according to the true construction of Linton's will, if the power was not well exercised, there is an implied gift, not to all the children of Mr. and Mrs. Christie, but only to such one or more of them as might be living at the death of the survivor of the parents.

It is evident, that the Plaintiff's title depends entirely upon his being able to maintain the point for which he contends, that, in default of appointment, all the children of Mr. and Mrs. Christie took vested interests in the fund, under the gift. If he cannot maintain that point, he has no interest in the question, whether the power was capable of being exercised or not.

[195] There is no gift in default of appointment, in special terms; but the Plaintiff contends, that the words of the will amount to a direct gift to all the children of Mr. and Mrs. Christie; that, under that gift, each child took a vested interest in some share; and that the power authorised no modification of that interest, but only enabled the surviving parent to determine the amount of the share which each child was to take, and, in default of appointment, left the shares equal.

The Defendants, except Sampson, who is the representative of the deceased son, contend, that the words do not amount to a direct gift to all the children, but amount to a gift, either direct or implied, only to such children as might have been objects of the power; that as the power was to be exercised only by the will of the survivor of Mr. and Mrs. Christie, and could only operate in favour of children living at the death of the survivor, the objects of the power were surviving children only, and they only were the children who could take under the gift in default of execution; and, further, it is argued, that the gift only appears by the direction to the trustees to transfer and pay; which direction was to be acted upon only after the decease of the survivor of Mr. and Mrs. Christie, and, consequently, only in favour of children then living; and, besides, that, if the children took under the will of Linton, they could only take as joint-tenants, and the whole, therefore, would belong to the survivor, Mrs. Renneck.

I have read the cases which were cited in the argument. It is not easy, and perhaps not possible, to reconcile them all; and there is none in which the power and the gift are expressed in the same terms as they are here. I think that there is a gift

to children of Mr. and Mrs. Christie, subject to a power to be exercised by [196] the surviving parent. But in considering what children of Mr. and Mrs. Christie were objects of the gift, it is necessary to consider the whole sentence in which the gift is expressed, and that sentence comprises the words creating the power; and although a portion of the sentence, if taken by itself, imports a gift to all the children, the generality of the expression may be limited by the other words of the same sentence; and as the power was to be exercised only by the will of the surviving parent, and therefore could only be exercised in favour of those who were living at the death of the surviving parent:—as this is not, in express terms, a gift to all the children in default of appointment, but a gift or trust for children, with words annexed, shewing that the distribution was to be among the children living at the death of the surviving parent:—and, moreover, as the gift is expressed only in the form of a direction to trustees to transfer and pay to children, after the death of the surviving parent; I think that the objects of the power and the objects of the gift are the children living at the death of the surviving parent, and, consequently, that the Plaintiff has no interest in the fund.

The Plaintiff contends that the words expressing the power ought to have no effect in determining the objects of the gift, but ought to have effect in shewing an intention to sever the shares of the children so as to prevent a joint-tenancy, but the words cannot be thus alternately rejected and employed.

His bill must therefore be dismissed, and with costs.

Affirmed by Lord Lyndhurst, C., 31st of January 1842 [1 Ph. 72].

[197] PERRY v. MEDDOWCROFT. *June 28, 29, 1841.*

[S. C. 12 L. J. Ch. 104.]

An agreement, made upon an advance of money, to convey property, and containing a power of redemption within a given time, and in default the sale to be absolute. Held, under the circumstances, to be a conditional sale and not a mortgage.

A. having agreed to purchase a property for £1435, borrowed £185 (the amount of auction duty and deposit) from B. B. afterwards advanced A. £600 on account of the purchase, but which was not so applied, and £1291 of the purchase-money remained unpaid. A. and B. afterwards entered into an agreement, by which it was agreed, in consideration of the £185 and the £600, and of a further sum of £400 to be paid by B. to A., that the property should be conveyed to B., provided that if A. paid B. on a day specified the £1435, and the sum of £1000 advanced, the agreement should be void; and A. was to have permission to make sales in the meantime, subject to the approval of B., so as to reimburse the purchase-money and advances made; "but if not then made, the sale was absolutely confirmed to B." The agreement contained no engagement to pay. B. afterwards completed the purchase. Held, that this was a conditional purchase, and not a mortgage, and A. having made default in payment, that the estate belonged absolutely to B.

It is the duty of executors to get in property specifically bequeathed, at the expense of the general estate.

The facts, as appearing by the reports of the Master after mentioned were these:—On the 15th of August 1820 John Davies (the husband of the niece of the testator Meddowcroft) contracted to purchase an estate called Wallasey Hills for £1435; but, being unable to pay the purchase-money, he applied to the testator to assist him. Meddowcroft in the first place paid for Davies the deposit money, amounting to £143, 10s. 1d., and a further sum for auction duty, making together £185, 7s. 1d. In October 1820 Meddowcroft advanced to Davies £600 on account of the purchase. It appeared that although the £600 was advanced on account of the purchase, it was not applied towards payment of the money remaining due to the vendor, which was wholly paid by the testator, very soon after the date of the agreement. In November 1820 Davies having occasion for a further sum of £400, the parties came to the agreement upon the construction of which the questions now before the Court depended.

The agreement itself was in the following words:—"An agreement made the 7th

of November 1820, between John Davies of Liverpool, gentleman, of the one part, and James Meddowcroft, of Grays Inn, gentleman. [198] "Whereas, on the 15th of August last, an estate called Wallasey Leasowe, or Wallasey Hills, was advertised for sale by public auction, at the Seacombe Hotel, in divers lots, agreeable to a plan then and there produced, but was sold to the Rev. Augustus Campbell in one lot, comprising 259a. 3r. 7p., together with all the benefit and advantage of the sea and lands, and shore bounding the same, which the Commissioner under the Wallasey Inclosure Act was empowered and authorised to allot and convey, at or for the price or sum of £1435. And whereas the said Augustus Campbell did not purchase on his own account, but was agent for the said John Davies. And whereas the said John Davies hath been in treaty for the sale of Lot 1, part thereof. And whereas the said James Meddowcroft, at the request of the said John Davies, paid the sum of £185, 7s. 1d. for the deposit and auction duty, and hath since advanced to the said John Davies the further sum of £600 on account of the said purchase. Now it is agreed that the said James Meddowcroft shall have conveyed to him, or as he shall direct, the whole of the said purchase, in consideration of the said sums of £185, 7s. 1d. and the said £600 so advanced as aforesaid, and the further sum of £400 in two months from the date hereof. Provided always, that in case the said Davies shall pay the said James Meddowcroft the whole of the said purchase-money of £1435, together with the said sum of £1000 now advanced, with interest for the same at the rate of 5 per cent. per annum, on the 15th of July next, this agreement to be void; and that the said John Davies have permission of making sales in the meantime, subject to the approval of the said James Meddowcroft, commencing with Lot 1, in rotation, so as to reimburse the purchase-money and advances made, and the lawful interest; but if not then paid, the sale is absolutely confirmed to the said James Meddowcroft."

[199] After the date of the agreement, the testator paid to Davies the £400 mentioned in the agreement, and paid to the vendor the residue of his purchase-money, amounting to £1291, 10s., and then he was let into possession of the estate.

In this state of things he made his codicil, dated 6th of April 1821, whereby he gave all his right and interest in the estate called Wallasey Hills to certain parties to be suit. The testator died on the 7th of July in the same year, before the day on which Davies, by paying the sums mentioned in the agreement, might have made the agreement void. Davies became insolvent, and neither he nor his assignees repaid the money to James Meddowcroft or his representatives.

By the decree made in this cause on the 10th of February 1826, it was referred to the Master to enquire, whether James Meddowcroft had, at the respective times of making his codicil and of his death, any and what estate or interest in the estate and hereditaments called Wallasey Hills, in the pleadings mentioned.

The Master, by his report dated the 5th of June 1832, found, that at the times mentioned, the testator was an equitable mortgagee of the estate in question, for the several sums of money paid by him as therein mentioned to the amount of £2476, 7s. 1d.

This finding was excepted to, and on hearing of the exception, in November 1832, it was referred to the Master, to enquire, whether, after the date of the agreement in the pleadings mentioned to bear date the 7th of November 1820, any steps were taken by John Davies, with a view to a redemption of the estate; and this was to be without prejudice to the question, [200] whether or not the testator was to be considered a conditional purchaser of the estate. The Master made his report on this enquiry, dated the 10th of March 1840; the cause came on, and upon the facts stated in the report the question was, whether James Meddowcroft, the testator, at the respective times of making his codicil and of his death, was, in equity, the conditional purchaser a fee-simple, or only mortgagee of the estate.

Mr. Tinney and Mr. Parker, for the Plaintiffs, the executors.

Mr. Kindersley and Mr. Younge, for parties claiming under the testator's will, contended, that the transaction between the testator and Davies was a sale with a privilege of repurchase, and not a mortgage; and default having been made in repurchasing upon the day specified, the estate belonged absolutely to the testator, and passed by his will. In *Tasburgh v. Echlin* (2 Bro. P. C. 265), a reversionary estate in a leasehold was conveyed in consideration of £200, with a proviso for redemption on payment of £200 and interest within five years; but on failure of repayment at the time limited, then the estate of the grantee was to be "absolute and indefeasible, as

well in equity as at law," and the grantee should "be for ever debarred from all right and relief in equity." The grantee also covenanted to release "all his right in equity to redeem the premises." The deed (as in the present instance) contained no covenant to repay, and in that case, the grantee was considered in the light of a conditional purchaser; and default having been made in payment within the five years, it was held that no decree for redemption could be made against him. The cases of *Seale v. Greenway* (19 Ves. 412) and *Verner v. Win-[201]-stanley* (2 Sch. & Lef. 393) turned on the particular circumstances which shewed the transaction to be one of mortgage; but it was admitted that the right to repurchase would not have been sufficient to turn the transaction into a loan. And see *Floyer v. Lavington* (1 P. Williams, 255) and *Mellor v. Lees* (2 Atk. 494).

That this transaction could not have been one of mortgage, for the testator had no right to foreclose after the expiration of the term, and consequently Davies had no right to redeem.

That the condition being a privilege granted to Davies, and not a penalty or forfeiture, the Court could not grant equitable relief: *Davis v. Thomas* (1 Russ. & Myl. 506).

As to the testator's interest passing under the will, they cited *Silberschildt v. Schindler* (3 Ves. & B. 45), and *Woodhouse v. Meredith* (1 Mer. 450).

Mr. Elmsley (in the absence of Mr. Pemberton), for the assignees of Davies, contended, first, that they were not bound by the condition; and, secondly, that the testator was a mere mortgagee. That the transaction appeared from the first a loan and security; and the rule of this Court was, that once a mortgage always a mortgage. That the proviso in this case was nothing more than the ordinary proviso for redemption, on payment on a certain day, against which the Court would always relieve. That the established principle in this Court was, that a mortgagor could not, by the most solemn engagements entered into at the time of the loan, debar himself of his right to redeem. (Coote on Mortgages, 21.)

[202] Mr. James Russell, for the assignees of the heir at law.

Mr. K. Parker, Mr. Hetherington, Mr. Skirrow, Mr. Stuart, and Mr. Lowndes, for other parties.

Mr. Tinney, in reply.

June 29. THE MASTER OF THE ROLLS [Lord Langdale]. The agreement is not expressed with the fulness and perspicuity with which it ought to have been; but having regard to the circumstances in which the parties were placed, I am of opinion, that the testator became the conditional purchaser of the interest to which Davies was entitled under the contract.

The contract was plainly a very beneficial one; but Davies, though entitled to the benefit of the contract, was unable to pay the purchase-money.

In November 1820 the testator, on the credit of the contract, had paid the deposit money to the vendor; and had advanced £600 to Davies, who was in want of £400 more; and the remainder of the purchase-money, £1291, 10s., was still due; and under these circumstances, it was agreed, that, in consideration of the deposit money and auction duty paid, and of the £600 paid, and £400 agreed to be paid to Davies, Meddowcroft should have conveyed to him the whole of the purchase; by which, I think, was meant the beneficial interest in the contract, together with the liability to pay the remainder of the purchase-money to the vendor.

[203] This arrangement, if absolute, would have given to Davies an immediate profit of £1000 upon the transaction; but it was not intended that the purchase should be immediately absolute; and the proviso was added, that if Davies paid to Meddowcroft the whole of the purchase-money of £1435, together with £1000 advanced to Davies, with interest on the 15th July then next, the agreement should be void. Davies expected to realise the money by sale of the property in lots, and the agreement contained an arrangement for that purpose, adding that the sales were to be made "so as to reimburse the purchase-money and advances made, and the lawful interest; but if not then paid, the sale is absolutely confirmed to the said James Meddowcroft."

Whatever may have been the conditions on which the £185, 7s. 1d. and the £600 were advanced, I am of the opinion that the agreement was, in its nature, a conditional purchase and not a mortgage. It was an arrangement, by virtue of which

Davies secured a profit of £1000 upon his purchase, and had the means of realising my further profit which the purchase would yield, if he could raise the money to pay Meddowcroft the amount of his advances with interest at the time agreed upon. Meddowcroft was the purchaser of the benefit of the contract, subject to the condition which might have been, but was not performed; and by reason of the non-performance of the condition he became absolute purchaser.

Under these circumstances, I am of opinion that Meddowcroft was entitled to an estate which passed by the devise in his codicil. (See also *Williams v. Owen*, 10 Sim. 366, and *Willis v. Latham*, 1 Ll. & Goo. 68.)

NOTE.—Affirmed by the L. C. 12th Dec. 1842 [12 L. J. Ch. 104].

[204] Another point was also decided in this case, which was as follows:—

The executors had incurred costs, charges and expenses in getting in some costs due to the testator, and which had been specifically bequeathed. The executors presented a petition for a reference to enquire whether they had properly incurred my costs, charges, and expenses in respect of these matters; and the question was, whether these expenses ought to be borne by the general estate, or by the specific legatee out of his legacy.

Mr. Stuart argued the former.

Mr. Kindersley the latter.

THE MASTER OF THE ROLLS. I consider it part of the duty of executors to get in the testator's estate, whether specifically bequeathed or otherwise; and I know of no instance in which the expenses have not been paid out of the general estate, as part of the expenses of the administration.

[205] *OVERTON v. BANISTER.* June 29, 1841.

[See *Overton v. Banister*, 1844, 3 Hare, 503.]

A plea for want of parties, to a bill in respect of a legacy given to a class of children to vest at twenty-one or marriage, objected, that the representative of A. B., a deceased child of that class, had not been made a party, but it did not shew that A. B. had attained a vested interest. The plea was overruled as informal. Request of £1200 to A. and B. upon trust, to appropriate and apply, in two equal parts or shares to be divided, to and for the benefit of all their children respectively. Held, on the context to give legacies of £600 to each family severally.

This case came before the Court on a plea for want of parties. The testator bequeathed to John and James Banister £1200 4 per cents., "upon trust to appropriate and apply the said sum of £1200, in two equal parts or shares to be divided, to and for the sole use and benefit of all their children respectively, together with the dividends arising and accruing therefrom, which he directed should, from time to time, be laid out and invested in the said stocks or public funds, there to accumulate for the benefit and advantage of all the children of his said two sons, share and share alike; and upon the further trust, that his trustees should pay, [206] transfer, and set over, the said sum of £1200, and all interest, dividends, and produce thereupon due, unto and among all and every the child and children of his said sons, equally to be divided between and among them, if more than one, and if but one, then the whole to such one, and to belong to and be vested in such child or children, being a son or sons at his or their age or respective ages of twenty-one years, or day or respective days of marriage, which should first happen." The will then proceeded in the following terms:—"Provided always, and it is my will, and I do hereby direct that in case all the said children of either my said sons shall depart this life not attaining the said years, days, or times aforesaid, then the said capital stock, as well original as accruing by virtue of this present clause or proviso, shall go and become vested in my said son or sons respectively, whose children shall have so departed this life."

The bill stated that James Banister had three children only, viz., James Banister, who had released his rights, and the Plaintiffs Sarah Overton and Mary Ann Banister, who had attained twenty-one.

That John and James Banister had sold out the sum of £600 4 per cents., being a

moiety of the £1200, like annuities, which John handed over to James, and that it was agreed that the proceeds thereof should be held by James Banister, and considered as and for the share and interest of his children. The bill alleged that he (James Banister) had applied the same to his own use.

The bill was filed by William Adams Overton and Sarah his wife, and Mary Ann Banister against John and James Banister alone, and it sought to make them liable for the breach of trust in respect of the Plaintiffs' share in the bequest and accumulations.

[207] The Defendant John Banister pleaded, that he had ten children who were now living; and that James Banister in addition to the children in the bill mentioned, had another son John who had departed this life; and insisted that all the children of John, and the representatives of the deceased child of James were necessary parties to the suit. The plea did not state that John, the child of James, had attained twenty-one or had married.

Mr. Kindersley and Mr. Shadwell, in support of the plea, cited *Andrew v. Partington* (3 Bro. C. C. 400), *Prescott v. Long* (2 Ves. jun. 690), and *Boraston's case* (3 Co. Rep. 16), to shew that all the children who came into *esse* before the eldest attained twenty-one would be entitled to participate in the legacy, and were therefore necessary parties; and they argued that all the children of John, and the representatives of John, the deceased child of James, were necessary parties to the suit.

Mr. Tinney and Mr. Metcalfe, *contra*, contended that the different moieties of the legacies were so distinct and severed that it was quite unnecessary to make the children of John parties to a suit for the recovery of the distinct share of the children of James.

And as to the representatives of John the younger, they objected, that the plea did not shew that he had lived to attain a vested interest in the fund.

They contended also, that the plea was multifarious, because it objected that several distinct persons were necessary parties, and therefore did not raise a single issue.

Mr. Kindersley, in reply.

[208] THE MASTER OF THE ROLLS [Lord Langdale], after referring to the terms of the will, and adverting to the words "appropriate" and "respectively" used therein, said that, in his opinion, the fund was so divided into two distinct parts, as to make it unnecessary to bring the children of John before the Court in this suit.

As to the representatives of the deceased child of James, that it was not very important, as the class must be ascertained by the Master; but he was of opinion that the plea could not be sustained on the ground that it did not state whether John the younger had attained twenty-one or married.

That on these grounds he must overrule the plea.

[208] WILLIS v. PLASKETT. July 2, 3, 1841.

[S. C. 5 Jur. 572. Disapproved, *In re Sander's Trusts*, 1866, L. R. 1 Eq. 675.]

Stock held, upon the context of a will, not to pass by the word "money."

A testatrix first directed her funeral expenses to be paid, and she gave the remainder of her monies to B., and her wearing apparel, trinkets, and all other property, whatsoever and wheresoever, to C. Held, that money in the funds did not pass to B.

Gift to A. for life, with remainder, in case A. died unmarried (which happened) between B. and C., "or such of them as should be then living," and the lawful children of such of them as should be then dead, "for the share of the father or mother deceased only." B. and C. died in the lifetime of the tenant for life. B. had issue, C. had none. Held, that C.'s interest was not vested, and that his representatives were not entitled.

The testator, Robert Jobling, gave to his trustees certain monies, in trust to invest in the funds; which, with his money in the funds, were to be held in trust for his wife Sarah Jobling for life; and after her death, to pay an equal half part of the

dividends to her daughter Elizabeth Jobling, for her separate use for life; and after her death, to transfer a moiety of the funds "unto and among all and every the lawful child or [209] children of her said daughter Elizabeth Jobling, and any lawful grandchild or grandchildren of her said daughter Elizabeth Jobling, for the share of the father or mother deceased only, share and share alike;" and he then proceeded in the following terms: "but in case my said daughter Elizabeth Jobling shall die unmarried" (which event happened), "or being married, shall die without leaving any child or children, grandchild or grandchildren, then, my said trustees and the survivor of them, his executors or administrators, shall sell, assign, or transfer such last-mentioned moiety or half part of the said annuities, and pay and divide the money arising therefrom unto and between my said son John Jobling and my said daughter Sarah Eleanora Terry, or such of them as shall be then living, and the lawful child or children of such of them as shall be then dead, for the share of the father or mother deceased only, share and share alike. And I give and bequeath all the rest and residue of my estate, goods, chattels, and effects unto my said wife Sarah Jobling, for her own use."

Soon after the testator's death the monies were invested in the funds.

The testator's widow survived him, and died in 1797. Elizabeth Jobling died in 1839, without having been married. John Jobling died in 1820, without issue; and Sarah Eleanora Terry died in 1819, leaving children.

The first question was, whether the legal personal representative of John Jobling took anything under the preceding gift; or whether the moiety of a moiety, intended for him and his children, belonged to the representatives of the widow, who was residuary legatee.

[210] Mr. Pemberton and Mr. L. Wigram, for the Plaintiffs, contended that one moiety went to the children of S. E. Terry, and that the other was undisposed of, and went to the widow as residuary legatee.

Mr. George Turner and Mr. Gaselee, *contra*, contended that there was a vested gift to John Jobling and Sarah E. Terry, with a gift over on a particular event, which had not happened; and that therefore the vested gift to John Jobling remained undefeated; *Harrison v. Foreman* (5 Ves. 207), *Sturges v. Pearson* (4 Mad. 411).

Mr. Beavan, for the Defendant Plaskett.

Mr. Pemberton, in reply. There is no vested gift.

THE MASTER OF THE ROLLS was of opinion, that the share intended for John Jobling and his children had not vested, but passed under the residuary gift to the widow.

His Lordship having decided that the one-fourth passed, under the residuary clause, to the testator's widow, it then appeared, that Elizabeth Jobling became entitled to one-half thereof, or one-eighth of the whole. Elizabeth Jobling, by her will, dated the 2d of December 1832, gave as follows:—"I first direct my funeral expenses to be paid, and the remainder of what monies I die possessed of to be equally divided between my niece Mrs. Sarah Willis and my nephew Mr. Charles Terry. I also give to the said Mrs. Sarah Willis all my wearing apparel, trinkets, and all other property whatsoever and wheresoever that I may die possessed of."

[211] For the Plaintiff it was contended, that the trust property did not pass under the word "monies;" but that it passed under the residuary bequest in the will of Elizabeth Jobling. *Ommanney v. Butcher* (Turn. & Russ. 260), *Legge v. Asgill* (1b. p. 265, note), *Gooden v. Dotterill* (1 Myl. & K. 56).

For the Defendant it was argued, that stock would pass under the expression "money;" as in *Rogers v. Thomas* (2 Keen, 8), *Dowson v. Gaskoin* (2 Ib. 14). That the testatrix, having directed her funeral expenses to be paid out of her monies, was clearly referring to her whole property, and that the words "all other property whatsoever," must at least be referred to property *ejusdem generis*, as wearing apparel and trinkets, and not to the general residue.

THE MASTER OF THE ROLLS [Lord Langdale]. It does not appear to me that, by the word *money*, the testatrix intended to give the stock. When a testator directs the payment of his funeral expenses, there is an inference that he is referring to his general personal estate; but having regard to the other parts of this will, I think I am prevented from giving to the word "monies" its extended meaning.

[212] ALDRIDGE v. WESTBROOK. July 1, 1841.

The two co-heiresses of a trustee, who lived at a distance from each other, were made parties to a suit for enforcing the performance of marriage articles. They submitted to act as the Court might direct, and defended separately. Held, they were entitled to two sets of costs.

By certain marriage articles under seal, dated in 1802, the husband covenanted with trustees to convey and settle certain real estates on the trusts therein mentioned. The articles not having been performed, a bill was filed for that object, and to bill the co-heiresses of the surviving covenantor of the articles were made parties. The bill prayed a specific performance, the appointment of new trustees, and a conveyance to the co-heiresses or such new trustees.

One of the co-heiresses resided with her husband in Sloane Street, Chelsea, the other at Benson in Oxfordshire.

They appeared, and answered, and were defended, by separate solicitors. On them put in a full answer to all the allegations in the bill, stating that if she was trustee, she submitted to act as the Court might direct, on being indemnified and her costs. The other put in a short answer, stating that she was a stranger to matters; but that if a trustee, she was desirous of relinquishing the trust; and submitted to act under the Court.

The cause coming on for further directions,

Mr. Bethell, Mr. Stinton, and Mr. Randell submitted that the two co-heiresses who had severally in their defences, ought to be allowed one set of costs only; **[213]** v. *Taylor* (2 Beavan, 346); and the first mentioned co-heiress was wrong in answering the whole of the bill, as to which she was not interested.

[THE MASTER OF THE ROLLS. That might be so if you had not required her to answer all the interrogatories: you might have limited the extent of discovery as to her. (See the 16th Order of August 1841. Ord. Can. p. 168.)]

Mr. James, for Mrs. Wood, one of the co-heiresses, and for her husband, contended that this was not the ordinary case of trustees, but of parties strangers to the trust, and upon whom the law alone had cast a duty which they were not bound to accept: that they had no estate, and that there existed no privity of contract; under the circumstances, and considering the distance at which the parties lived from each other, they were justified in appointing separate solicitors.

Mr. K. Parker, for Mrs. Hollis, the other co-heiress, and for her husband. The case depends on its own particular circumstances; and in a late case in this Court *Slaughter v. Perry*, it was held that living at a distance was a sufficient reason for trustees defending separately.

THE MASTER OF THE ROLLS [Lord Langdale]. According to the facts as represented, these two ladies are the co-heiresses of the surviving trustee. They acted in common in the performance of the trusts, nor did they ever undertake to perform the duty which belonged to their ancestor: they appear also to have been living at a distance from each other, and therefore **[214]** I do not think that it comes within that very salutary rule, which prevents trustees from separating in their defences, and putting money into the pockets of third parties at the expense of persons beneficially entitled. They are both, therefore, entitled to their costs between party and party.

See 27th Order of April 1828. Ord. Can. p. 16.

[214] WILSON v. CLUER. July 3, 1841.

Decree against a mortgagee in possession, with costs; a tender having been made in the suit, and it having been found, upon taking the accounts with annual rests (that was the point in the cause), that nothing was, at that time, due to the mortgagee.

This case is reported in 3 Beavan, 136, where it appears that the Master of the Rolls directed the account to be taken, with annual rests, as against a mortgagee.

possession, on the ground that all the arrears of interest had, by a settlement of accounts, been then converted into principal.

It appears also that, in 1824, the mortgagor tendered the mortgagee £40 in payment of his demand; and that, upon taking the accounts without annual rests, £5 was due to the Defendant.

The cause now came on upon the Master's report, by which, according to the new mode of taking the accounts, he found that £159 was due from the mortgagee to the mortgagor, and he further found, from the accounts, that by this particular mode of taking the accounts, the mortgage had been paid off previous to the tender of the £40. Mr. Pemberton and Mr. Coleridge, for the Plaintiff, asked that the Defendant should pay the costs of suit.

[215] Mr. Stinton, *contra*, contended that the mortgagee ought not to be subjected to, as the decision in the case was new, and as the mortgagor had been originally in default. *Billington v. Harwood* (Turn. & Russ. 477) was cited.

THE MASTER OF THE ROLLS said he had no choice, but must direct the Defendant to pay the balance found due from him, with the costs of the suit; and to assign the costs at the expense of the Plaintiff.

NOTE.—See *Harvey v. Tebbutt*, 1 Jac. & W. 197, and the cases there referred to.

[215] HARVEY v. HARVEY. July 1, 5, 1841.

[For subsequent proceedings, see 5 Beav. 134.]

Where a class of persons entitled is numerous, it is a question of convenience whether the Court will require them all to be made parties.

Where a numerous class of residuary legatees permitted to sue on behalf, &c., in the absence of the greater portion of them.

The testator, by his will dated in 1816, devised and bequeathed unto his wife "full and entire enjoyment" of "his real and personal estate, subject to the payment by his said wife of the sum of £150 of lawful money of Great Britain annually, to such of his relations as she should deem requiring and most meriting;" and he devised his real estates to trustees, after the death of his wife, "to the eldest son that might then be living of James Harvey, his nephew, and the son that should then be living of Edward Harvey his nephew, in equal portions, share and share alike, during the terms of their natural lives; then, if said eldest sons of the said James Harvey and Edward Harvey should become entitled by virtue of his said will to receive the rents and profits of his said freehold estate during their minorities, it was his will that there should be paid to the said James Harvey" [216] and Edward Harvey, respectively, the sum of £30 annually for the education and maintenance of such the said eldest sons respectively until they should respectively attain the age of twenty-one years, out of the rents and profits of his freehold estate, with remainder to the second, third, and other sons of James and Edward Harvey, in tail male; with remainder to their daughters; with remainder to the testator's right heirs. And he directed his trustees, immediately after his wife's death, to sell all his leasehold and chattel property, and invest the proceeds in the funds, "upon trust that they should apply the dividends and interest of said securities, so as aforesaid to be purchased, unto, and equally amongst, all his children and children, grandchild and grandchildren, of the said James Harvey and Edward Harvey, who should not, from time to time, be in the receipt of the rents and profits of his said freehold estates, devised as aforesaid;" and in the event of the issue of the said James Harvey and Edward Harvey, the testator directed that the dividends and interest of the said securities should be equally divided between them amongst his own legal representatives.

In a codicil he declared it to be his will and meaning, that all his freehold leases of different estates which he held under the See of Exeter, or otherwise, should be sold in the same bequest, and be disposed of in like manner and for the same purposes, after the death of his said wife. And the said testator directed that all and sundry the child and children of his sisters Mary Arnold, Maria Odges, and Grace

Hicks, deceased, and of Catherine Pearson, then alive, which should or might be living at the time of the death of his said wife, should take his and their share and shares of his property, directed to be sold by his trustees as aforesaid, in common with the representatives of James and [217] Edward Harvey, provided for by his said will. And, lastly, the testator further declared his desire that his said wife Jane Harvey, alias Jenefer Harvey, should be *empowered* to retain in her hands all or any parts of the annual sum of £150, given by his said will to his different relatives, and to be paid them as therein mentioned, and by such means to create a fund to be applied for the renewals of a life or lives, in all or any of his freehold leases or leases for lives, determinable on terms of years. And the testator expressed it to be his desire that in so doing his said wife should consult with and take the advice of his said trustees.

After the testator's death his wife proved his will.

The Plaintiff, one of the children of James Harvey, filed this bill "on behalf of herself and all others entitled as residuary legatees in remainder," against the widow, the surviving trustees, the heir at law, and Catherine Pearson.

The bill alleged, that the persons now forming the class in the said will named, as children and grandchildren of James Harvey, and Edward Harvey, and the children of Catherine Pearson, were exceedingly numerous, being upwards of twenty-six, at least, in number. That there were several children of Mary Arnold, Maria Odges, and Grace Hicks in the said will named; and who were alleged by the Defendant, the widow, to have, as next of kin of the said testator, an interest, conflicting with that of the Plaintiff and the other legatees.

The bill prayed the establishment of the will:—the necessary accounts of the estate:—the renewal of the leases out of the surplus of the £150 a year: that the executrix might be made answerable for the lease-[218]-holds which had not been renewed, and that the £150 might be duly administered under the direction of the Court.

The executrix by her answer admitted "that the grandchildren of the said James Harvey and of Edward Harvey, in the said bill named, then living, and the persons representatives of such of them as had died since the death of the said testator, and the children of the said testator's sisters, Mary Arnold, Maria Odges, Grace Hicks, and Catherine Pearson, were exceedingly numerous; but what were the number she did not know, and she submitted, whether they had such a common interest in the subject of this suit as to entitle the Plaintiff to file a bill on behalf of herself and the others of such persons, and whether they or some of them ought not to be made Defendants to the said bill. She also stated that there were thirteen children of Mary Arnold, Maria Odges, and Grace Hicks living; and she submitted, whether the trusts of the fund to be invested out of the produce of the leasehold and chattel property were not wholly void for remoteness.

The cause now came on for hearing.

Mr. Kindersley and Mr. W. M. James, for the Plaintiff.

Mr. Turner and Mr. John Bailly objected that the suit was imperfect for want of parties. They contended that though a creditor could sue on behalf, &c., yet it was not competent for one of several residuary legatees to do so; and here there were some of the parties, on whose behalf the Plaintiff professed to sue, who, as next of kin, might have an interest to contend that the gift was too remote and void, and whose interests therefore were opposed to that of the Plaintiff.

[219] They argued also, that all the next of kin were necessary parties to the suit, to argue the question of remoteness.

Mr. Kindersley and Mr. W. M. James, *contra*, on the question of want of parties, contended, that the Plaintiff might properly represent those interests which were identical with her own; and as to the next of kin, that the widow and Catherine Pearson the sister of the testator, who would be entitled to share in the undisposed-of residue, were sufficient parties to argue the question as to remoteness. That it would be impossible to bring all these parties before the Court; and convenience and justice required that the questions in the cause should be determined in the suit as now framed, which would bind the rights of all the absent parties.

They cited *The Attorney-General v. Heelis* (2 Sim. & S. 67), *Adair v. The New River Company* (11 Ves. 429), *Cockburn v. Thompson* (16 Ves. 321).

Mr. Turner, in reply.

THE MASTER OF THE ROLLS. I will hear this cause, to know what is the nature of the decree asked, before I decide the point of parties.

The cause then proceeded, when the question of remoteness between the residuary legatees and the next of kin arose. There were several other questions, for it appeared that the widow had given £344, out of the £150 a year, to a widow of the testator's brother Thomas; she had also surrendered a lease, a part of [220] the testator's property, of which she was the surviving *cestui que vie*, in consideration of \$120. These acts were questioned by the Plaintiff, who insisted that the direction to renew the leases was compulsory.

THE MASTER OF THE ROLLS [Lord Langdale]. The principal point which arose for decision, in this case, was whether a legacy, given by the will of the testator, after the death of the tenant for life, to a class of persons not now ascertained, but who are to be ascertained upon the death of the tenant for life, was void for remoteness. Two objections for want of parties were taken by the Defendant. The first was, that it was not competent for the Plaintiff to sue "on behalf of herself and all others" who were in the like interest; for, as some questions might arise between them, the suit could not be sustained, unless all the persons who had presumptive rights to a share of this legacy were before the Court. Questions of this nature, whether certain persons are circumstanced as or are not indispensable parties to a suit, are very much questions of convenience; and in this case, I am of opinion, that though some inconvenience may arise, in not having all the parties presumptively entitled before the Court, yet that such inconvenience would be considerably less than would necessarily arise, from requiring them to be made parties in this stage of the cause; and which would probably amount to a complete obstruction of the suit, and would render it impossible ever to bring it to a hearing. My opinion is, that the first objection must therefore fail.

The other objection for want of parties is this; it being a question whether the legacy is void for remoteness, it may happen, that the next of kin have an in-[221]-terest in the legacy. That the next of kin will be convenient or proper parties, provided they can be had here without inconvenience to the other side, is a matter of no doubt. The Plaintiff herself has considered that they would be proper parties; because she has made one of the next of kin, and another person who is both heir at law of the testator and legal personal representative of another next of kin, Defendants; and the widow, who would be entitled to a share of the legacy in case of intestacy, is also a Defendant. The Plaintiff alleges, that there are now sufficient persons here to argue the question, or to maintain the interest of the next of kin.

This again is a state of things in which the Court may consider a suit properly constituted, on the ground of convenience; and looking, with that view, at the allegations contained in the bill and the answer, it does not now appear known that there will be a preponderating inconvenience by bringing the next of kin before the Court. I am therefore of opinion that the cause cannot proceed without some further enquiry respecting the next of kin, and, upon this occasion, I must order an enquiry who are the next of kin, and who are the legal personal representatives of each of the next of kin as are dead. I make no other order; because, in the end, it may turn out, when we know who are the next of kin, that it would be necessary, or at least proper, for the Plaintiff to proceed, even in the absence of the other next of kin. The question which I determine, in the present stage of the cause, is this, that there is nothing upon which I can act, to shew that there would be a preponderating inconvenience in bringing before the Court the other next of kin, or their representatives. There must be an enquiry before any further steps can be had.

[222] The question is one of considerable nicety: I have carefully looked into the cases of this kind, but it would be improper for me to give any further opinion upon it now. It requires a good deal of consideration what ought to be done.(1)

(1) It appearing that the next of kin and their representatives were numerous; but that there were no representatives of some of those who had died; and that five-eighths of the interest of the next of kin were represented in this suit; the cause was, on the 8th of June 1842, heard in the absence of those persons who were not already parties. See 5 Beav. 134.

[222] CALVERT v. SEBBON. July 6, 1841.

A testator appointed A. and B. executors, and after giving certain legacies, he gave A. £500 and B. £500. The executors renounced. Held, that they were not entitled to their legacies.

The testator, by his will, dated the 10th of July 1833, nominated and appointed Wm. Collins and R. M. Webster executors of his will, and, after giving certain legacies, proceeded:—"I give and bequeath to J. B. Price of &c., £500; to E. F. Price the like sum of £500; to the said Wm. Collins the sum of £500; and to the said R. M. Webster the sum of £500."

On the death of the testator, Collins and Webster renounced probate. The question was this, whether Collins and Webster, who had renounced, were entitled to the legacies of £500.

Mr. Kindersley, for Collins, and Mr. G. Turner, for Webster.

Mr. Swanston, Mr. Pemberton, and Mr. Willcock, *contra*.

[223] THE MASTER OF THE ROLLS [Lord Langdale] was of opinion that the legacies to the executors did not take effect.(1)

[223] WARD v. WARD AND OTHERS. July 7, 1841.

The Plaintiffs, after filing a replication to the answer of A. B., one of the Defendants obtained an order of course to examine him as a witness, saving just exceptions. Held irregular, and the order was discharged.

The Defendant Hearn having filed his answer, the Plaintiffs, on the 29th of January 1839, filed a replication thereto.

On the 16th of June the Plaintiffs obtained an order of course, for liberty to examine the Defendant Hearn as a witness for the Plaintiffs in this cause, saving all just exceptions.

This order had been obtained on the petition of the Plaintiffs alleging, "That the cause being at issue, the Petitioners were advised that the above-named Wm. Hearn was a very material witness for the Petitioners, and inasmuch as he was in no way concerned in point of interest," &c.

Mr. Pemberton and Mr. Campbell now moved to discharge this order.

Mr. Kindersley and Mr. Piggott, *contra*.

THE MASTER OF THE ROLLS [Lord Langdale] discharged the order with costs; on the ground that the Plaintiffs, having replied **[224]** to the answer of the Defendant, could not afterwards obtain an order of course, to examine him as a witness; which proceeded on the allegation that he was not interested.(2)

[224] LOCKHART v. HARDY. July 12, 1841.

Bill of costs incurred by two persons, ordered to be taxed, on the application and upon the undertaking of one.

An application for an order of course, to tax a solicitor's bill of costs incurred by two persons, upon the application and undertaking of one only, was made to the secretary of the Master of the Rolls, who, having some doubt as to the propriety of granting such an order as of course, the petition was served on the solicitor, and was now brought before the Court.

(1) See *Harrison v. Rowley*, 4 Ves. 216; *Dix v. Reed*, 1 Sim. & St. 239; *Stackpole v. Howell*, 13 Ves. 421; *Humberston v. Humberston*, 1 P. W. 333; *Cockerell v. Barks*, 1 Simons, 28, 2 Russ. 585; *Barksdale v. Abbott*, 3 Russ. 186; *Read v. Devaynes*, 3 B. C. C. 95, 2 Cox, 285; and *Piggott v. Green*, 6 Sim. 72.

(2) See *Holmes v. Corporation of Arundel*, 4 Beav. 155, and the cases there referred to.

Mr. G. Turner, in support of the petition, cited *Hazard v. Lane* (3 Mer. 285), where the order for taxation was made upon the application of one of two trustees and executors, and *Margerum v. Sandiford* (3 B. C. C. 233), where a bill was ordered to be taxed, although part of the business had been done for other persons jointly with the person applying.

THE MASTER OF THE ROLLS [Lord Langdale] said he did not see any objection to the order, and which was made upon affidavit of service.(1)

NOTE.—This cannot be done after action brought against two, *In re Chilcote*, Beavan, 421.

[225] *In re THE FOWEY CHARITIES. July 13, 1841.*

[S. C. 10 L. J. Ch. 368.]

reference, on the petition of the Attorney-General, made under the 2 W. 4, c. 57, to appoint new trustees of a charity, to settle a scheme, and to ascertain the property, and in whom the legal estate was vested.

This was a petition presented by the Attorney-General, intituled, "In the Matter of the Town Lands of the Borough of Fowey, the Free School, John Treffye's Charity, and Nicholas Sawle's Charity; and In the Matter of the 2 W. 4, c. 57." (2) The petition stated the origin of certain charities for the benefit of the inhabitants of Fowey; that the management thereof [226] and of the estate had devolved upon the corporation, no new trustees thereof having been appointed upon the death of the original trustees; and that the Corporation of Fowey had now become dissolved.

The petition also stated that an information and supplemental information had been filed respecting these charity estates, and that other proceedings respecting them had taken place in the Court of Chancery, which, however, had been discontinued. It was stated that great losses had been occasioned to the charities; and prayed that it might be referred to the Master to approve of new trustees of the said charity estates—to approve of a scheme for the said charities—and that it might be ascer-

(1) Reg. Lib. 1840, B. 885. The Petitioner submitting to pay, &c., order the taxation of so much of the bill, &c., of G. C., as relates to business done for the executors of J. W. deceased.

(2) "An Act to continue and extend the provisions of an Act passed in the fifty-ninth year of His Majesty King George the Third, for giving additional facilities in applications to Courts of Equity, regarding the management of estates or funds belonging to charities, and for making certain provisions respecting estates or funds belonging to charities."

This Act of 59 G. 3, c. 91, enacted, amongst other things,

"That whenever upon any examination or investigation taken or had by and before the Commissioners appointed or to be appointed under the authority of the fore-mentioned Acts, any case shall arise or happen in which it shall appear to the said Commissioners that the directions or orders of a Court of Equity are requisite for the remedying of any neglect, breach of trust, fraud, abuse, or misconduct, in the management of any trust created for any charitable purposes as aforesaid; or of the estates or funds thereto belonging, or for the regulating the administration of any such trust, or of the estates or funds thereof; it shall and may be lawful for the said Commissioners or any five or more of them, if they shall think fit, to certify the particulars of such case in writing under their hands to His Majesty's Attorney-General, and thereupon it shall be lawful for His Majesty's Attorney-General, if he shall so think fit, either by a summary application in the nature of a petition, or by information, as the case may require, to apply to or commence a suit in His Majesty's High Court of Chancery, or to or in His Majesty's Court of Exchequer sitting as a Court of Equity, stating and setting forth the neglect, breach of trust, fraud, abuse, or misconduct, or other cause of complaint or application, and praying such relief as the nature of the cause may require," &c.

tained of what the said property consisted, and in whom the legal estate in the landed property was now vested. The particulars stated in the petition had been certified to the Attorney-General under the above statute by the Charity Commissioners.

THE MASTER OF THE ROLLS [Lord Langdale] made the order as prayed, but the registrar objected to draw up the order, on the ground that such an order could only be obtained upon petition, under the 52 G. 3, c. 101. (Sir Samuel Romilly's Act.)

The petition was, therefore, again mentioned to the Master of the Rolls, and his Lordship held the objection to be unfounded, and directed the order to be drawn up.

Mr. Pemberton and Mr. Blunt appeared for the Attorney-General.

[227] SMITH v. LYSTER. July 14, 1841.

[S. C. 10 L. J. Ch. 344.]

A receiver appointed for the benefit of two infant tenants in common, not discharged on one coming of age.

The two infant Plaintiffs and the two adult Defendants were tenants in common in tail of certain estates. A bill was filed by the two infants by their next friends, and by the decree made in 1832, a receiver had been appointed, with directions to pay one-fourth of the net rents of the property to each of the Defendants, and an order was made for the appointment of a guardian of the Plaintiffs, and for allowance for their maintenance. The expense of the receiver was paid out of one moiety of the rents belonging to the infants.

The Plaintiff Mary Wilson attained twenty-one in February 1841, when she adopted the suit. The other Plaintiff was still an infant.

Mary Wilson now presented a petition, stating that she was desirous of being put into possession of the rents of her one-fourth of the hereditaments, and of having the receiver discharged, so far as respected her share. That the object of the said petition, so far as related to her, having been effected, she was desirous of having the petition dismissed, so far as respected her interest therein; or else, of being properly indemnified against any future costs, charges, or expenses, to which she might afterwards be rendered liable, by the same being further prosecuted in her name, as one of the Co-plaintiffs therein; and it accordingly prayed that the receiver might be discharged:—that the Petitioner might be let into possession of her one-fourth of the said suit, so far as related to her interest therein, might be dismissed, or else that she might be properly indemnified on the [228] behalf of the Plaintiff William Sumner Smith, or his next friend, against any costs, charges, and expenses which she might be put unto or incur for or by reason of her name being continued or made use of as a Co-plaintiff with the said William Sumner Smith.

Mr. E. R. Daniel, in support of the petition.

Mr. Leach, for the Co-plaintiff, cited *Calvert v. Adams* (2 Dick. 478), in which it is stated that a receiver was appointed of two-fifths of an estate; but Mr. Daniel took a note to that case, states, "but in *Willoughby v. Willoughby*, Lord Northampton refused to appoint a receiver of an undivided moiety, putting this question, 'could a receiver let, set, or distrain, or take any step without the consent of the coparcener?'"

Mr. Lloyd, for the Defendants, stated that the two parties who were concerned had submitted to a receiver merely on account of the infants.

THE MASTER OF THE ROLLS [Lord Langdale]. I do not see why this application should be now made. There is an estate belonging to four tenants in common, of whom being infants, a receiver was, with the consent of the Defendants, appointed for the protection of the infants, with directions to pay over to the adults their share. One of the infants has attained twenty-one; and she, so far from rejecting the suit, or alleging that it is improper, states the contrary, and adopts the proceedings. The object then being to protect the property during the infancy of both, one attains twenty-one, and desires to be dismissed from the [229] suit,

be let into possession. The object for which the suit was instituted and the receiver appointed has not yet been fully accomplished, and I cannot therefore make the order asked. If there has been any abuse, it must be brought before the Court in a proper form. At present I can make no order, and the petition must be dismissed with costs.

[229] *LOVELL v. YATES. July 15, 1841.*

Depositions ordered to be delivered over to a clerk in Court, for the purpose of producing them in a Court of law; he having been already ordered to attend with the bill and answers.

An indictment for perjury had been preferred against one of the parties to this cause, in relation to some of the proceedings therein, and a true bill had been found. By an order of this Court, made in March last, the clerk in Court was ordered to attend the trial at the Stafford Assizes, with the bill, answers, and affidavits.

It was found necessary that the depositions taken in the cause should also be produced. Part of these were in the custody of one of the examiners of the Court, and the remainder in the custody of the other examiner.

Mr. Blunt now moved that, to save the expense and trouble of the attendance of the examiners' clerks, the depositions should be delivered over to the clerk in Court, who should be ordered to attend the trial therewith.

THE MASTER OF THE ROLLS [Lord Langdale]. The documents necessary for the trial are in the hands of three of the officers of this Court; and the [230] clerk in Court having been already ordered to attend with some of them, I think it right that he should have the custody of the depositions also for the purpose of the trial.

[230] *LLOYD v. JENKINS. July 8, 1841.*

Where an answer is filed after notice of motion for a special injunction, affidavits subsequently filed cannot be used to contradict the answer.

The bill was filed in this cause by a party entitled under the will of the testator, and it claimed, as part of the testator's estate, a fund which, at the death of the testator, was standing in the joint names of himself and the Defendant, his reputed wife, and which therefore, by survivorship, came under the control of the Defendant. Some time after the filing of the bill, and before the answer had been put in, a notice of motion was given for a special injunction to restrain the Defendant from transferring, &c., the fund.

The Defendant put in her answer after the notice of motion had been given, and the Plaintiff subsequently filed affidavits in support of the motion, which contradicted the answer.

Mr. Tinney and Mr. Shebbeare, in support of the motion, were about to read the affidavits.

Mr. Kindersley and Mr. Twells, *contrâ*, objected that the affidavits could not be read to contradict the answer, they having been subsequently filed.

Mr. Tinney, in reply.

THE MASTER OF THE ROLLS [Lord Langdale] said his impression was that these affidavits could not be read for the purpose [231] for which they were tendered; and his Lordship disposed of the motion without reference to them.(1)

(1) See *Norway v. Rowe*, 19 Ves. 143; *Shirreff v. Barnard*, 8 Sim. 161; *Boddington v. Woodley*, 8 Sim. 167; *Naylor v. Wellington*, 8 Sim. 396; *Smith v. Cleasby*, 10 Sim. 91.

[231] LLOYD v. LLOYD. July 20, 22, 1841.

[S. C. 10 L. J. Ch. 327; 5 Jur. 673. See *Green v. Portman*, 1846, 5 Hare, 28. Questioned and distinguished, *In re Judkin's Trusts*, 1884, 25 Ch. D. 749. Cf. *la Parker* [1901], 1 Ch. 408.]

Where a gift of a portion of a residue fails, it belongs to the next of kin, and not the other residuary legatees. Thus, where a testatrix gave one-third of the residue to A., and another one-third to B., and as to the other one-third thereof, gave £500 to C., and the remainder thereof to D., and C. died in the lifetime of the testatrix it was held that the £500 belonged to the next of kin, as undisposed of.

The testatrix gave all her residuary personal estate, after payment thereof of her just debts, legacies, and expenses attending thereon, upon trust to divide the residue thereof into three equal parts or shares; and as to one equal third part of such residue, upon trust to pay or transfer the same unto her son John Lloyd, executors, administrators, or assigns, for his and their own use and benefit; and as to one other equal third part thereof, upon trust that they, her said trustees, should, within the space of six calendar months next after her decease, pay unto her son Charles Lloyd the sum of £500, part thereof, to and for his own sole absolute use and benefit; and as to the residue and remainder of such last-mentioned third part, upon trust for Charles Lloyd for life, with remainder to his children; and as to the remaining one-third part of such residue of her estate, she gave the same unto her daughter Charlotte Hodgkinson for life, with remainder to her children.

Charles Lloyd died in the lifetime of the testatrix, leaving children, and the question was to whom the £500 belonged.

[232] Mr. Pemberton and Mr. K. Parker, for the Plaintiffs, the children of Charles Lloyd.

The testatrix's intention was evidently to divide the residue between her children and their issue. The trustees were to divide it into three parts, and Charles Lloyd £500, and "the residue and remainder" was for the benefit of his children; when, therefore, the benefit intended for Charles Lloyd has been provided for, the residue belongs to his children, and this, in the event which happened, comprises the £500. The testatrix may be said to have given the residue, and this lapsed legacy of £500 belongs to that residue out of which it is to be paid.

Mr. Rogers, *contra*, contended that the £500 was undisposed of, and belonged to the next of kin. That it was not a simple gift of a legacy of £500, but was a portion of the one-third of the residue, and could not be held to have lapsed and have fallen back, a second time, into the residue, so as to belong to the other residuary legatees. He contended that the case of *Skrymsher v. Northcote* (1 Swan. 566) was precisely in point, and that the rule there applied to revocation, was equally applicable to a case of lapse.

Mr. Tennant, for the children of Charlotte Hodgkinson.

Mr. Pemberton, in reply. Revocation is different from lapse: the former indicates an intention; the latter is a matter of mere chance.

July 22. THE MASTER OF THE ROLLS [Lord Langdale]. In this case of *Lloyd v. Lloyd* I have looked over the case of *Skrymsher v. Northcote*, and I confess that [233] not able to find that there is any substantial difference between that case and the present.

In that case the testator gave to each of his daughters a life interest in his residuary estate, with remainder to their children; making, in the event of their being children, an absolute severance of the fund. And he directed, that if either of the daughters died without children, £500 should be paid, out of the moiety of the residue given to her and her children, to H. N.; and the remainder of that moiety was to go over to the other sister, subject to the same limitations. The testator revoked the gift of the £500, and the event on which it had been given having happened, the question was, whether it was to go to the other residuary legatee, or to the next of kin; and Sir Thomas Plumer considered, that although where a legacy

it enured to the benefit of the residuary legatee, yet "that a part of a residue, of which the disposition failed, would not accrue in augmentation of the remaining portion as a residue of a residue, but, instead of resuming the nature of residue, devolved as undisposed of;" and in that case he determined that the £500 must go to the next of kin. He considered that there was a subdivision made of that moiety of the residue, and that the sum given out of it was a portion of the residue, which neither went to the other residuary legatee, nor to any other person, but had lapsed for the benefit of the next of kin.

In this case the testatrix has given her residue, and directed it to be divided into three equal portions. One portion she gave to one person absolutely. As to the second portion, she gave £500 out of it to the father of the children who were intended to have the remainder after his death; and then she gave the remainder of the [234] third part of the residue to the father for his life, with remainder to his children; and the other third she gave to another branch of the family.

The question in this case is, what is to become of the £500, the gift of which has failed by the death of the legatee in the lifetime of the testatrix? I am satisfied that if she had contemplated the event which happened, namely, the death of that person in her lifetime, she would have given the whole of the share of the residue to his children, in the way she had given the remainder. But looking at the decision in the case before Sir Thomas Plumer, that there is a difference between a legacy and a legacy given out of a share of the residue, I must consider the £500 as a portion of the one-third share of the residue, and as a mere subdivision of it, and that it belongs to the next of kin as undisposed of.

[235] TAYLOR v. HEMING. July 22, 1841.

[S. C. 10 L. J. Ch. 369; 5 JUR. 766. See *Bate v. Bate*, 1844, 7 Beav. 537; *Turner v. Burkinshaw*, 1863, 4 Giff. 402.]

The Court cannot, at the instance of the Defendant, order a Plaintiff to produce for the Defendant's inspection documents stated in his bill, to be in the Plaintiff's possession.

Where a Plaintiff by his bill states documents to be in his possession, and it is necessary for the Defendant to see them, in order to put in his answer, the Court, though it cannot compel their production, will extend the time for answering, until after the Plaintiff has produced them. The fact of the documents being in the Plaintiff's possession must, however, appear upon the record.

The decision in *The Princess of Wales v. The Earl of Liverpool* approved of.

The bill alleging some fraudulent transactions between two of the Defendants, Messrs. Heming & Needham, and a Mr. Holmes, the partner of the Plaintiff, set forth some letters which had passed between those parties as proving the allegation. It then contained the following passage, that the Plaintiff "hath in fact discovered various other parts of the written correspondence between the said parties, that is to say, letters from the said Defendant J. S. Needham to the said George Holmes, and Plaintiff is ready and willing to deposit the same, if required for the purposes of this suit, with his clerk in Court, or to permit inspection thereof by the Defendants hereto; but Plaintiff hath, in order to avoid the expense of setting the same out in this his bill of complaint, set forth, in the schedule hereto annexed, a list or schedule of such letters by date, and to which Plaintiff craves if required to refer."

The schedule contained a list of about twenty letters from Needham to Holmes, specifying their dates.

The solicitor of the Defendants Heming & Needham had applied to the Plaintiff's solicitor for copies of the letters referred to in the preceding allegation, and he received copies of the letters which were mentioned in the schedule. Some of the dates of these copies did not agree with the dates as stated in the schedule; but this difference was stated to have accidentally arisen in the copying. It appeared from the correspondence which took place between the solicitors [236] after the filing of the bill, that the Plaintiff had in his possession other letters between Messrs. Heming

& Needham, and Holmes, besides those mentioned in his schedule, which he refused to allow the Defendants to have copies of.

Under these circumstances a motion was now made, on behalf of the Defendants Heming & Needham, that the Plaintiff might, within seven days after service of the writ of execution of the order, deposit, upon oath, with his clerk in Court the letters referred to in his bill and the schedule thereto; and also all other letters written by the said Defendants or either of them to Holmes, and Holmes, Taylor & Co., or either of them, and that the Defendants might be at liberty to inspect the same and take copies thereof, and that the Defendants might have a month's time to put in their answer after such letters should have been so deposited.

Mr. Pemberton and Mr. W. S. Daniel, in support of the motion.

Mr. Rogers, *contra*.

The Princess of Wales v. The Earl of Liverpool (1 Swan. 114, and also reported in 1 Wils. C. C. 113, and 2 Wils. C. C. 29), and *Shepherd v. Morris* (1 Beav. 175) were cited.

THE MASTER OF THE ROLLS [Lord Langdale]. This is an application of a description which is not very often made. Only one similar case has come before me; and I believe there are very few cases of this description to be found in the books. It is, however, a motion which is quite founded in justice, if the cir[237]-cumstances of the case be such as to render it proper, according to the practice of the Court, to grant the application.

The Plaintiff by his bill states, that he has in his possession certain documents which he does not set forth, not because they are not a material part of his case, but on account of the expense, and he offers to produce or deposit them. The question which is raised on this occasion is, whether he is to exclude the Defendants from that which he offers by his bill, and still avail himself of the process of the Court to compel the Defendants to put in their answer. I am of opinion that there is sufficient authority for saying he is not entitled to do so. If a Plaintiff refers in his bill to documents in his possession as forming part of his case, then, whether he does or does not offer to produce them, he cannot call on the Defendant to answer until he has seen the documents which are necessary for his answer. The Court has acted on that principle from the earliest period (see Wy. Pr. Reg. 161, and *Jones v. Lewis*, 2 Sim. & St. 242), and the case of *The Princess of Wales v. The Earl of Liverpool* was by no means the first case on the point. Judges of great experience have said that they could never understand on what principle that case was founded (see 5 Sim. 510), but I believe it is founded on principles, which upon examination would fully support it. What is asked in this case is, that the Plaintiff shall produce the documents. I am of opinion that I have no jurisdiction to make such an order. (See *Penfold v. Nunn*, 5 Sim. 409; *Milligan v. Mitchell*, 6 Sim. 186.) But the next part of the application is, that the Defendants may have a certain time to answer after the documents have been produced. This is what the [238] Court has done before, and which it is expedient to do in cases which fall within the rule.

The Plaintiff has set forth some letters, and referred to other letters, and it is contended that by his bill he leaves it to be inferred that there are letters forming part of his case which are not included in his schedule. I cannot arrive at that conclusion. I think that the Defendants should have full inspection of the letters stated in the schedule before they are compelled to answer. As to those of which copies have been given, but which do not correspond as to dates with those in the schedule, I observe it stated in the correspondence that there is a mistake. This may be so. I think the Defendants have a right to have this mistake explained by the affidavit of the Plaintiff, or of the parties employed by him.

There has been a subsequent correspondence between the solicitors, by which it appears that there are other letters which are not stated in the schedule which form part of the correspondence, but not of the Plaintiff's case as made by the bill. This fact appears from the subsequent letters, but not upon the record, and, however inconvenient, I am of opinion, that, according to the rule of the Court, I cannot either order the Plaintiff to produce them, or stay the progress of the suit until they are produced. It may be inconvenient and render a cross-bill necessary, but there is not, on the record, a statement that the Plaintiff has these documents in his possession. If a cross-bill were filed, there might be sufficient ground for a motion to

stay the proceedings in the first suit until all the correspondence has been produced. I think, however, as the case stands, that the rule of the Court compels me [239] to abide by the record; and I cannot, therefore, grant that part of the application.

The order must be that the Defendants have one month's time to answer after the production of the documents mentioned in the bill, and of an affidavit to prove their identity.

NOTE.—See also *Jackson v. Sedgewick*, 2 Wils. C. C. 167.

[239] BRETT v. HORTON. July 22, 1841.

[S. C. 10 L. J. Ch. 371; 5 Jur. 696. Followed, *In re Campbell's Trusts*, 1886, 31 Ch. D. 685. See *In re Stone* [1895], 2 Ch. 196.]

A testatrix directed her trustees to divide the rents, &c., of her real estate equally between A., B., C., and D. the widow of E., until E.'s children attained twenty-one; and upon their attaining twenty-one, the trustees were to sell and divide the produce between A., B., C., and the children of E., "in equal shares and proportions as tenants in common;" but if D. married, her part of the income was to be applied to the maintenance of E.'s children; and she gave the residue of her real and personal estate "equally between A., B., C., and the children of E. who attained twenty-one."

There were four children of E. who attained twenty-one. Held, that they did not take the property *per capita* with A., B. and C., but one-fourth only between them.

The testatrix, by her will, dated the 24th of January 1830, after directing a particular part of her real estate to be sold for payment of her debts, directed her trustees to pay and divide the rents of the remaining part of her estates unsold, "equally between her sister (the wife of Richard Bodington), her niece Sarah (the wife of John Bodington), and Sarah Brett (the widow of her late nephew William Brett), and her niece Ann Jones, until all the children of her said nephew William Brett should attain twenty-one years, or die under that age, which should first happen;" upon which event, she directed her trustees to sell the last-mentioned real estate, and pay and apply the money arising from such last-mentioned sale "unto and equally between her sister (the wife of [240] Richard Bodington), her niece Sarah (the wife of John Bodington), the child and children of her said nephew William Brett who should attain the age of twenty-one years, and her niece Ann Jones, and their respective executors, administrators, and assigns, *in equal shares and proportions as tenants in common.*" Provided, that in case the widow of William Brett should marry again, she directed her trustees, immediately thereupon, to pay her part of the income of the remaining part of the farms, &c., before directed to be paid to her, for the maintenance and education of the child or children of William Brett who should be then living.

And the testatrix devised and bequeathed the residue of her property, both real and personal, "unto and equally between her sister (the wife of Richard Bodington), her niece Sarah (the wife of John Bodington), the child and children of her said late nephew William Brett, who should live to attain twenty-one, and her niece Ann Jones, their respective heirs, executors, administrators, and assigns.

The testatrix died in 1830. The testatrix's nephew, William Brett, had four children; and the question now raised was, whether upon the youngest of such children attaining twenty-one, the four children were together entitled to one-fourth part of the testatrix's estate, or whether, on that event, they each became entitled to one-seventh part thereof.

Mr. Kindersley and Mr. Elderton, for three of the children of William Brett, argued that they were each entitled to one-seventh of the property, and that they took *per capita* with the other legatees; *Blackler v. Webb* (2 P. W. 383), [241] *Butler v. Strallon* (3 Br. C. C. 367), *Weld v. Bradbury* (2 Vern. 705), Roper on Legacies, 140; and see *Douling v. Smith* (3 Beavan, 541).

Mr. Pemberton and Mr. Lloyd, *contra*, did not dispute the general rule, but

contended, that there was, on the face of the will, a sufficient indication of the testatrix's intention, that the children should take only one-fourth between them.

Mr. Kindersley, in reply.

THE MASTER OF THE ROLLS. The testatrix seems to have postponed the division of the capital, until the children had attained a capacity to receive; and in the meantime the fund was to be divided into fourths, one of which was to be paid to their mother until all the children attained twenty-one, but to be applied towards their maintenance in case of their mother marrying again during that period. There can be no doubt, that, according to the general rule, a gift "to the wife of Richard, &c., and the children of William Brett equally as tenants in common," taken by itself, would entitle the legatees to take *per capita*; but these words may be controlled by the context; and I cannot conceive that it could have been the intention of the testatrix, that the other legatees were to take one-fourth each until the children attained twenty-one, but to have their shares reduced to one-seventh on that event. My impression is strongly against a division into sevenths, and, unless compelled, I cannot adopt that construction.

July 22. **THE MASTER OF THE ROLLS** [Lord Langdale]. In this case I have read over the whole of this will, and I confess the impression I have now, is [242] stronger than it was when this case was argued before me.

The testatrix had given the purchase-money to arise from the sale of the real estate, and the residue, in such terms, as, if taken by themselves, would, I think most clearly, have entitled every one of the children to an equal share in the fund; that is, according to the construction which the Court has frequently given to words of this kind, it would have to be divided into seven parts. But though this would be the effect of the words taken by themselves, yet, in this case, as in all cases, we must look at the whole will to see if we can discover what really was the intention of the testatrix, and this must control those technical and arbitrary rules which would otherwise prevent the real intention from being carried into execution.

The testatrix, in this case, after providing for the payment of her debts, has directed that the income of the remaining property should be paid in equal fourth shares; one-fourth share to each of three persons distinctly named, and the other fourth to the mother of the children, in a way, which shews it was intended, through her, to be applied for the maintenance and care of the children until the youngest of them attained twenty-one. This was to continue until the youngest of them attained twenty-one, but then the property was to be sold and divided amongst the three persons named and the children, describing them as a class, their respective "executors, and administrators, in equal shares and proportions as tenants in common." I cannot impute to this testatrix the intention of making a division when the youngest of those children attained twenty-one years different from that which she had previously made. I think the intention [243] was to continue its division into four parts; and all the words of the will will then have their full operation by that construction. Those children who attained twenty-one were to have one-fourth part of the estate in common amongst them and their respective heirs, executors, and administrators. I think that gives effect to the words contained in this will, and though it may be attended with some doubt, I think that is the true construction, and I must consequently hold that these children are entitled amongst them to a fourth only.

[243] SALOMON v. STALMAN. *July 22, 1841.*

An order, obtained on affidavit of service, discharged with costs, on the ground of a misnomer of a party in the affidavit.

A notice of motion was given by the Defendants to dismiss a bill for want of prosecution; and was entitled in a cause in which Joseph Constant Salomon was Plaintiff, and George Thomas Stalman and others (naming them) were Defendants.

The Plaintiff did not appear upon the motion, but it being stated that a replication had been filed, since the notice of motion had been given, the Defendant, on the 12th of June, obtained an order, upon affidavit of service of the notice of motion, that the Plaintiff should pay the costs of the application.

It was now moved, on behalf of the Plaintiff, that the order might be discharged for irregularity; on the ground, that the notice of motion had described the first-named Defendant as George Thomas Stalman, whereas his name as stated on the record was George Stalman only. There were other objections raised, [244] but the one stated was the foundation of the decision.

Mr. Pemberton, for the motion.

Mr. Addis, *contrâ*.

THE MASTER OF THE ROLLS [Lord Langdale]. This order was not regular, because the name of George Thomas Stalman is substituted in the notice of motion for George Stalman. This is enough in itself to decide this motion. If the Plaintiff had appeared there would have been no difficulty in setting the matter right, but when a party takes an order on affidavit of service, he takes it subject to every objection which can possibly be taken to it.

It has sometimes occurred, that parties, in order to embarrass their adversary, have not appeared, and at the same time have been actually present watching the proceedings, in order to discover some irregularity, of which they might afterwards take advantage.

Discharge the order with costs.

[245] GARROD v. HOLDEN. July 23, 1841.

The Court cannot, under the 1 W. 4, c. 36, assign counsel or solicitors to pauper Defendants on the application of the Plaintiff.

The Defendant, Sophia Holden, having been taken by the sheriff upon an attachment for want of answer, was on the 15th of April 1841 brought up, and having then sworn, pursuant to the provisions of the 1 W. 4, c. 36, that she was unable, by reason of poverty, to employ a solicitor to put in her answer to the Plaintiff's bill, an order was made, by which it was ordered that the Defendant should be turned over to the Fleet, and remain there until she should fully answer the Plaintiff's bill, clear her contempt, and the Court should make other order to the contrary. And it was referred to the Master to certify whether the said Defendant was unable, by reason of her poverty, to employ a solicitor to put in her answer to the Plaintiff's bill.

The Plaintiff prosecuted the reference, and obtained the Master's report, which was in the affirmative. The Defendant, however, refused to take any steps in order to avail herself of the provisions of the before-mentioned statute.

Mr. Tripp, on behalf of the Plaintiff, now moved under the second and sixth rules of the 1 W. 4, c. 36, s. 15, that the Defendant *might have counsel and solicitor assigned to her*, in order that she might be enabled to put in her answer; and that she might be brought to the Bar of the Court on the 4th of August; and that the Plaintiff's clerk in Court might then attend with the record, that the bill might be taken *pro confesso* against the Defendant, unless in the meantime she should put [246] in her answer. He cited *Welford v. Daniel* (9 Sim. 652), but observed that the Lord Chancellor had decided that the seventh rule of the statute in question was meant for the benefit of Defendants only. *Watkin v. Parker* (1 Myl. & Cr. 370).

THE MASTER OF THE ROLLS [Lord Langdale] having taken time to consider the provisions of the statute, refused to grant the motion in the terms asked, but ordered that a writ of *habeas corpus* should issue to bring the Defendant to the Bar of the Court on the 4th of August to answer her contempt, and that the clerk in Court for the Plaintiff should then attend with the record of the Plaintiff's bill, in order to take the same *pro confesso* against the Defendant.(1)

(1) See also *Williams v. Parkinson*, 5 Sim. 74; *Atkinson v. Flint*, *Ib.* 77; *Viscountess Barnewell v. Cooke*, 7 Sim. 320.

[246] UPJOHN v. UPJOHN. *July 27, 1841.*

Preliminary enquiries had been directed under the General Order of the 9th of May 1839; the sole Plaintiff died before the report, and before decree. Held, that a Defendant might file a supplemental bill to have the benefit of these enquiries.

The testatrix devised an estate to Catherine M. Upjohn for life, with remainder over to certain other parties.

In 1839 C. M. Upjohn, as sole Plaintiff, filed her bill against different parties interested in the estate, and amongst others against her husband Francis Upjohn, who represented one of the parties entitled in remainder, praying that the trusts of the will might be carried into execution.

In November 1839 certain preliminary enquiries were directed to be taken before the Master, under the 5th **[247]** General Order of May 1839 (Ord. Can. 136), to ascertain the heir at law and next of kin of the testatrix; and also to ascertain who was the survivor of the trustees, and in whom the legal estate of the property was vested, and whether certain parties had married, and what children they had.

Proceedings were had in the Master's office under this order; but before any report had been obtained, the sole Plaintiff died, and the suit became abated.

No decree had been made in the cause.

A supplemental bill was then filed by Francis Upjohn, one of the Defendants to the original bill, stating the proceedings in the original suit, and praying to have the benefit of all the proceedings therein. It now came on for hearing.

Mr. Pemberton and Mr. S. Prescott White stated the circumstances of the case, and observed that the Defendant in the original suit had a right to the benefit of the enquiry made under the decretal order of November 1839.

Mr. Purvis, for some of the Defendants, submitted whether it was regular for a Defendant to file such a bill as the present, where no decree had been made in the original suit.

Mr. Campbell, for other Defendants.

THE MASTER OF THE ROLLS [Lord Langdale]. The order of November 1839 was for the benefit of all the parties, and I see no objection to the decree now asked. The General Orders in reference to preliminary **[248]** enquiries have in practice been found very beneficial, and the Court must struggle to get over all difficulties, in order that they may have their full operation. (See Mitford Tr. p. 72, 79, 4th ed., and *Lloyd v. Johns*, 9 Ves. 37.)

[248] GRIFFITH v. BLUNT. *July 27, 28, 1841.*

[S. C. 10 L. J. Ch. 372. Distinguished, *Picken v. Matthews*, 1878, 10 Ch. D. 268.]

Bequest in trust to accumulate for all the children of A. and B. (who were living) equally, the shares of sons to be vested at twenty-five, and of daughters at twenty-five or marriage, and if one child only to be paid at twenty-five or marriage. Held too remote.

The testatrix, by her will, gave her residuary personal estate to her executors, upon trust to pay one-third part thereof to her nephew Thomas Robert Dimsdale, and to pay one-third part to her nephew Charles John Dimsdale, and proceeded thus:—"And as to the remaining one-third part of my said residue, upon trust to pay and make over the same to William Pitts Dimsdale, John Dimsdale, and Joseph Blunt, and the survivors and survivor of them, and the executors and administrators of such survivor, to be held by them upon the trusts hereinafter mentioned and declared of and concerning the same; that is to say, upon trust that they or he do and shall lay out and invest the same, in their or his names or name, in the Parliamentary stocks or public funds of Great Britain, or at interest upon Government or real securities in England or Wales, and do and shall from time to time alter, vary, and transpose the said trust monies so to be laid out and invested as aforesaid, for,

into, or upon other stocks, funds, and securities of the like nature at their or his discretion. And I do hereby declare that the said trustees or trustee, for the time being, shall stand and be possessed of and interested in the said trust monies, and the stocks, funds, and securities in or upon which they shall be invested, in trust [249] *to accumulate the same*, and the interest thereof, and to stand possessed of the same and the accumulations thereof upon and for the ends, intents, and purposes hereinafter expressed and declared of and concerning the same; that is to say, *in trust for all and every the child and children of my said two nephews Thomas Robert Dimsdale and Charles John Dimsdale*, equally to be divided between or amongst them, if more than one, share and share alike, *per capita* and not *per stirpes*, the share or shares of such of them as shall be a son or sons, to be an interest or interests vested in him or them, respectively, at his or their age or respective ages of *twenty-five years*, and the share or shares of such of them as shall be a daughter or daughters, to be an interest or interests vested in her or them respectively, at her or their age or respective ages of *twenty-five years*, or day or respective days of marriage, with the previous consent of her or their parents or guardians, which shall first happen. And if there be but one such child, then to such only child, his or her executors, administrators, or assigns, absolutely, *to be paid* to such child, if a son, on his attaining the age of *twenty-five years*, or if a daughter, on her attaining that age or on her marriage, with such consent as aforesaid, which shall first happen."

"Provided always, and my will is, that if any of the said children, being a daughter or daughters, shall die under the age of *twenty-five years*, without being or having been married, or if any of them, being a son or sons, shall depart this life under the age of *twenty-five years*, then and in such respective cases, the shares of the legatees so dying as aforesaid, shall go and accrue to the survivors or survivor of the children of my said two nephews, who shall be entitled to the remaining part of the said one-third part of the residue, share and share alike, and the share or shares surviving or accruing to the survivors or survivor of the said children shall be [250]—some vested in and be transferable to such survivors or survivor respectively, at such time or respective times as hereinbefore directed concerning his, her, or their original share or shares, and such benefit of survivorship and accruer shall extend, as well to the surviving and accruing as to the original share or shares."

By a codicil the testatrix, after reciting that she had given the two-thirds of her residuary personal estate to her nephews, proceeded in the following terms:—"And the other third part I have given among the children of my said two nephews, to be *equally divided* between them *at the times* and in the manner in my said will directed. Now I do hereby revoke the said disposition and direction, and instead thereof I direct that my said residuary personal estate shall be divided into five equal parts. And I give and bequeath two of such five parts unto my said nephew the Honourable Thomas Robert Baron Dimsdale, his executors, administrators, and assigns, to and for his and their own absolute use and benefit. I give and bequeath two other of such five parts unto my said nephew Charles John Dimsdale, his executors, administrators, and assigns, to and for his and their own absolute use and benefit. And as to the remaining one-fifth part thereof I give and bequeath the same to and among the children of my said two nephews, in the same manner and subject to the same limitations and conditions as directed by my said will, with respect to the third part thereby given to and amongst the said children as hereinbefore mentioned."

The testatrix died in 1832. Thomas Robert Dimsdale and Charles John Dimsdale survived her.

The Plaintiffs were the only children of Thomas Robert Dimsdale and Charles John Dimsdale; they were [251] all under the age of *twenty-five*, and one, who was a daughter, had married with the consent of her father. The residue amounted to more than £200,000.

The question was, whether the gift to the children of Thomas Robert Dimsdale and Charles John Dimsdale was or not too remote.

The usual accounts of the estate having been taken, and certain enquiries made, the cause now came on for further directions.

Mr. Tinney and Mr. Calvert, for the Plaintiffs. The trustees were to accumulate and hold the fund "in trust for all and every the child and children:" here there was a valid vested gift. The testatrix afterwards uses the term "vested;" but it is

clear that she referred to the time of payment; for if there was one child, the whole fund was to be "*paid* to him at twenty-five or marriage."

It appears from the codicil that the testatrix thought she had provided only for the time of distribution; she says: "I have given amongst the children of my said two nephews, to be equally *divided* between them at the times and in the manner in my said will directed." They cited *Blease v. Burgh* (2 Beavan, 221).

Mr. Pemberton, Mr. Kindersley, and Mr. Piggott, *contra*, for the next of kin, contended that the gift was too remote. They cited *Leake v. Robinson* (2 Mer. 363), *Ring v. Hardwick* (2 Beavan, 352).

Mr. Girdlestone, for the executors.

[252] Mr. Tinney, in reply.

THE MASTER OF THE ROLLS. I will read over the will; the only question seems, whether the word "*vested*" means "*paid*."

July 28. THE MASTER OF THE ROLLS [Lord Langdale] said that the will was really free from ambiguity; that the vesting was not to take effect till twenty-five or marriage, and that the gift was therefore too remote.

[252] SHEPHERD v. MORRIS. (*Ex relatione.*) July 28, 1841.

In a bill for an account, the Plaintiff, in general terms, charged errors in the accounts between him and the Defendant; and stated, that they appeared in a certain report of an accountant; but the bill did not state the report, or specifically point out the errors. Held, that the Plaintiff could not, on this record, give evidence of the report, or of such errors; and that, notwithstanding the Defendant had stated the report in his cross-bill, and had explained some of the errors.

The Defendant was the commission agent of the Plaintiff, and sold Roman cement on his account. The Defendant, from time to time, transmitted to the Plaintiff, who lived in the country, periodical accounts of the sales and other pecuniary transactions between them.

The bill alleged, that such accounts were not settled accounts binding upon the Plaintiff and the Defendant; and the bill charged, that in these periodical accounts, and in the other accounts, kept by the Defendant, of the pecuniary transactions between the Plaintiff and the Defendant, there were various errors; it also charged, that in each year, there were errors of sums received, and not credited to the account of the Plaintiff, of [253] sums improperly entered as paid on account of the Plaintiff, and other inaccuracies; and the bill charged, that such errors appeared in a report of an accountant in the Plaintiff's possession, and which he called upon the Defendant to inspect. The bill, however, did not set out the report, or otherwise specifically refer to it. The Plaintiff in fact objected to produce this report; and the Defendant obtained an order, for a month's time to answer, from the time of the deposit of the report with the Plaintiff's Six Clerk. (1 Beavan, 175.)

The Defendant afterwards filed a cross-bill, stating the report, and various explanations of the alleged errors in the account. The Plaintiff, by his answer to the cross-bill, abandoned some of these errors, and subsequently amended his original bill, whereby he gave up many of the errors alleged in the report; but he did not incorporate the report in the amended bill. The suits were ordered to come on together, and the evidence in one suit was ordered to be evidence in the other.

At the hearing, the Plaintiff in the original suit proposed to give the report in evidence in that suit; and also to give evidence of the specific errors mentioned in the report.

Mr. Girdlestone and Mr. Teed, for the Plaintiff Shepherd. The reason of the rule that in opening an account, specific errors must be alleged, is, in order that the Defendant may have notice of the errors, and an opportunity of explaining them. In this case the [254] rule does not apply. Here the Defendant has not only had notice of the errors, but has actually stated the report in his cross-bill, and by way of pretence and charge gone into and endeavoured to explain these errors. He has seen the report, and has, in fact, had the same notice of it, and of the errors mentioned in it, as if the report had been set forth at length in the bill or in a schedule.

Mr. Pemberton and Mr. Willcock, for the Defendant Morris, were proceeding to object to the evidence, when

THE MASTER OF THE ROLLS [Lord Langdale] said, I am of opinion, that the Plaintiff must state the specific errors on the record. Here there is an allegation, that there are various errors appearing in a certain report, which the Plaintiff calls on the Defendant to inspect. The Plaintiff however afterwards objected to the inspection, and the Defendant was obliged to apply to the Court for the special order stated, and afterwards filed a cross-bill explaining the errors appearing in the report. The Plaintiff put in his answer to the cross-bill, shewing that he was satisfied with respect to some of these errors, and he amended his original bill, but did not state on which of the errors mentioned in the report he relied, nor did he make the report a part of the record. I am of opinion that neither this report nor evidence of the errors pointed out in it can be received in the original suit.

[255] THE ATTORNEY-GENERAL v. DULWICH COLLEGE. Dec. 21, 1840;
Jan. 16, 29, 30, July 29, 1841.

[S. C. 5 Jur. 814.]

By letters patent, E. A. was empowered to found a charity, consisting of a master and a specified number of other members, who were thereby created a corporation, with power to take certain lands. E. A. was empowered to make ordinances for the Government thereof, and for the better ordering of the estates. E. A. established the charity, and conveyed the lands to the use of the master and other members, of the numbers specified by the letters patent, and to no other intent and purpose whatsoever. He afterwards made ordinances, whereby, amongst other things, he added to the number of members specified by the letters patent; and appropriated to them a portion of the revenues of the charity property. Held, that E. A. had not the power of creating additional members, or of declaring any trust of the property in their favour.

An information, alleging an abuse in the internal regulations of a charity dismissed, on the ground that they were the proper subject for the interference of the special visitor.

By letters patent, dated the 21st of June 1619, licence was granted by King James the First to Edward Alleyne, for the maintenance of poor men, women, and children, and the education of the same poor children, to found a college in Dulwich, to endure for ever, and consist of one master, one warden, four fellows, six poor brethren, six poor sisters, and twelve poor scholars, to be maintained, educated, and governed, according to such ordinances and statutes as he should make in his lifetime, or as the persons nominated by him should make after his death. And he was empowered to make such ordinances, constitutions, and statutes for the maintenance, education, and government of the said master, warden, fellows, poor brethren, sisters, and scholars as often as need should require. The college was to be called "The College of God's Gift," and the said master, &c., were to be a body corporate, and to have power to take, to them and their successors, for the maintenance of the said college, the lands therein mentioned. And licence was thereby granted to Edward Alleyne, to make statutes and rules for the better ordering as well of the said college, as the master, &c.; and also of the said lands and the rents thereof, to remain for ever inviolable, not being re-[256]-pugnant to the king's prerogative, nor contrary to the laws of the realm, nor ecclesiastical laws or constitutions of the Church of England. And the Archbishop of Canterbury was to be, for ever, visitor of the college, and to have power over the same, and the persons therein, and to visit, order, and punish, according to the ecclesiastical laws of England and such constitutions and ordinances as Edward Alleyne should make.

Pursuant to this licence, and on the 13th of September 1619, Edward Alleyne established the college, and nominated the master, warden, four fellows, six poor brethren, six poor sisters, and twelve poor scholars, to have perpetual succession according to such statutes as should be made.

Afterwards, by a deed dated the 24th of April 1620, Edward Alleyne conveyed the lands in the letters patent mentioned, to the sole and only use of the master,

warden, four fellows, six poor brethren, six poor sisters, and twelve poor scholars, and for and to no other intent and purpose whatsoever.

On the 29th of September 1626, or six years after the endowment, the founder established certain statutes and ordinances, for the maintenance, education, and government of the college; and he thereby stated the qualifications and duties which were to be required from, and performed by, the master, warden, fellows, poor brethren, and sisters, and poor scholars; and how the revenues were to be distributed.

In framing these statutes, he seemed to have considered, that, in some respects, he was at liberty to vary the corporation and foundation which he had established; and he appointed, that there should be [257] six chaunters for music and singing in the chapel, who should be called and esteemed junior fellows, every one of them to have his voice, as the four senior fellows had; six assistants touching the ordering of the college, and the rents, revenues, and profits thereof; and thirty members. And desiring that a proportion of the poor brethren and sisters should be chosen out of each of the parishes of St. Botolph without Bishopsgate, St. Saviour's in Southwark, and the parish now called St. Luke's, he directed the two churchwardens from each of those parishes should for ever be the assistants of the master, warden, and fellows for the governing thereof; and further, that the churchwardens and vestry of those parishes, should respectively make choice of ten poor persons, i.e., five poor men and five poor women in each parish, to be the members of the college, and to be admitted by them into the almshouses in London, that from thence they might be admitted into the college, as places should fall void; and he directed the mode of choosing the poor brethren and sisters, out of those members, by lot, and for making a payment to the poor men or poor women drawing a blank lot; and he ordered to be paid to each of the chaunters a certain annual sum, and a share of the surplus annual revenue; to each of the thirty members intended to be so appointed, a weekly payment of 3d., a gown once in two years, and a proportion of the surplus annual revenue.

The same Edward Alleyne by his will, dated the 13th of November 1626, gave certain specific bequests to the college; and directed his executors, within two years after his death, to build ten almshouses in the parish of St. Botolph without Bishopsgate, for ten poor people of that parish, to be members of the college, and likewise ten other houses, in St. Saviour's parish, for other ten [258] poor people, to be likewise members of the college; and having made a further memorandum, dated 20th of November 1626, whereby he confirmed two leases to the college, he died on the 26th of December in the same year.

The founder having, by his statutes and ordinances, and by his will, given directions which, if followed, would have altered the constitution of the foundation, and the estates, with which he had endowed the college, being, as it would appear, insufficient for all the purposes he contemplated, and moreover his assets being insufficient to provide ground, and build the almshouses which he had directed to be built, a bill was filed in this Court by the rectors, churchwardens, overseers, and certain parishioners of St. Botolph, against the college and the surviving executor of the founder, praying discovery and relief. In their answer to this bill, the corporation alleged, that the lands amortised to the corporation were but sufficient to bear the charge of the first foundation, and charges thereto incident, which the founder had omitted to provide for; so that the latter addition of six chaunters and thirty almspeople of the three parishes could not be maintained by the revenues; for which cause, and also for that the new addition to the corporation was not warrantable by law, they thought they were not compellable by law or equity to part with any part of the college revenues for the finding of six chaunters, or the relief or maintenance of the thirty almsfolk. And the surviving executor stated the assets he had received, and the payments he had made, and that he was content to charge himself with the remainder in his hands (which was £120) towards building the almshouses in St. Botolph's. That he thought the sum sufficient, and had offered therewith to build the almshouses, if the parish would provide the [259] land, but the parish rather desired to have the money for the benefit of the poor, by some other charitable employment, than to have the almshouses built, unless the allowances for the maintenance of the poor, according to the ordinances, could be had; and which could not be, for the reasons aforesaid. And he stated himself to be ready to prove, that £120 was the uttermost that the personal estate would produce for the building of

the almshouses required by the bill. In this suit, it was ordered, by consent, that the Defendant, the executor, should pay to the Plaintiffs the sum of £120, upon security to be given by the parish that the same should be duly employed. And it was ordered, that if any new addition of estate should come to the college, or there should thereafter be an overplus of value in the college revenue, then the Defendant should be liable to apply such increase to the additional charities of the founder, as the Court should think fit to direct; and upon payment of the £120 to the parish, the executor was to be discharged from the bequest.

At a subsequent period, some disagreement having arisen among the members of the college, the visitor (Gilbert Sheldon), the Archbishop of Canterbury, by his orders, dated the 16th of July 1664, ordered, that the college should consist of one master, one warden, four fellows, six poor brethren, six poor sisters, twelve poor scholars, and certain servants, all which persons were to be in-members dwelling within the college, and certain servants, who were not to be entertained as in-members, but to be servants at large. And moreover, that there should be, as the statutes ordained, six assistants and thirty poor people, pensioners of the college, who were to be out-members. And the orders contained several regulations respecting the master, warden, and fellows, the chapel, the school, the estates, and the disposition of the revenues. The ordinances were en-[260]-forced by injunction of the archbishop, dated the 9th of October 1667.

In the month of December 1724 William Wake, the then Archbishop of Canterbury, made various orders respecting the school and other matters; and the 17th Order, after reciting it to be very clear that the founder never had any power or authority in law to appoint any such assistants (as were mentioned in the statutes) at all, or to enlarge the number of his fellows beyond four, so that what was done by him in that respect was contrary both to the charter of incorporation and deed of uses, nevertheless, out of regard to what was done by him, and for the other reasons in the order mentioned, the visitor, as far as it was competent to him, allowed that three churchwardens might continue to act as assistants, and have the usual allowances, in proportion, out of the revenue belonging to the foundation.

It appeared that the churchwardens were not satisfied with this injunction, and instead of complying with it, threatened legal proceedings to compel the college to admit them to act as they had before done; and this being communicated to the visitor, he made an order, dated the 1st of February 1726, to the effect, that being not willing to engage them in the trouble and charge of law, he left the college at liberty, notwithstanding the injunction, if they should think it more for the benefit of the society, to admit the whole number of assistants to discharge the trusts committed to them by the statutes, and to receive the usual allowances for the same; though the visitor was still of opinion, that the founder did not intend that their number should be so great as to equal, and in some cases to overbalance, the whole foundation, and that he had no power to appoint any allowances to be made to them, any more than to the [261] junior fellows, out of the revenues before settled upon the college, and that therefore what was done in pursuance of any such appointment, was done in manifest diminution of the just rights and interests of the same.

Some time after the date of this order, the Attorney-General, at the relation of Samuel Higgs and others, filed an information against the college and the Archbishop of Canterbury, stating, that the churchwardens of the three parishes had been prevented from acting as assistants to the members of the college, and praying that they might be restored to the office of assistants to the college, and to the exercise and enjoyment of the powers given by the statutes. On the 4th of April 1728 Lord King, by his decree, declared that the founder could not, by his ordinances and statutes of the 29th of September 1626, add any persons to the corporation, or make any new person a member of the body corporate; but that he could appoint assistants to the corporation. And he therefore ordered, that the churchwardens and their successors should be admitted to be assistants to the corporation, according to the ordinances, and be quieted in the possession thereof; but the order was to be without prejudice to the archbishop's right of visitation, or of any application to be made to him, to correct, alter, or amend any of the said ordinances, or to any correction, alteration, or amendment that the archbishop might lawfully make or ordain.

After this decree, and by an order made by the archbishop on the 22d of January 1729, it appears that both the college and the churchwardens were desirous that the alleged obligation of the college to pay the pensions to the churchwardens, for the use of the poor of their respective parishes, should be legally deter-[262]-mined and in order that the college might be at liberty to try the question, as if the order of the Archbishop Sheldon had not been made, the then archbishop (Wake) suspended the same order. But the question was not tried, and the order has not since been acted upon. The non-payment of any pension to the out-members appears to have been acquiesced in up to the time when the Commissioners concerning charities made their report, under the 1 & 2 W. 4, c. 34, in which they suggested, that the present members of the college were receiving a larger share of its surplus annual income than was given by the statutes, or intended by the founder; and submitted to the consideration of the Attorney-General, whether the opinion of a Court of Equity should not be taken, on the propriety of extending the charity to such a degree, and in such a manner, as might be deemed most expedient.

The present information was filed by the Attorney-General, in the month of June 1836, under the 2 W. 4, c. 57, *ex officio* and without a relator; and it alleged, first, that the thirty members, referred to in the ordinances, were essential to the existence of the corporation; and that their rights were not bound by the decree of Lord King, pronounced in the year 1728; 2dly, That the revenues of the college had greatly increased (NOTE.—The gross revenue was now about £8000), and the share of each member, so greatly exceeded the benefits contemplated by the founder, so as to be inconsistent with the real objects of the founder's bounty; and that some alteration ought to be made, either in the maintenance to be afforded to the poor brethren and sisters, or in the rules, now in force, for their election: 3dly, That not only were the shares of the several members greater than was intended by the founder, but, reason of the [263] shares provided by the founder for the six chaunters and the members, being withheld from them, and divided between the other members of the college, such other members not only received more than they were intended to receive, but something which they were expressly intended not to receive. And was further charged, that the interests of the twelve poor scholars had been greatly neglected: that large balances of the college funds had been occasionally kept in hand by the warden: and that, under such circumstances, it had become necessary and expedient, that proper directions for the regulation of the college should be given by this Court.

This information prayed, that it might be declared who were entitled to participate in the funds and revenues of the college; that the charity ought to be extended to a greater number of objects; that directions might be given for carrying into effect the charitable purposes of the funds, and for securing to the scholars of the school the benefits intended for them, and that the numbers of the scholars might be increased. That it might be referred to the Master, to inquire what alterations would be necessary in the regulations, now in force, as to the residence of the members, or otherwise to the government of the college. That directions might be given for the appropriation of the revenues according to a scheme to be settled, and that in settling such a scheme regard might be had, not only to the statutes and ordinances, but also to the intention of the founder.

It did not appear that any application had been made to the special visitor (the Archbishop of Canterbury) on the subject of the matters complained of by the information.

[264] His grace, by his answer to this information, stated "that finding, that the members of the See of Canterbury, that the practice and usage as to the administration of the said college, and the discharge of their respective duties by the several members thereof had continued during two centuries, with little or no variation, and that he had no complaint or representation brought before him as visitor, relating thereto, he had not deemed it necessary, as such visitor, to originate any proceeding for the purpose of altering the mode in which the said college had been hitherto conducted. That he was desirous, that the said college should be so regulated, that its revenues be appropriated and distributed amongst the several members thereof, in such manner as might be most to the advantage of the said charity, and might be most in conformity with the intention of the founder. And whilst he claimed to himself and succe

Archbishops of Canterbury, such powers and authorities over the administration of the said college, as were, by the said letters patent, conferred upon them as visitor thereof, he was willing that any defects which might be found to exist in the administration of the said college, might be remedied and supplied, and that any new regulations for the better government thereof, in conformity with the intentions of the founder, might be introduced, by and under the direction of this honourable Court; and that he was ready to concur in all necessary proceedings to that end."

The Defendants, the master, warden, fellows, brethren, sisters, and scholars of the college, by their answer submitted, that those parts of the statutes whereby Edward Alleyn professed to appoint six chaunters or junior fellows and thirty additional members, and to give to such six chaunters and thirty additional members any portion of the revenues of the college estates, were void: that the revenues of the co-[265]-tates were duly appropriated for the benefit of the members of the college; that if any regulations were necessary, they ought to be made by the visitor; and that the interference of this Court was not required.

The case was argued by

Mr. Kindersley and Mr. Blunt, in support of the information.

Mr. Pemberton, Mr. C. P. Cooper, and Mr. Teed, on behalf of the college.

Mr. Cockerell, for the Archbishop of Canterbury.

Mr. Girdlestone, Mr. Turner, Mr. Jemmett, and Mr. K. Parker, for other parties.

The effect of the arguments is stated in the judgment of the Court.

The following authorities were referred to; *Attorney-General v. Middleton* (2 Ves. sen. 327), *Attorney-General v. Price* (3 Atk. 108), *Attorney-General v. The Governors of the Foundling Hospital* (2 Ves. jun. 41), *Attorney-General v. The Master of Brentwood School* (1 Myl. & K. 376), *Ex parte Berkhamstead School* (2 Ves. & B. 134), *Attorney-General v. Crook* (1 Keen, 121), *Attorney-General v. Smithies* (1 Keen, 289, and 2 Myl. & Cr. 135), 59 G. 3, c. 91, 1 & 2 W. 4, c. 34, 2 W. 4, c. 57, and Shelford on Mortmain.

July 29. THE MASTER OF THE ROLLS [Lord Langdale] (after stating the circumstances of the case) said, [266] The principal points contended for, on behalf of the Attorney-General, are, first, That by the foundation, a trust was created for charitable purposes, beyond the maintenance of the college, and the objects stated in the charter; and 2dly, That the interference and authority of the Court is required, for the establishment of such internal regulations of the college, as may best contribute to promote the founder's object.

As to the first, it is argued, that the object of the trust, was not only to establish and maintain the college, but also to promote and carry into effect other charitable purposes, by means of the college: that a portion of the revenues was not intended to be applied for the benefit of the members of the first foundation, but for the benefit of other objects of the testator's bounty; and that such portion of the revenues ought, in execution of the trust, to be applied by the corporation for the benefit of those other objects. It is admitted, in argument, that the founder could not alter the corporation, or engraft new members upon it; but it is insisted upon, that there was a trust to maintain the thirty persons who were intended to be members, or poor men and women who were not, or could not be made members of the corporation; and that this Court ought to execute that trust, and approve of a scheme for that purpose, and for the regulation of the school. If there be any such trust it ought to be executed here; but the letters patent authorised Edward Alleyn, for the maintenance of poor men, women, and children to found a college, to consist of certain specified persons only; and it is manifest, that they were the poor men, women, and children to be maintained, and the poor children to be educated; the generality of the first expression is limited by the description and enumeration which immediately follows.

[267] Pursuant to the licence, the college, consisting of the persons so described and enumerated, was established. The corporate body, thus established, became entitled to acquire property, pursuant to the licence; and the founder conveyed the lands mentioned in the licence, to the sole and only use of the master, warden, four fellows, six poor brethren, six poor sisters, and twelve scholars, and their successors, and to and for no other intent and purpose whatsoever. And I am of opinion that

the college, being thus established and endowed, pursuant to the licence, the founder was not entitled, by statutes purporting to be made under the licence, or by will, to make any alteration in the constitution of the college, or to divert the revenues of the estates, with which he had endowed the college, to any other purpose. The lands were conveyed to the use of the college, and it was not competent to the founder, afterwards, to subject the same lands to any trust for other persons or purposes. The object of the foundation was to maintain, educate, and govern the specified and enumerated members of the college, according to such ordinances as should be made. The endowment was for the sole use of the same members, and the ordinances, purporting to direct the application of any part of the revenues to other purposes, were invalid. After the endowment, the founder was no longer owner of the property:—no longer at liberty to change his intention;—having devoted the property to one purpose, the wish which he seems to have entertained (when he made the statutes and his will) could not be accomplished; and the Attorney-General or the churchwardens of the parishes cannot successfully allege, that the college or the members of the college, have something which they were not intended to have, because they are entitled, under the endowment, to something which the founder [268] afterwards, and when it was too late, desired, but had not the power to take from them.

I am of opinion that no trust was created, either for the persons whom the founder desired to make members, or for the purposes of general charity. What was given by the endowment was given for the use of the college, and for no other use; and except for the education of the poor scholars, no specific duties were imposed upon the members of the corporation. If additional property had been given to the college by the testator's will, the question whether such additional property was accepted, or made subject to any particular trust would have arisen; but it does not appear that the college received anything under the will.

The other question is, whether there is any such abuse in the internal regulation of the college, or in the distribution or application of its revenues, as to make it necessary or proper for the Court to interfere; and I am of opinion that there is not. There is a special visitor appointed by the founder, and, looking at the several charges contained in the information, it does not appear to me that there is anything complained of, which may not (even if the complaint be well founded) be regulated by the visitor, who does not refuse to act for himself, although he is willing to concur in all necessary proceedings for introducing such regulations as this Court may direct.

At the hearing of the information, a question was raised, whether, having regard to the nature of the case, the alleged grounds of complaint, and the relief asked, the Attorney-General had authority to sue in the form here adopted. It is unnecessary for me to give any opinion upon that question, because, as it appears to me [269] that there is no trust to be executed in this Court, and no occasion to resort to this Court for internal regulation of the charity, this information, independently of the question of authority, must be dismissed.

[269] PAGE v. ADAM. March 11, 13, July 30, 1841.

[S. C. 10 L. J. Ch. 407; 5 Jur. 793. See *Morley v. Cook*, 1842, 2 Hare, 110.]

A testator gave his real and personal estate to A., subject to the payment of his debts and certain annuities, and appointed him executor. Held, that A. could make a good title to the real estate, without the concurrence of the annuitants, and that a purchaser from A. was not bound to see to the application of the purchase-money. Held, also, that the objection was one of title, and not of conveyance.

Freehold and leasehold estate was devised to A., subject to the payment of debts and annuities. A. sold the real estate. The purchaser insisting that the annuitants ought to concur, filed a bill against the vendor for a specific performance. The vendor's answer admitted the sufficiency of the personal estate to pay the debts:—that they had all been paid since the contract, and that the sale had not been made for the specific purpose of satisfying the debts. Held, that these circumstances did

not vary the rule as to the liability of the purchaser to see to the application of the purchase-money, and that he was bound to complete.

By conditions of sale, all objections to the title were to be taken within twenty-eight days from the delivery of the abstract, which, if not removed within fourteen days, the vendor was to be at liberty to annul the contract, on payment of the deposit, but without costs. The purchaser having made an objection which was not removed, the vendor gave notice to annul the contract. The objection being held valid, the Court considered the vendor entitled to avail himself of the condition; but was of opinion that if, in giving the notice to annul, the Defendant had sought improperly to escape from the performance of a duty which, by the nature of the contract, he was bound to perform, it would have been invalid.

This was a bill for specific performance, filed by a purchaser against Sir Charles Adam, the vendor.

Sir C. Adam claimed under the will of his brother William G. Adam, Esq., the late Accountant-General, by which he gave and devised to the Defendant, "but under the burdens and payments thereafter imposed and directed to be made," all his real and personal estate; and he proceeded as follows:—"And it is hereby expressly declared that these presents are granted, with and under the burdens and conditions following, [270] viz.: 1st. *That the said Sir C. Adam and his foresaids shall pay all my just and lawful debts and funeral expenses, and all such gifts and legacies as I have hereby made or left, or may make or leave by any deed or other writing expressive of my meaning.*

2dly. *That the said Sir Charles Adam shall pay to Mary Eliza Loch, daughter of William Loch of the Bengal Civil Service, deceased, an annuity of £300, to be paid quarterly for the term of her life, and to be secured in manner hereinafter directed, unless, upon being married, she shall prefer (the preference to be declared or written six months after her marriage by writing signed by herself) to give up the annuity, and to take instead the sum of £4000, to be settled upon her marriage, as hereinafter directed, in which case the said annuity shall cease; but so long as the said annuity shall continue, it shall be paid to her for her sole and separate use, and free from the debts and *jus mariti* of her husband, and shall be secured, in such manner as the said Sir C. Adam and his foresaids, with the advice of James and John Loch, the said Mary Eliza Loch's uncles, or the survivor of them shall think best. And if the said Mary Eliza Loch shall elect to have the sum of £4000, in lieu of the annuity of £300, it is my will and intention that that sum shall be settled upon her marriage as follows: The principal to be vested in trustees, and the interest to be paid to the said Mary Eliza Loch during her life, for her sole and separate use, and free from the debts and *jus mariti* of her husband; and after her death to her husband during his life; after the death of them and the survivor of them, the principal to be held by the trustees for the benefit of the children of the marriage, in equal shares, who, being sons, shall attain the age of twenty-one, or, being daughters, shall attain that age or be married: unless [271] there be but one child, in which case the said sum of £4000 shall be reduced to £3000, the £1000 becoming part of the residue of my estate: the interest, until payment of the principal, to be paid to the children in equal portions. My object is to provide for the said Mary Eliza Loch, her husband, and her children; but if she should not have any children, or they should all die under the age of twenty-one years, being sons, or under the age of twenty-one and unmarried, being daughters, then I mean the money to revert to my own immediate family. And I direct the settlement, if any, to be made in such manner and form, and the money to be secured, till paid, in such manner as my said brother Charles, after advising with James Loch and John Loch, or the survivor, shall think best; in the belief that it will be more agreeable to my said brother Charles to have their assistance: but I wish his convenience and the state of his affairs to be consulted, knowing that he will do everything to carry my wishes into effect. And I should recommend the settlement to contain the provisions usually in English marriage settlements of this sort; but I leave this to my said brother Charles, as knowing my objects and wishes, and not bestowing any power upon any other person or upon any Court of law or Equity to interfere in any respect.*

3dly. *That the said Sir Charles Adam shall pay an annuity of £200 to my said*

four unmarried nieces, Clementina, Louisa, Mary, and Jane, to be paid to them quarterly, so long as they live and are unmarried, in equal portions; and in the event of any of them being married, or dying, her share to be paid to those remaining unmarried, in equal portions, and the whole to the unmarried survivor. The annuity to be secured in such way as the said Sir C. Adam and his forebears shall think best, knowing that he will take care that it be done effectually.

[272] 4thly. That the said Sir Charles Adam shall pay an annuity of £18, 3s. to Mrs. Jane Burt." The testator appointed Sir C. Adam his sole and universal legatee.

The testator died in 1839; and the Defendant, Sir C. Adam, who was his brother and heir at law, proved his will.

In July 1839 the Defendant advertised certain lands, forming part of the real estate of the testator, to be sold by auction in three lots, subject to several conditions, of which the fifth was as follows:—"The vendor shall, within ten days from the day of sale, at his expense, prepare and deliver to each purchaser, or his or her solicitor, an abstract of title to the lot or lots purchased by him or her; and the purchaser to whom or to whose solicitor such abstract shall be delivered, shall, within twenty-eight days next after the delivery of the abstract, state in writing and transmit to the solicitors of the vendor, all his or her objections (except such as he or she is precluded by these particulars and conditions of sale from taking) to the title shewn by such abstract, and all requisitions in respect thereof; and such title shall be considered as approved of in all other respects. Any purchaser failing or neglecting to state or transmit his or her objections and requisitions, within the time and in the manner aforesaid, shall be deemed to have absolutely accepted the title to the lot or lots sold to him or her, and to be precluded from objecting thereto; and if any such objections are made, and not removed within fourteen days after the expiration of the twenty-eight days herein named, that then, or at any time thereafter, *the vendor shall be at full liberty* (by notice in writing to be delivered to any purchaser or his or her solicitor) *to annul and put an end to his or her contract for sale*; and in such case the vendor shall, [273] within one week after the delivery of such notice, repay to any purchaser his or her deposit money, with interest at the rate of 4 per cent. per annum, with the auction duty paid by such purchaser, but without costs."

The sixth condition was as follows:—"The vendor shall make and execute, and procure to be made and executed, by all proper parties, all deeds of conveyance, surrenders, assignments of terms, and other deeds, which may be necessary or usual for vesting the premises in any purchaser at this sale, or as he or she may appoint, on the same being tendered to him for the purpose. At which conveyances, surrenders, assignments, copies of court roll, and other deeds, are to be prepared by, and made at the expense of, each purchaser; and the vendor shall not be called upon to shew any prior title to the leasehold part of the estate than the lease or leases under which the same is held."

The sale took place, according to the advertisement, on the 26th of July 1839. The Plaintiff became the purchaser of Lot 3, at the price of £760, and paid a deposit of £152, and his share of the auction duty.

The abstract of the title was delivered on the 2d of August, and it then appeared, that the estate had belonged to Mr. William George Adam; who by his will had devised it to his brother the Defendant, subject to the payment of his debts and of certain annuities as before stated.

The Defendant, being the brother and heir at law of the testator, was supposed to be also his copyhold heir, and had applied for admission as such.

The abstract was returned in due time, and, amongst other observations and questions, was the following:—[274] "The will gives the property charged with debts, annuities, and legacies. Satisfactory evidence must be given of their discharge."

Answers to the queries were returned; and some observations being made on the answers, Messrs. Wing and Twining, [the solicitors of the vendor, on the 28th of August 1839, after replying to other observations, expressed themselves as follows:—"As to the release of the annuities, &c., being the only other point mentioned in your letter, we cannot have the least objection to your taking the opinion of counsel, as you propose; but we think it only fair to tell you that Sir Charles Adam will put an end to the contract when the proper time arrives, if your client is not previously satisfied with the title; but in order to satisfy you that Sir Charles Adam has no

improper wish to do so, we beg to send you, by his desire, an extract from the opinions of Mr. Walters, the conveyancer, on this point, taken by the solicitor of Mr. Sams, and upon which Mr. Sams has long since paid the whole of his purchase-money."

The Plaintiff's solicitor afterwards expressed himself satisfied with the answer and explanations given, except as to the annuities charged by the will. As to this, he insisted upon the Plaintiff's right to have the annuities discharged, or released; and he further insisted, that the Defendant had not, according to the conditions, any right to put an end to the contract. The parties unfortunately differed upon both these points. Drafts of conveyance and of release of the annuities were prepared on the behalf of the Plaintiff, but the Defendant refused to acknowledge the Plaintiff's right to the releases, and in the end gave notice of his intention to annul the contract under the conditions, and tendered the deposit and auction duty to the Plaintiff. On the 3d of [275] February 1840 this bill was filed for a specific performance of the agreement.

The bill prayed for a specific performance by the Defendant, by executing the conveyance, and by procuring the execution of a deed by all necessary parties, for releasing the lands from the annuities.

The answer admitted that the personal estate of the testator was more than sufficient to pay his debts, which had then been all paid, though they had not been paid at the time of the sale. It also stated that the sale had not been made for the specific purpose of satisfying any debts, but generally for the purpose of enabling him to carry out the intentions of the testator.

One of the annuitants was under age.

The defence was, first, that the contract had been annulled; secondly, that the Plaintiff had no right to require the concurrence of the annuitants; and, thirdly, that the Defendant had no power to compel them to concur.

Mr. Pemberton, Mr. George Turner, and Mr. Miller, for the Plaintiff. The first defence made by the vendor amounts to this: that if the purchaser makes any acquisition, however reasonable, and the vendor neglects to comply, the latter acquires a right, in consequence of his own neglect, to annul the contract, without payment of any of the costs incurred by the purchaser in the investigation of the title; in other words, it is to be a contract binding on a purchaser, but from which the vendor may at any moment he pleases relieve himself. Courts of Justice [276] will, however, deal with the language of such conditions of sale, and do violence to it in order to make them consistent with common sense and justice. In *Roberts v. Watt* (2 Taunton, 268), an action of trover was brought by a purchaser against the solicitor of the vendor for an abstract; this had been sent to the purchaser, who having taken an opinion thereon, had returned it with the objections to the vendors' solicitor; the latter stated that he was unable to clear up the objections of the purchaser's counsel, and refused to deliver the abstract, though the purchaser offered to take such title as the Defendant could make. One of the objections to the action was, that the contract was at an end under a proviso, "that in case the vendors could not deduce a good and marketable title, such as the purchaser or his counsel should approve, or if the purchaser should not pay the purchase-money on the appointed day, the agreement should be utterly void." Sir James Mansfield there observed, "The Defendant still says, I cannot answer this objection of Mr. Humphreys, and the whole transaction is at an end; but that is not so: if the Plaintiff had said the thing is over, the matter might be rescinded. But what says the Defendant? I cannot answer the objections. In equity, such an answer will not suffice; otherwise a seller who had altered his mind, might very easily get rid of a contract; but the Courts of equity say he shall answer on oath first in his answer to a bill filed against him, then on examination before a Master whether a title cannot be made; the Courts often make a way to obviate apparent difficulties, and compel the seller to procure conveyances in order to complete his title: and the Defendant's declaration that he rescinds the contract, will not at all defeat the purchaser's right:" and Lawrence J. concurred, saying, "I am of the opinion upon the [277] construction of the proviso: it would be a monstrous construction, if either party could vitiate the agreement by refusing to perform his part of it." *Southby v. Hutt* (2 Myl. & Cr. 207), *Tanner v. Smith* (10 Simons, 410), *Rippingall v. Lloyd* (2 Nev. & M. 410).

The Defendant cannot be allowed to take advantage of his own wrong to defeat his contract. *Rede v. Farr* (6 M. & Sel. 121). The real meaning of the expression in the fifth condition, if any objection be not removed, is, if it cannot be removed. The Defendant cannot annul the contract under the fifth condition, for the objection is not one of title, but of conveyance: *Maddock Ch. Pr.* (2d ed. p. 140), *Lewis v. Lazen* (1 Mer. 179); and, therefore, falls within the sixth condition. A further objection is that this advantage should be taken of the condition at the earliest moment. The objection ought to have been insisted on in August, and not in the following month of January. Sir John Leach decided in *Minchin v. Nance* (reported 4 Beav. 332, on another point) that you cannot put an end to a contract under such a condition, except at the first moment, and that after permitting the other party to proceed, you cannot turn round and say, "now I will put an end to the contract."

The second objection is the one of the greatest importance, namely, whether, where there is a general charge of debts and annuities on the real estate, the trustee, by a sale of the estate, when quite unnecessary for the payment of the debts, can altogether defeat the annuitants. If such be held to be the law, the consequence will be (now that by the 3 & 4 W. 4, c. 104, the real estate is in all cases liable to debts), that in no case can an annuity be secured on real estate by a testator.

[278] We admit that in respect to general legacies the rule is so; but there is a great distinction between the case of legacies and that of annuities. A legatee may at once file his bill to have his legacy raised, and his bill being on the file he is safe; but an annuitant has no such power so long as there are no arrears of his annuity. The distinction is pointed out in *Elliot v. Merryman* (Barnardiston, 82). There the Court said, "The only objection, that seemed to be of weight with regard to this matter, is, that where lands are appointed to be sold for the payments of debts generally, the trust may be said to be performed as soon as those lands are sold; but where they are only charged with the payment of debts, it may be said that the trust is not performed till those debts are discharged. And so far indeed is true, that where lands are charged with the payment of annuities, those lands will be charged in the hands of the purchaser, because it was the very purpose of making the lands a fund for that payment, that it should be a constant and subsisting fund; but where lands are not burdened with such a subsisting charge, the purchaser ought not to be bound to look to the application of the money: and that seems to be the true distinction." In *Wynn v. Williams* (5 Ves. 130) real estate was charged with debts, and legacies, and an annuity to the widow, and the Court directed an account of the annuity against a purchaser for valuable consideration of the estate, and declared it a charge thereon. A passage in Sugden's *Vendors* (vol. 2, p. 39, 9th ed.) is relied on by both parties, a *quære* having been added in the last edition. In *Omerod v. Hartman* (5 Ves. 722), there was a trust for payment of debts, legacies, and annuities; no distinction was taken between legacies and annuities; but a bill for specific performance was dismissed on the ground [279] that it was not possible for one of the *cestui que trusts* being a lunatic to see the purchase-money applied. It must, however, be admitted that Lord Eldon did not altogether approve of that decision.

It is not, however, necessary to enter into that question, for here it is admitted that the estate was not sold for payment of the debts, and the purchaser has express notice of that fact, and, therefore, the trust for payment of debts confers no protection to him; *Bonney v. Ridgard* (1 Cox, 145), *Watkins v. Cheek* (2 Sim. & St. 199). In *Johnson v. Kennett* (6 Sim. 390), overruled on other grounds (3 Myl. & K. 624), the Defendant sold in his character of heir and not as trustee.

Thirdly. The Defendant can compel the annuitants to join, upon his securing their annuities. If there be any doubt on the point an inquiry must be directed, as in *Graham v. Oliver* (3 Beavan, 124), and by Sir John Leach in *Minchin v. Nance* (*post*, p. 331). As to the infant the Plaintiff will be contented to take the Defendant's indemnity.

Mr. Loftus Wigram and Mr. Loch, *contra*. The purchaser is bound by the conditions of sale, which are explicit, and were framed for the express purpose of preventing litigation. He cannot reject the terms of the agreement, and yet adopt the contract, of which the conditions are a part. No complaint is made of them by the bill, and no question as to their validity can now be raised. The objection, however, is one of title, and not of conveyance, the Defendant having no controul over the

annuitants to compel them to concur. (See *Sidebotham v. Barrington*, 3 Beavan, 524, and *ante*, p. 110, and the cases there cited.) The [280] Plaintiff insisting on the objection, the Defendant acted rightly in annulling the contract, to avoid an expensive and useless litigation; the delay in doing so is accounted for by the correspondence, &c., which took place between the parties in the hope of adjusting their differences.

As to the second point there is no distinction between legacies and annuities: the reasoning applicable to the one, applies with equal force to the other. It is the priority of the debts, and the utter impossibility for a purchaser to see to their payment, which renders it unnecessary for him to see the subsequent charge of legacies or annuities satisfied, or to see to the application of his purchase-money. Suppose a legacy were payable at the end of a year, it is admitted that the legatee would not be a necessary party to a conveyance to a purchaser. If the legatee were to have an additional legacy at the end of two years, the same rule would prevail; and so if he had a succession of annual legacies, or what is equivalent, a legacy.

The expression in *Elliot v. Merryman* is obscure. It may apply to a case where there is no charge of debts. But it is clear that the question as to annuities never arose in that case, and the point was never decided. Lord Eldon in *Jenkins v. Hiles* (6 Ves. 646), expressly disapproves of the decision in *Omerod v. Hardman*, which was plainly wrong, and in a note to that case (6 Ves. 654), it is said, "The Lord Chancellor during the argument observed upon that case, that the Court were mistaken in supposing the purchaser had anything to do with the annuity to the lunatic, the legacy of £400, &c. If that was so, his Lordship said he should agree with the judgment: but it was long settled, that where a man by [281] deed or will charges or orders an estate to be sold for payment of debts generally, and then makes specific dispositions, the purchaser is not bound to see to the application: it is just the same as if the specific bequests were out of the will. The case under consideration would shake that rule: the trustees had the legal estate under the deed; and the trust was to sell for payment of debts generally. They were therefore enabled to make a title to the purchaser, who was not bound to see to the payment of the legacy the annuity," &c.

Lord Eldon's opinion, therefore, clearly was, that there was no distinction between annuities and legacies in this respect. If it were otherwise, a suit in equity would, in every case where annuities were also charged, be necessary to obtain payment of debts charged on lands. Both in *Johnson v. Kennett* and *Eland v. Eland* (1 Beavan, 235, and 4 Myl. & Cr. 421) there were annuities, yet the distinction was never thought of.

The debts were not paid at the time of the sale, and the circumstances and situation of the personal estate might have been such as to justify the sale of the real estate. The validity of the contract depends on the circumstances existing at the time of the sale.

[THE MASTER OF THE ROLLS. The Plaintiff has now notice that the debts have been paid, and he has not yet paid his purchase-money; would he not be liable to the annuitants if he were now to pay it to the Defendant?]

It is the Plaintiff's own fault, he might have had a good title, but by his delay, and by raising untenable points, he has himself created the difficulty which he cannot now be permitted to take advantage of.

[282] It might be argued that there is no charge of the annuities, but merely a personal liability on the part of the Defendant to pay them. *Messenger v. Andrews* (4 Russ. 478), *Spackman v. Timbrell* (8 Simons, 253).

The Defendant cannot compel the annuitants to join; any enquiry on the point would be useless, for one is an infant; and the Plaintiff is not, in the absence of a contract to that effect, entitled to an indemnity. *Aylett v. Ashton* (1 Myl. & Cr. 105).

Shaw v. Borrer (1 Keen, 559), *Braithwaite v. Britain* (1 Keen, 206); *Horn v. Horn* (2 Sim. & St. 449), *Costigan v. Hastler* (2 Sch. & Lef. 160), were also cited during the argument.

Mr. Pemberton, in reply.

THE MASTER OF THE ROLLS reserved his judgment.

July 30. THE MASTER OF THE ROLLS [Lord Langdale]. The only question before the Defendant's notice of annulling the contract, was, whether the concurrence of the annuitants, or a release from them, was necessary to give a safe title to the purchaser.

The will of Mr. Adam charged the whole of his estate with the payment of his debts, and also with the payment of the annuities given by his will.

It is admitted that if the will had charged the real estate with the payment of his debts and pecuniary [283] legacies only, the purchaser would, in the absence of special circumstances, have been exonerated from any liability in respect of the application of the purchase-money; but it is said, first, that there are special circumstances, tending to shew that a sale of the estate was not required for the payment of debts; and, secondly, that annuity legacies are different from others, and being intended to continue a charge on the estate, the lands must be liable in the hands of a purchaser. I do not think that there are in this case any special circumstances to take the case out of the common rule. The rule, as to the exoneration of the purchaser from liability to look to the application of the purchase-money, was stated by Lord Lyndhurst (3 M. & K. 631) to be applicable to the state of things at the time of the testator's death; and the particular arrangements which may be made by the executor for the payment of the debts, the time when they may be paid, or the fund out of which they may, in the first instance, be paid, do not appear to me to vary the effect of the rule. The question therefore is, whether annuity legacies are subject to different considerations from mere pecuniary legacies. When an annuity is charged on land, and there is no devise for the payment of debts, and no general charge of debts, it must be deemed that the land was intended to be a constant and subsisting security for the payment of the annuity. But in the case of *Elliot v. Merryman* (Barnardiston, 82), where an expression to that effect is used, it was not considered, and the case did not require it to be considered, whether, in a case in which both debts and annuities were charged, the lands would be charged with the annuities, in the hands of a purchaser from the person whose duty it was to sell for payment of debts; and the opinion of Lord Eldon, as stated in the note to [284] *Jenkins v. Hiles* (6 Vesey, 654, n.), is, "that where a man by deed or will charges or orders an estate to be sold for payment of debts generally, and then makes specific dispositions, the purchaser is not bound to see to the application of the purchase-money. It is just the same as if the specific bequests were out of the will." Seeing no reason to differ from this opinion, and conceiving that an annuity legacy charged on the estate is, in the sense here used, a specific disposition, subject to the payment of debts, I do not think that the rule ought to be departed from, by reason of the nature of the legacy. The reason on which the rule is founded operates precisely in the same manner, whether the legacies are of annuities or of sums of money; and it would occasion very great inconvenience, if no sale of estates, for payment of debts charged thereon, could take place without the authority of a Court of Equity, if the author of the charge for payment of debts, had also charged the estate with payment of legacies in the form of annuities. There are one or two cases, *Johnson v. Kennett* (3 Myl. & K. 627), *Eland v. Eland* (1 Beavan, 241), in which legacies of annuities have not been distinguished from other legacies; but as the point was not raised in those cases, I think they are not to be relied on as authorities on the present occasion. But it appears to me, that, on principle, and for this purpose, there is no substantial difference between the two kinds of legacy. The charge of debts is general, the amount is indefinite, and may exceed the whole value of the estate; it is the first duty of the executor, and of the devisee of the estate which is subject to the charge, to pay the debts; and for that purpose he is entitled to sell; if he sells, something or nothing may be left to secure payment of the annuities. The purchaser [285] seems to have nothing to do with this; he cannot know or ascertain the amount of debts, and cannot, if he would, protect the annuitant;—his title is derived under an authority or right to sell for payment of debts;—a purpose which is paramount to the payment of annuities, and in respect of debts he is not bound to enquire. There may be cases, in which the land being charged with debts, and legacies by way of annuity, the annuitants may refuse to accept any substitute, as a security in lieu of the land charged; but the annuitant being a mere volunteer under the will, can only take subject to the charge for debts: he cannot prevent the loss or diminution of his security upon the land charged, when a sale is required for the payment of debts; and I think, that the purchaser is not called upon to inquire, whether the executors and devisees act properly, when they sell the estate; and that it is not incumbent on him to look to the application of the purchase-money. On the whole, therefore, it appears to me,

that in order to shew a good title or to procure a valid conveyance, the Defendant was under no obligation to procure the concurrence of, or to obtain releases from, the annuitants under the will of the testator, whose estate was the subject of sale.

And it appearing that the Defendant had done all which was incumbent on him to do, for the purpose of shewing a good title, and that the Plaintiff persevered in requiring something more, which the Defendant was not bound to do, I think that the Defendant did not, unreasonably, avail himself of the means which the conditions afforded him of putting an end to the contract.

I think that the question was, as it was treated by the parties, a question of title, and not a question of [286] conveyance; and I should have thought the notice to annul the contract invalid, if, in giving it, the Defendant had sought improperly to escape from the performance of a duty which, by the nature of the contract, he was bound to perform; but the case is very different, being in fact, as it appears, an attempt on the part of the purchaser to compel the Defendant to do more than was required by his duty under the contract.

As the Defendant gave his notice to annul the contract, only because the Plaintiff insisted upon a release from the annuities, and as the Plaintiff has, at the Bar, expressed his desire to have a specific performance of the agreement even in the case of the question as to the annuities being determined against him, it may be that both parties may now be desirous that the purchase should be completed under the direction of this Court.

If they are not, I think that the bill must be dismissed with costs.

[287] FRAMPTON v. FRAMPTON. *April 22, 23, July 30, 1841.*

[S. C. 5 Jur. 980.]

A deed of separation between husband and wife, containing no covenant on the part of a trustee to indemnify the husband, or other valuable consideration, is not on that account void.

On the separation between a husband and wife, the former by deed made between himself, his wife, and trustees, assigned the dividends of some funds standing in the names of trustees to other trustees, for the benefit of the wife, and he covenanted that she might live apart from him, &c.; and the wife agreed to accept the provision in lieu of alimony, dower, &c.; and to exonerate her husband from all her debts, and to forfeit her rights under the deed if she violated the agreement. The deed contained no covenant on the part of the trustees, and was supported by no further consideration. Held, that the deed was not invalid, and that the wife was entitled to the provision made for her by the deed.

This bill was filed by Elizabeth Frampton, praying to have the benefit of a deed, dated the 16th day of August 1824, executed by her late husband, James A. Frampton on the occasion of a separation between them. The bill was filed against William H. Frampton, the legal personal representatives of James A. Frampton, and the surviving trustee of the deed. The facts were as follows:—

The Plaintiff, before her marriage with the late Mr. Frampton, was entitled under the will of Wm. White to a sum of £19,000 3 per cent. consols, and to a sum of £1000 East India stock, which were standing in the names of John Edmondson and Wm. Calvert, on trust to pay the dividends to her for life, with remainder to her issue. She had sold out the sum of £1900, part of the £19,000 3 per cent. consols, for a specific purpose, and the retransfer of it was secured to Edmondson and Calvert, by a policy of insurance on her life for £1500.

Before her marriage the Plaintiff, by deed dated the 16th of October 1816, assigned her interests in the stocks to Mr. Frampton, her intended husband; and in a few days after the marriage, viz., on the 22d October 1816, Mr. Frampton executed a deed-poll, whereby it was purported, that he covenanted with Edmondson and Calvert, that if he should die in the lifetime of the Plaintiff, and there should be failure of issue,

Edmondson and [288] Calvert should stand possessed of the stocks, on trust for the Plaintiff for her life; and after her death, on trust for her executors, administrators, and assigns.

Differences having afterwards arisen between Mr. and Mrs. Frampton, they agreed to live separate from each other; and they executed an indenture dated 16th August 1824, and Edmondson the trustee being dead, the indenture was made between Mr. Frampton the husband of the first part; the Plaintiff, Mrs. Frampton, of the second part; James Marshall, and the Defendant William Frampton, of the third part; and Wm. Calvert of the fourth part. And, thereby, Mr. and Mrs. Frampton assigned to Marshall and the Defendant, the dividends of the stocks then standing in the names of Edmondson and Calvert, and also the dividends to arise on the £1900, if the same should be retransferred in the lifetime of Mrs. Frampton, subject to the annual premium of £47, 11s. 3d., payable on the policy for £1500; to hold and receive the same on trust during the joint lives of Mr. and Mrs. Frampton, to pay to Mrs. Frampton the annual sum of £300; and to invest the surplus in the purchase of stock, in the names of Marshall and the Defendant, and accumulate the same, and stand possessed of the accumulations, on trust to pay the interest thereof to Mrs. Frampton, in addition to her annuity of £300; and if Mr. Frampton should die in her lifetime, on trust to transfer to her the principal of such accumulations. The deed contained a proviso, that if Calvert should require the £1900 to be retransferred, the accumulations might be made answerable for that purpose, under the arrangement therein mentioned. Mr. Frampton covenanted that Mrs. Frampton might live apart from him, and dispose of any goods, property, and effects which she might acquire during the separation; and that he would do all acts to enable Marshall [289] and the Defendant to receive the dividends of the stocks; and that if they should be prevented from receiving the dividends, Mr. Frampton would, himself, pay the annuity of £300 to the trustees of Mrs. Frampton. And Mrs. Frampton agreed to accept the provision thereby made for her, in lieu of alimony, dower, or any other claim on Mr. Frampton; and to exonerate him from all debts, charges, and incumbrances to be contracted by her, and not in any way to disturb him; and that if she violated the agreement, she should forfeit her right to the accumulations, which, in that case, were to become the property of Mr. Frampton; and if he should be prosecuted for any debts contracted by her, the trustees were empowered to deduct the amount out of the annuity and pay the same to Mr. Frampton.

From the date of the deed, Mr. and Mrs. Frampton lived apart from one another. Mrs. Frampton did not, in any manner, infringe the agreement. Mr. Frampton paid to her an annuity of £300, and after 1829 some additional sums of money; but, in other respects, the deed was not strictly acted upon. The trustees did not interfere; the income arising from the stocks was paid to the account of Mr. Frampton at his bankers, and he made no investment of the surplus which remained after payments of the sums which he paid to Mrs. Frampton.

Although living apart, Mr. and Mrs. Frampton appeared to have entertained no feelings of enmity towards each other. After a lapse of some years they corresponded together, and the correspondence shewed that each of them had a desire to contribute to the comfort of the other. Mr. Frampton offered to make additions to the income, in language, from which it might be inferred, that she was not entitled to it; and [290] she expressed herself to be grateful to him for the additions which he made, and for other marks of attention shewn to her by him.

There was no issue of the marriage, and no investment had been made of the surplus dividends.

Marshall, the co-trustee of the Defendant, died in 1832.

Mr. Frampton died in September 1836, and the Defendant was his legal personal representative, as well as surviving trustee of the deed of 1824. The Defendant, however, having never acted in the trust, was ignorant of everything which had taken place in relation to it. The Plaintiff having required performance of the trusts of the deed, and the Defendant not feeling himself at liberty to comply with her requests until her demand was satisfied by a proper investigation, this bill was filed, and it prayed a declaration that the surplus dividends ought to have been invested in consols, and held on the trusts of the deed of 1824, and the dividends thereon paid to the Plaintiff. It prayed also for the proper accounts consequent on such a declaration,

and for payment of what might be found due to the Plaintiff out of the estate of James A. Frampton.

It was admitted that the deeds were executed; that the subsequent correspondence took place between Mr. and Mrs. Frampton; that the dividends of the stock were received by Mr. Frampton; and that during the life of Mr. Frampton, the Plaintiff never applied to the Defendant for any account of the dividends of the stock.

The defences were, first, that the deed of separation was invalid, as being contrary to the policy of the law; [291] and, secondly, that the deed had been put an end to, by the subsequent conduct of the parties. The second objection depended principally on a series of correspondence between the husband and wife, the result of which was stated in the judgment of the Court, but which it is thought unnecessary to repeat.

Mr. Pemberton and Mr. E. F. Smith, for the Plaintiff. Whatever doubts may have been expressed by some Judges as to the policy of interfering in cases of deeds of separation between husband and wife, still they have been repeatedly supported. The difficulty generally arises in consequence of the Court being unable to enforce an agreement for a separation; here it has been performed, and the husband having received the whole benefit stipulated for on his part, ought to perform his portion of the engagement. The absence of a covenant on the part of a trustee to indemnify the husband, does not invalidate the deed; for if the deed were invalid, as contrary to the policy of the law, when it contained no such covenant, then the introduction of such a covenant could not make good that which the policy of the law condemns. The cases of *Ross v. Willoughby* (10 Price, 2) and *Wilson v. Mushett* (3 Barn. 743) are, however, express authorities that such a covenant is unnecessary. Here it is not asked to enforce any covenant against the husband or his estate; in taking the deed to be merely voluntary, then there is a valid trust created in favour of the wife, which it was not in the power of the husband to revoke. The Plaintiff now merely calls on her trustees to perform their trust. [292] She is fully entitled to the relief, the trust being complete, and there being nothing more to be done by the settlor; *Collinson v. Patrick* (2 Keen, 123).

The trusts of the deed have not been put an end to; the separation continued to the death of Mr. Frampton. It appears from the correspondence, that the parties entertained feelings of regard for each other; but it was not necessary that a state of hostility should exist between them, in order that the deed might continue to operate.

Mr. Stuart and Mr. Faber, *contra*. A contract for a separation between husband and wife is contrary to the policy of the law; and this Court will not enforce any stipulation contained in a deed executed for that purpose, unless it be supported by some other valuable consideration. The covenant of a trustee to indemnify the husband, or some other valuable consideration, has always been considered necessary to support such a deed. Here, the deed contains no such covenant, and that on the part of the wife is a mere nullity. The deed, therefore, is a simple deed of separation entered into without consideration, which this Court cannot enforce.

The trust is incomplete, and is one purely voluntary, having for its object the continuance of a separation. The trust for the benefit of the wife cannot be enforced inasmuch as the other stipulations intended for the benefit of the husband could be performed: which they plainly could not.

The trustees have never acted under the deed, and the conduct of the parties shows that a reconciliation [293] took place, and that they regarded the deed as nullity, and that the trusts had terminated. They cited *Westmeath v. Salisbury* (5 339), *Worrall v. Jacob* (3 Mer. 256), *Durant v. Tiley* (7 Price, 577), *Durant v. Durant* (2 Cox, 207), *St. John v. St. John* (11 Ves. 537), *Bateman v. Ross* (1 Dow,

Mr. Pemberton, in reply.

THE MASTER OF THE ROLLS reserved judgment.

July 30. THE MASTER OF THE ROLLS [Lord Langdale]. The questions are, first, whether the deed is valid, or invalid as founded on an agreement against the policy of the law for the separation of husband and wife. And, secondly, whether if the deed were valid, it was not annulled by the waiver or abandonment of the parties.

Upon the first, it must be admitted on the one hand, that an agreement for husband and wife to live separate and apart from each other, is against the policy of the law, and will not be executed in this Court; and on the other, that contracts founded on that motive, have in numerous cases been enforced, both at law and in equity. It is in vain to regret the perplexities in which the Courts have found themselves involved, by enforcing the minor and auxiliary parts of the agreement to separate, while they profess to repudiate the principal and essential part and motive of it. It does, as Sir Wm. Grant expresses it (*Worrall v. Jacob*, 3 Mer. 268), seem rather strange, but has been settled that in certain cases they must do so; and [294] in this case it is, I apprehend, clear upon the authorities, that the deed now in question would have been valid if it had contained a covenant by the trustee to indemnify the husband against the debts of the wife. The principal objection made to it is, that there is no sufficient consideration, that the husband was protected only by the agreement of the wife to exonerate him from debts, and the provision, that if she violated her agreement, she should forfeit her right to the accumulations, which were, in that case, to become the property of her husband; and that he should be repaid any sums which might be recovered against him, out of the annuity of £300. It is contended, that a covenant by trustees is an essential part of a valid deed of separation; and that the want of it, in this case, necessarily makes the deed void. In the case of *St. John v. St. John* (11 Ves. 532), Lord Eldon seems to have considered, that this Court interfered in such cases only, upon the contract between the husband and the trustee, and the covenant of the trustee to indemnify the husband against her debts; and Lord Loughborough, in *Legard v. Johnson* (3 Ves. 359), expressed his opinion, that the interest of the party who bound himself to indemnify the husband against the debts of the wife, raised a consideration for that party, between whom and the husband there might be a contract to be enforced. Both Lord Loughborough and Lord Eldon expressed doubts upon the case of *Guth v. Guth* (3 Bro. 614); but the cases of *Fitzer v. Fitzer* (2 Atk. 512) and *Cook v. Wiggins* (10 Ves. 191) have not been overruled, and I am not aware that it has ever been decided, and no case has been adduced to shew, that without the intervention and covenant of a trustee, the husband may not voluntarily execute a deed, [295] or create a trust in favour of his wife, and that such deed or trust may not be binding as against him, even if the benefit of that deed or trust should be made dependent upon an existing or continuing separation, which was the principal, if not the only, inducement for the whole arrangement. In this case the property came from the wife. The husband had become entitled to the income during the joint lives, and he voluntarily, and without consideration, assigns the dividends and declares a trust for her; the creation of the trust being accompanied by an agreement to live separate, and a provision to forfeit or lose a portion of the beneficial interest if the agreement should be violated. Laying out of consideration the agreement of the wife, as wholly inoperative, and admitting that this Court can in no way interfere to enforce a separation; yet, considering what has been done to enforce agreements between husband and trustee, though accompanied by a provision for separation, it does not appear to me, that a voluntary assignment and declaration of trust can be vitiated by such a provision; and, without regard to any supposed contract, it would scarcely be just to say, that although a voluntary trust may be binding in other cases, it shall not be so in the case where a husband has, by creating such a trust, prevailed upon his wife to live apart from him, and waive the enforcement of her conjugal rights. And, on the whole, it appears to me, that as against the estate of the husband, this is a valid deed. I say nothing as to the effect of it between the Plaintiff and creditors of her late husband.

Conceiving the deed to be valid, I have considered the admitted facts and the correspondence, with the view to the question whether the deed was subsequently waived or abandoned.

[296] Mrs. Frampton appears to have known that the income of the trust fund was received by her husband; she received from him the annuity of £300 till 1829; in the subsequent years she received some sums of money of unequal amount in addition to the annuity. The largest additional sum was £70. If the trust had been duly performed there would have been an annual investment, and a constantly increasing income. Mrs. Frampton might therefore, from the circumstances, have concluded,

that the whole income was received by Mr. Frampton; and by the non-payment to her of an increasing income, might have found reason to infer, that the trust was not duly performed; but I think, that Mr. Frampton, by receiving the income took upon himself personally the performance of the trust, to which he had made it subject; and I find nothing affording the least ground to infer, that Mrs. Frampton ever intended to waive any benefit to which she was entitled under the deed. Notwithstanding the separation, she appears to have had great confidence in Mr. Frampton, and a reliance that he would do what was right. It is true, that, independent of any intention, the conduct of the parties may be such that the law may, in analogy to the case of contracts, have put an end to the trust. I cannot say that the trust would have remained if the parties had lived together again; but however this might have been, I am of opinion, that in this case, nothing occurred which would have put an end to a contract subsisting between the husband and a trustee for the wife. The separation remained, the wife performed the species of condition imposed upon her by her husband, and although no hostility remained, and a correspondence by letter, which, under the circumstances, must be considered as creditable to both parties, took place, in the latter part of Mr. Frampton's life, there was no change in the circumstances, under which the deed was [297] executed, and no waiver or abandonment; and I am therefore of opinion, that the Plaintiff is entitled to the relief which she asks.

An account must be taken of the dividends of the trust funds received by Mr. Frampton, and of the payment thereof made to Mrs. Frampton; and there must be an inquiry what stock might have been annually purchased with the surplus of the income, and what dividends would have arisen therefrom, &c., &c.

See *Moore v. Freeman*, Bunb. 205; *Logan v. Birkett*, 1 Myl. & K. 220.

[297] ATTORNEY-GENERAL V. KERR. June 24, July 15, August 2, 1841.

[S. C. 10 L. J. Ch. 373; 5 Jur. 863. For previous proceedings, see 2 Beav. 420; 3 Beav. 425.]

Generally, the relator in a charity information is, upon obtaining a decree, entitled to his costs as between solicitor and client; and to be paid the difference between the amount thereof and that portion recovered from the Defendants, out of the charity estate. In special cases, he may be entitled to his costs, charges, and expenses. The extra costs of a charity information, instituted in respect of one only of several gifts belonging to the charity, should, in the first instance at least, fall on the property which is the subject of the information. It may happen that justice to the relator, and even the interests of the charity, might require a different provision, which would be made when the circumstances require it, but not otherwise.

This case is reported *ante*, 2 Beavan, 420, and 3 Beavan, 425. The information was filed with a relator to set aside a conveyance and reversionary leases of property left for the benefit of St. Thomas' Hospital, Northampton. The information having to a great extent succeeded, the Defendant, Mary Kerr, was ordered to pay certain costs, "and it was ordered that it be referred to the Master to tax and settle the costs, charges, and expenses of the relator of incidental and preparatory to these causes properly incurred, in addition [298] to the costs hereinbefore directed to be taxed and paid by the said Mary Kerr, to be paid by the trustees of the Hospital of St. Thomas for the time being, or the treasurer thereof, out of the funds belonging to the hospital." It was also thereby declared that the estate of William Kerr was entitled to compensation, for certain improvements made on the property, out of the charity estate. (3 Beavan, 427.)

These causes, on the petition of the trustees of St. Thomas' Hospital, came on to be reheard so far as related to the above costs, charges, and expenses which had already been taxed.

Mr. Bethell and Mr. Whitworth, for the trustees, contended, first, that the decree was wrong, so far as it gave the relator "the extra" costs, charges, and expenses of the relator "of incidental and preparatory to these causes properly incurred." The consequence of these words was, that although the information was filed in 1836, the bill of costs commenced three years previously, and £200 had been allowed for costs incurred prior to any relator having been found; 2dly, That these extra costs, &c., ought not to be charged on the whole property of the hospital generally, but only on the property which was the subject of the information. That as the funds of the hospital arose from various sources, and had been derived from the benevolence of various individuals, it would be most unjust to apply the funds of others, which had been devoted by the donors to charity, to the payment of costs, charges, and expenses incurred in litigation in respect of other independent property.

Mr. Pemberton, Mr. G. Turner, and Mr. O. Anderdon, *contra*, contended that, the costs having been taxed, it [299] was now too late to object, and that there could be no rehearing for costs; that the decree was right, and was sanctioned by authority. That in the case of *The Attorney-General v. The Skinners' Company* (Jacob, 630), Lord Eldon gave all parties their costs between solicitor and client, "together with any costs, charges, and expenses reasonably and properly incurred by the relators, to enable them to institute and prosecute the suit;" and in *The Attorney-General v. The Corporation of Manchester* (3 L. J. 64), Sir J. Leach stated "that relators in such cases were persons discharging a great public trust; that they ought to be completely indemnified, and therefore, that they ought to be allowed their costs, charges, and expenses." That on principle, it was but equitable that a party wresting charity property from a wealthy family for the benefit of a charity, should be protected against all costs. It could not be expected that parties would come forward on public grounds at their own expense, even if successful. That a charity suit formed an exception to the general rule, and that in such cases, even the heir at law was allowed his costs, charges, and expenses. [THE MASTER OF THE ROLLS. I believe that has been done. (*Currie v. Pye*, 17 Ves. 462).]

The charity which has the benefit of the property recovered by this information, ought to bear the expenses out of its general property; it would be more beneficial than raising the amount out of this property.

The following unreported cases relate to the question: *The Attorney-General v. Trotter* (M. R. 21st. Feb. 1832), *The Attorney-General v. The Mayor of Dartmouth* (M. R. 20th July 1832), *The Attorney-General v. Hutchinson* (M. R. 24th July 1832), *The Attorney-General v. The [300] Mercers' Company* (M. R. 27th Jan. 1833), *The Attorney-General v. Corpus Christi College* (V.-C. 9th March 1833), *The Attorney-General v. The Goldsmiths' Company* (M. R. 26th June 1833), *The Attorney-General v. The Clothworkers' Company* (V.-C. 24th March 1835), *The Attorney-General v. Walford* (9th June 1835), *The Attorney-General v. The Fishmongers' Company* (M. R. Jan. 1837), *The Attorney-General v. St. David's* (V.-C. 19th April 1838, and 15th Jan. 1839), *The Attorney-General v. Harper* (V.-C. 4th Feb. 1839), *The Attorney-General v. Lasley* (V.-C. 8th August 1839), *The Attorney-General v. Nethercoat* (V.-C. 29th Jan. 1841), *The Attorney-General v. The Drapers' Company* (M. R. 19th March 1841).

Mr. Bethell, in reply. The points complained of were not brought before the notice of the Court at the hearing. It is an important question of principle, and may therefore be set right upon a rehearing.

The treasurer of the hospital has no funds in hand to pay these costs, and if paid out of the accruing rents, the trustees will be unable to continue to perform the charitable purposes of the founders of the hospital. It is unreasonable that the charitable donation of A. should be applied in payment of the costs of a charity founded by B. The case of *The Attorney-General v. Nethercoat* (see 1 Hare, 400) is a strong practical instance of the effect of giving costs in such extensive terms. It was an information complaining of the mismanagement of the charity, and the Court gave an order for the sale of the charity property to pay the costs, charges, and expenses. It realised £1200, out of which costs, amounting to £1080 [301] were paid, so that the interference of the Court to protect the charity ended in its entire destruction. I brought the matter before the attention of the Court, hoping it would interfere, but was unsuccessful. Here the extra-taxed costs amount to £1043, and it is doubtful

whether the property recovered, after making the allowance for improvements, will be worth it.

THE MASTER OF THE ROLLS observed, I have no doubt that this particular point was never brought under my attention at the first hearing; I will consider it. We are all aware of the great abuse which has been practised in these charity informations for many years past. In some cases, no doubt, they have been productive of considerable good; but in many, they have ended in the entire ruin of the charities they professed to protect.

August 2. THE MASTER OF THE ROLLS [Lord Langdale]. These causes came on to be reheard upon that part of the decrees by which it was ordered, that the relator should have his costs, charges, and expenses, of incidental and preparatory to these causes; and that the amount of the costs, and of certain sums to be allowed to Mary Kerr, should be paid by the trustees out of the funds of the charity.

It is alleged, on the behalf of the trustees, that the relator is not entitled to such costs, charges, and expenses; and that the amount of what may be payable to the trustees ought to be paid out of the estate which is the subject of this suit, and not out of the general funds of the charity.

On the behalf of the Attorney-General and the relator it has been argued, that the relator is entitled to [302] such costs, charges, and expenses, according to the usual course and practice of the Court, and several cases in which such costs, charges, and expenses have been allowed were cited.

It appears to me, that the practice of making any such allowance is of very recent origin, and that it is not a matter of course to make it. I think that the order made by Lord Eldon in *The Attorney-General v. Skinners' Company*, and the order made by Sir John Leach in *The Attorney-General v. Winchester*, must have depended on the particular circumstances of those cases, which were of a complicated and special nature. The subject was not brought under the consideration of the Court in any of the other cases which were cited.

Sir John Leach, indeed, seems to have thought, that a relator was to be considered in some sense in the situation of a trustee; and there are several cases in which he allowed the relator his costs as between solicitor and client, and these cases are of themselves sufficient to shew that there was no general rule to allow costs, charges, and expenses. One of those cases was *The Attorney-General v. Goldsmiths' Company* in June 1833; and in the case of *The Attorney-General v. Fishmongers' Company* (1 Keen, 492), which afterwards occurred before me, I had occasion to consider, how far the relator in a charity information was entitled to costs as between solicitor and client as a right; and thinking that he was not so entitled, I thought it right, in that case, to give him his costs as between party and party only.

On considering the cases which have occurred, it appears that the relator in a charity information, where [303] there is nothing to impeach the propriety of the suit, and no special circumstances to justify a special order, is, upon obtaining a decree for the charity, entitled to his costs as between solicitor and client, and to be paid the difference between the amount of such costs and the amount of the costs which he may recover from the Defendants, out of the charity estate. (See *Attorney-General v. Carte*, 1 Dick. 113, and Beames on Costs, 343.)

There may be special cases in which the relator may be entitled to charges and expenses, in addition to his costs of the suit, as between solicitor and client; but it appears to me, that such cases must depend upon their peculiar circumstances, to be brought forward and established by evidence on proper occasions.

Upon the second point, I find, that there are several cases, in which the costs to be paid by the trustees of a charity, have been ordered to be paid out of the funds of the charity generally; but the trustees objecting, it appears to me more regular and proper, in the first instance at least, to charge the costs which fall upon the charity estate, on the fund recovered by the information, or on the estate which is the subject of the suit. It may happen that justice to the relator, and even the interests of the charity, may require a different provision, which would be made when the circumstances require it, but not otherwise.

I am therefore of opinion, that the decree must be varied in the two particulars complained of; and that the relator, instead of being allowed his costs, charges, and

expenses, of, incidental, and preparatory to these causes, properly incurred, is only to be allowed his [304] costs of these suits as between solicitor and client; and that the costs and sums which are to be paid by the Defendants the trustees, instead of being directed to be paid out of the funds of the hospital, are to be a charge on the property which is the subject of this suit, and to be raised by sale or mortgage thereof.

Under the decree as it stood, the costs of the relator have been already taxed; and the effect of the variation now made will be to make a new taxation necessary.

The additional costs of taxation cannot be imputed to the relator alone; for although it does not appear that a claim, in conformity with the words introduced into the decree, was made to the Court (in which case it would probably have not been allowed), it was introduced into the minutes of the decree, and was well known to both sides, before the decree was settled. I think that in this respect both sides were acting in error. Whether any allowance can be made in respect of such costs, cannot be determined, either on the rehearing of the case, or on the petition, which has been presented for raising and paying the costs already taxed.

Upon that petition, I think that under the circumstances no order can be made.

[305] ATTORNEY-GENERAL v. THE DRAPERS' COMPANY. July 14, August 2, 1841.

In a charity information filed without a relator, the Attorney-General did not personally appear at the hearing, but two other counsel appeared in support of the information. Held, that the costs of a brief to the Attorney-General ought to be allowed in addition to those of the two counsel in the taxation of costs as between party and party.

Liberty given to except to the Master's report of taxation being applied for, on the ground of his disallowance of such brief, the report was referred back to the Master for review.

This was an information filed by the Attorney-General under the 2 W. 4, c. 57, without a relator.

At the hearing Mr. Pemberton and Mr. Blunt appeared in support of the information, but the Attorney-General did not personally appear. A declaration was then made against the Defendants with costs, as between party and party. (See 4 Beav. 72.)

On taxation the Master disallowed the costs of a brief given to the Attorney-General, but allowed those of the two other counsel. A petition was now presented to the Court for liberty to except to the Master's taxation on the ground of the disallowance.

Mr. Pemberton, in support of the petition.

Mr. Kindersley and Mr. Lloyd, *contra*, contended that the Master had come to a right conclusion on the subject; that his decision was final, and (this not being a case involving any principle) could not be reviewed. (See *Alsop v. Lord Oxford*, 1 Myl. & K. 564.)

That the long-settled practice upon the taxation of costs, as between solicitor and client, was to allow briefs to two counsel only, or, under special circumstances, three; *Downing College case* (3 Myl. & Cr. 474). That the [306] Master was therefore right in allowing only two briefs in support of the information, and in the disallowance of the brief to the Attorney-General, who did not attend the hearing, and as it appeared, never intended to do so. They argued also, that although the Attorney-General might be entitled as against the charity estate, yet that the Defendants were not liable to pay for services never rendered, and they cited *Attorney-General v. Dow* (Turn. & Russ. 328), *Attorney-General v. Kerr* (4 Beav. 297).

Mr. Pemberton, in reply. The brief was delivered to the Attorney-General, not as counsel in the cause, but in the character of a public officer whose duty it was to superintend the conduct of the suit, and who was a party to the cause. The Court itself on occasions requires the Attorney-General to attend, in order that he may fully communicate his opinion and exercise his discretion, and the practice has always been to allow his brief.

THE MASTER OF THE ROLLS [Lord Langdale]. I will consider this question, and see if the general rule which it seems has been heretofore acted on, is to be departed from in the present case.

I have frequently had occasion to observe, that there is nothing from which charities have more severely suffered than from the absence of the Attorney-General, and from his not having been furnished with full information. The duties which he is sometimes called on to perform, render it indispensable that he should be furnished with full information, which can only properly be communicated by means of a brief. Cases of hard-[307]-ship are sometimes represented to the Attorney-General in open Court, and he is asked, if he, in his discretion, will call on the Court to pronounce a decree according to the strict rights in favour of a charity (*Attorney-General v. Brettingham*, 3 Beavan, 91); if the Attorney-General be kept in ignorance of the real circumstances of the case, it would be impossible for him to exercise that salutary discretion.

Here it is said, that the Attorney-General ought not to be allowed his costs, because he did not attend personally at the hearing. The Attorney-General having due regard to the whole of his duty in the cause, may not have considered his personal attendance in Court necessary to the performance of that duty. This, however, is not the question, for there can be no doubt that the Attorney-General was properly furnished with a brief of the proceedings, and the real question is, upon whom the expense ought to fall.

August 2. THE MASTER OF THE ROLLS [Lord Langdale]. This is the petition of the Attorney-General for leave to except to the Master's report. And the single question is, whether the expense of preparing a brief for the Attorney-General at the hearing, and the fee thereon paid to him, are to be deemed costs as between party and party, or costs as between solicitor and client. The Master has refused to allow them as costs between party and party, and that is the subject of complaint.

As it is the duty of the Attorney-General to attend personally to the conduct of the cause, it is not denied that he ought to be supplied with a brief of the proceedings, nor is it contended that he ought not to receive a fee on the occasion; but it is contended, that the expense should not fall on the party against whom the Attorney-General obtains a decree with costs, but should be paid out of the estate which is the subject of the information.

The Attorney-General has a duty and responsibility quite distinct from the mere duty and responsibility of counsel attending at the hearing to argue the cause; and it is a duty which cannot be performed without the knowledge which is afforded by the brief. I conceive, therefore, that his brief is a necessary part of the expense of prosecuting the suit, and that, whether he appears to argue the case at the hearing or not. Upon inquiry, I have not been able to hear of a single instance before the present, in which upon a taxation of costs between party and party the costs of the Attorney-General's brief have not been allowed. The practice has been uniform. Even those officers who have, in their own opinions, considered that such costs ought only to be allowed upon a taxation of costs as between solicitor and client, have informed me, that, although they have frequently urged their reasons for their own view of the case before different Masters, it has always been without success. I must, therefore, consider the practice to be uniform, and there is no authority in the Master's office, or here, to alter it. If a new practice is to be introduced, it must be by higher authority than mine.

I am, therefore, of opinion, that the prayer of this petition must be granted.

Refer it back to the Master to review his report and tax the costs of the Attorney-General's brief.

[309] *In re SMITH. May 3, June 1, 5, 6, August 4, 1841.*

[For subsequent proceedings, see 9 Beav. 182, 342. See *Griffiths v. Griffiths*, 1843, 2 Hare, 595; *Cooper v. Ewart*, 1847, 15 Sim. 564; 2 Ph. 366; *In re Le Brasseur and Oakley* [1896], 2 Ch. 492.]

The taxation of the bill of costs of the agent of a solicitor, upon the footing of a special agreement requiring the Master to depart from the ordinary rules of taxation, cannot be obtained upon petition.

An account of all the dealings and pecuniary transactions not connected with the bills of costs, cannot be obtained upon a petition for the taxation of costs. The account directed on petition being limited to monies paid or duly appropriated towards satisfaction of the bills.

In general, a solicitor cannot obtain the taxation of his agent's costs without bringing the amount into Court; but, under special circumstances, that condition will be dispensed with or the amount limited.

Agent of a solicitor held, by the irregularity of his conduct, to have discharged himself, and ordered, before taxation or payment of his bills, to deliver up all papers, &c., on an undertaking of the principal to redeliver them, as the Court should order.

Payment in respect of counsels' fees should specify the cause, and each particular fee. Payments, except for stated and specific fees for particular matters of business done or to be done, disapproved of.

This was a special application by Mr. Husband, a country solicitor, for the taxation of the bill of Mr. George Smith, his London agent.

The facts of the case are fully stated in the following judgment of the Court.

Mr. Pemberton, Mr. Stuart, and Mr. Cole, in support of the petition.

Sir. W. Follett, Mr. Kindersley, Mr. Bethell, and Mr. W. S. Daniel, for Mr. George Smith.

The following authorities were referred to:—As to the authority of the Court to order the taxation of an agent's bill; *Lees v. Nuttall* (2 Myl. & K. 284); 2 G. 2, c. 23, and 12 G. 2, c. 13, s. 6; and see *Jones v. Roberts* (8 Sim. 397), and *Toghill v. Grant* (2 Beavan, 261).

That accounts could not be taken on the taxation of a bill of costs; *Anon.* (2 Ves. sen. 452), *Jones v. James* (1 Beavan, 311). And to shew the right of the Petitioner to the immediate delivery of the papers, on the ground that Mr. Smith by his conduct had discharged himself; *Heslop v. Metcalfe* (8 Sim. 622, and 3 Myl. & Cr. 183), and see *Cane v. Martin* (2 Beavan, 584). And to shew that after action brought upon an attorney's bill containing any taxable item, the Court will refer it to taxation, without imposing terms on the Defendant; *Williams v. Griffiths* (6 Mee. & W. 32).

August 4. THE MASTER OF THE ROLLS [Lord Langdale]. This petition is presented by James Husband, praying that the Respondent, George Smith, may deliver up to Messrs. Bourdillon & Sons, all deeds, briefs, and papers in his possession, as agent of the Petitioner, upon such terms as the Court may think fit. And may be ordered to deliver his further bill of costs, in any of the matters in which he has been employed as agent of the Petitioner, and his cash account in respect of the dealings between him and the Petitioner, during the years 1830, 1831, 1832, 1833, and 1834. And that it may be referred to the Master to tax the said George Smith's bills of costs from the year 1825 inclusive, down to the present time; and to settle and adjust the cash account between the Petitioner and the Respondent; and to take an account of all dealings and transactions between them, necessary for that purpose. And that in such taxation the Master may be ordered to have regard to an agreement stated in the petition, and upon which, it is alleged, the Petitioner employed the Respondent as his agent.

Mr. Smith has acted as agent for Mr. Husband, from the year 1825 down to the close of the year 1840; and there has been no taxation of his bills, and no settlement of accounts in relation thereto. I apprehend it to be the course of this

Court to order the taxation of such bills, and to have the amount due thereon ascertained, on payment into Court of the amount appearing to be due upon the bills and accounts delivered.

The peculiarities in this case are, *first*, that the Petitioner desires to have the bills taxed upon the footing of a special agreement, which, as he alleges, was entered into and subsisted between him and the Respondent; *2dly*, that the Petitioner asks for a general account of all dealings and transactions, so far as may be necessary for settling the cash account between him and the Respondent; and, *3dly*, that the Petitioner claims to have the order for taxation, and for the delivery up of his papers, without bringing any money into Court.

As to the agreement, the Petitioner alleges, that the employment of the Respondent as London agent of the Petitioner, was upon an express agreement or understanding between them, that the Respondent should only charge the Petitioner with the amount of the sums actually paid out of pocket in any suits, actions, and matters of business transacted by him as the Petitioner's agent, in which the Petitioner should be unsuccessful, and should not himself get paid, or in which the Petitioner should be personally interested or concerned as a party or otherwise, and should not himself get paid.

This agreement is, as distinctly sworn to by the Petitioner, and is, as it appears to me, distinctly denied by the Respondent. Evidence on the subject has been gone into at great length on both sides, and there is, I think, reason to believe that the Respondent intended that the Petitioner should expect to have some allowance or some favour in his personal and unsuccessful [312] cases; and that the Petitioner did accordingly, and with some reason, expect some such favour or allowance; but the evidence does not appear to me to prove the agreement alleged, or any other distinct and established agreement. A vague hope seems to have been held out on one side, and entertained on the other; but I am far from being satisfied, that both parties concurred in the same view of the subject, or that any settled agreement subsisted between them.

The evidence does not appear to me to establish any clear result, and I do not conceive it to be material in the present proceeding; because I am of opinion that upon such a petition as this, the Court has no jurisdiction to compel the specific performance of a special agreement, even if the same were established by evidence which could be relied on. All that can be done upon such a petition, is to order the taxation of the bills, according to the usual course and the general rules of the Court. Taxation upon the footing of a special agreement, requiring the Master to depart from the ordinary rules, and the result of which may be to give to one party something, more or less, than the general rules of the Court authorise, and to deprive one party of the fruit of labour, to which he would otherwise be entitled, and exempt the other from liabilities to which he would otherwise be subjected, can I think, only be directed upon the establishment of the special agreement, in a formal proceeding instituted for the purpose.

I am also of opinion, that upon such a petition as this, the Court has no jurisdiction to order an account to be taken of all dealings and transactions between the principal and his agent, so far as such account may be necessary to adjust and ascertain a general cash account between them. I think that accounts of dealings and [313] pecuniary matters not connected with the bills of costs, cannot be directed as merely incidental to an order to tax the bills of costs. In such cases there is usually a direction to ascertain the amount of what is due upon the bills, or what, if anything, is overpaid; and this renders it necessary to take an account of such sums of money as have been paid, or duly appropriated, towards satisfaction of the bills. If the principal desires to obtain a general account of all dealings and transactions (including agency business), between him and his agent, on the footing, as to such agency business, of a special agreement, I think that he cannot have the relief on petition; and that in ordering the bills to be taxed on petition, no more can be done than to direct, in the usual way, that the Master do ascertain what is due or overpaid.

In *Otte v. Christian* (Turn. & R. 324) and *Jones v. Roberts* (8 Sim. 400), it was held that the principal could not obtain the taxation of his agent's bills without bringing the amount into Court; but in the two cases of *Binsted v. Barefoot* (1 Dick. 112, and

Beames on Costs, 361), Lord Hardwicke did not order the costs to be brought in. And under special circumstances, I conceive that the condition of bringing the costs into Court may be dispensed with.

In this case it is alleged by the Petitioner, that the Respondent has for a long time, and in a great variety of transactions, committed very gross frauds against the Petitioner or his clients, in charging as disbursements in the causes and matters in which he has been employed, various sums of money which, in fact, never were disbursed. That his conduct in this and other respects has been such that he cannot safely permit him to act [314] as agent any longer. That under such circumstances the Respondent ought to be deemed to have discharged himself from his agency, and ought not to be allowed to throw any obstacle in the way of the business being carried on by some other agent. That the amount of what is really due to the Respondent must be uncertain, and that for these reasons, the Respondent ought to be ordered to deliver up the papers which he holds as the Petitioner's agent, and that the Petitioner ought to have the bills taxed without bringing the amount into Court.

Amongst other acts of misconduct with which the Respondent is charged, is this:—That he has in his bills of costs, charged as disbursements for fees paid to counsel, various sums of money, which, in fact, never were paid, or which, if paid, were less in amount than the fees charged. And Mr. Husband has sworn that Mr. Smith, on being remonstrated with on the subject, replied, "What matters it to you! You are not a loser; if I charge you, you charge your clients."

The Respondent has admitted, that in his several bills delivered, he has charged the Petitioner with money as paid for fees, which, in fact, were not paid at the time when charged; and that in several instances he has charged for fees to counsel, several sums of money larger than the amount of the fees which were in fact paid; he denies the imputed fraud, and attempts to remove the imputation, by endeavouring to shew that the overcharges were accidental errors, arising from mistakes made in the hurry of business, in the absence of necessary papers, or by the carelessness of clerks; and he alleges, that in some instances, fraud could not have been intended, because the means of detection were in the power of the Petitioner.

[315] And with respect to the expressions imputed to Mr. Smith, when remonstrated with, he denies any such expression with reference to overcharged fees; but says, that with respect to fees due to counsel and unpaid, he may have said, "the fees remaining unpaid is not a matter between you and me, as you have charged such fees to your clients; but that is a matter between me and counsel."

It is probable that some of the erroneous charges may have been unintentionally made. There are others which, I confess, I find it very difficult to impute to innocent mistake. There may have been no design to carry into execution a systematic plan of fraud, and the amount of all the overcharges which have been admitted, or proved, is not very considerable; but the mere facts that a solicitor acting as agent for his principal, has charged fees as paid, before the same were actually paid; and has, in so many instances, charged as paid for particular fees, sums of money larger than were ever really paid, proves (to say the least of it) such negligence and such disregard for the accuracy, which ought to characterise all his transactions, and shews a mode of doing business, affording such extensive means of committing fraud, and gives such reason to distrust the integrity of the person guilty of such errors, that all the confidence which ought to subsist between principal and agent must be destroyed; and without entering into the particulars of each case, I am of opinion, that there is enough admitted and proved, to shew that it became the duty of Mr. Husband to his clients, to discontinue the employment of Mr. Smith as his agent. And that for the purposes of this petition, Mr. Smith must be considered to have discharged himself from his agency; and I am of opinion that he must deliver up to Mr. Husband or Messrs. Bourdillon & Sons, if Mr. [316] Husband so desires it, all the papers in his hands as agent, on an undertaking that they shall be redelivered to him if the Court shall so order.

It appears that amongst the papers of which the Petitioner took possession on the 12th of December 1840, and which he afterwards refused or omitted to return to Mr. Smith, was an indenture of mortgage from Knapman to Mr. Husband, with

two memoranda of further charge. If the indenture and memoranda are not documents to be used in any proceedings, I think that they ought to be restored to the Respondent, or deposited in Court till the bills of costs are taxed and settled.

I have felt some doubt upon payment of money into Court, as to the condition on which the taxation of the bills of costs is to be ordered. The circumstances are such, that I do not think that I ought either to require the whole sum claimed to be paid into Court, or to confine the reduction to the amount of the overcharges actually proved. But considering the amount claimed, and the amount of the overcharges alleged, and making, as I think under the circumstances I am bound to do, very large allowances for the possible case of a solicitor who has committed such errors, not being able to substantiate many other charges in his bills of costs, I think it not unreasonable, that the Petitioner should be required to pay into Court the sum of £1000. And the order which I propose to make is,

"That the Petitioner paying into Court the sum of £1000, and undertaking to pay what shall appear to be due on taxation of his bills, order Mr. Smith to deliver his further bill, from the foot of the last bill delivered. And let the Master tax the bills, and ascertain the [317] amount of what is due thereon to Mr. Smith, having regard to the sums of money which have been paid, by or on behalf of, Mr. Husband, to Mr. Smith on account thereof.

"And the Petitioner, or Messrs. Bourdillon & Sons, undertaking to redeliver the papers, &c., now in the custody of Mr. Smith as agent, in case the Court shall at any time order them to be redelivered, it is ordered, that Mr. Smith do deliver up, &c., all such papers. And Mr. Smith is to have liberty to apply for a redelivery of the papers, &c., whenever he shall be advised so to do."

If this petition had been confined to the proper object of it, the taxation of the bills, and the claim to be relieved from paying money into Court, I should have ordered Mr. Smith to pay the costs of it; considering the other subjects which have been introduced, and the costs hereby occasioned, and the difficulty and expense of apportioning the costs, it appears to me that I ought not to give any costs of this petition.

I cannot part with this case, without stating my regret, that a practice likely to lead to great abuse has arisen. I had always understood, that it was irregular for counsel to receive from the clients any sum of money, except for stated and specific fees for particular matters of business done, or to be done. It is quite obvious, that to receive money generally on account, without specifying the causes and matters, and each particular fee, leaves the client open to imposition, in a manner that might otherwise be avoided. I cannot help hoping, that the circumstances which have occurred in this case, however unfortunate in themselves, may tend to restore, where necessary, the former course of conducting business between counsel and solicitors.

[318] JOHNSON v. JOHNSON. *June 9, 1828; June 10, 1841.*

Where there is no gift of the undisposed-of residue, a testator cannot, by negative words, exclude one of his next of kin from participating in it.

A testator, by his will, cut off his widow from any part of his property, and directed she should not receive any benefit therefrom, but he made no disposition of his property: Held, that she was nevertheless entitled to her share of the undisposed-of residue.

This case came on upon the petition of the children of Charles Johnson for payment of a sum of money out of Court. The following decision appeared to have been made by Sir L. Shadwell, Vice-Chancellor, on the 9th of June 1828, which not having been reported, is inserted on account of its peculiarity.

The will of the testator, Charles Johnson, was in the following words:—"I direct that my wife Harriett Johnson and her child Harriett (whom I entirely disclaim), shall be cut off from any part of my property, and shall not receive any benefit or advantage therefrom, and appoint my daughter Elizabeth Johnson, and my friend

John Howell, and my brother-in-law James Harris, executors of my will. And I direct that my daughter Ann Knight's share of my property shall be in trust for her separate use for her life, and afterwards for her children; and my son Charles's share shall be in trust for him at twenty-one, to be applied for his benefit in the meantime. As witness," &c.

It will be perceived that the testator made no disposition of his property by his will, and merely excluded his wife and daughter Harriett. He died leaving several children.

The bill was filed by the testator's widow Harriett, and her daughter Harriett.

By the decree made on the 9th of June 1828 (Reg. Lib. 1827, A. fo. 2101), it was, amongst other things, declared, that the Plaintiff, "the widow of the testator, and his next of kin, were [319] entitled to the clear residue of the testator's personal estate, according to the Statute of Distribution of Intestate's Estates."

Mr. Craig now appeared in support of the petition, the Master of the Rolls, however, directed the petition to stand over in order to bring the representatives of the widow before the Court.

[319] TULLETT v. ARMSTRONG. July 3, 5, 1841.

[For previous proceedings, see 1 Beav. 1; 48 E. R. 1 (with note); 4 My. & Cr. 377; 41 E. R. 147 (with note). See *Johnson v. Gallagher*, 1861, 3 De G. F. & J. 515; 45 E. R. 976; *London Chartered Bank of Australia v. Lemprière*, 1873, L. R. 4 P. C. 593; 9 Moo. P. C. (N. S.), 455; 17 E. R. 584; *Flower v. Buller*, 1880, 15 Ch. D. 676.]

A married woman, possessing separate estate, joined her husband in an annuity deed, purporting to secure the annuity on her separate estate. The husband alone conveyed the separate property, and alone covenanted. The wife entered into no obligation, and there appeared no agreement on her part to charge her separate estate.

Held, that her separate estate was not bound by the deed.

The question in this case was, whether a deed executed by a married woman was effective to charge her separate estate.

Under the will of N. Bradford, Mrs. Armstrong was, in 1819, entitled, for her separate use for life, to a certain copyhold and leasehold estate, subject however to a prior life-estate therein given to the testator's widow. As to this property the will provided no restraint against anticipation.

In April 1829 Mr. Armstrong, her husband, entered into a treaty with Mr. Izod, to whom he was then indebted, for granting him an annuity of £50 a year secured upon this reversionary interest.

By an indenture, dated the 7th of May 1829, and made between William Armstrong and Mary Ann his wife of the first part, Izod of the second part, and George Cox (a trustee) of the third part, after reciting the will of Bradford at considerable length, but thereby merely shewing that Mrs. Armstrong was entitled for her separate use in remainder to the leasehold and copy-[320]-hold estate in question, and after reciting the death of Bradford, and that William Armstrong was indebted to Izod in £201, and that Izod had agreed with William Armstrong for the purchase of an annuity of £50 payable during the life of Mrs. Armstrong, and that it had been agreed that the £201 should be considered as part of the purchase-money, and that the annuity should be secured by Mr. Armstrong's warrant of attorney, and by such assignment of Mrs. Armstrong's life interest as thereafter contained; it was witnessed, that Mr. Armstrong, alone, granted the annuity, and he alone assigned the leaseholds, and covenanted that he and his wife would surrender the copyholds to Cox. And it was agreed "between the parties" to the deed, that Cox should hold the property on certain trusts for securing the annuity. Mr. Armstrong covenanted that he had good right, &c., to assign the premises, and he covenanted for further assurance on the part of himself, and all persons claiming under or in trust for him or his wife.

The deed was executed by Mrs. Armstrong; but it will be observed that she neither joined in the operative part, nor in the covenants or engagements contained in the deed.

The widow afterwards died.

The Plaintiff had a charge on such part of the separate estate of Mrs. Armstrong as was unfettered by a restraint against anticipation (1 Beavan, 1, and 4 Myl. & Cr. 377), under a deed dated in 1832, and therefore subsequently to that of Izod, and he contested with the assignees of Izod the validity of the annuity of £50, so far as it affected Mrs. Armstrong's separate estate. The case now came on upon exceptions to the Master's report taken by the assignees of Izod.

[321] Mr. Kindersley and Mr. Wilbraham, for the assignees of Izod, contended that no particular form of words were necessary to effect an equitable assignment, and that Mrs. Armstrong being, as to her separate estate, a *feme covert*, her joining in the deed was sufficient to create a charge on that, which alone, she had a power of charging, viz., her separate estate. They cited *Wainwright v. Hardisty* (2 Beavan, 363).

Mr. Pemberton, Mr. Teed, and Mr. Haig, for the Plaintiff. It is impossible that any claim can be established against the separate estate of Mrs. Armstrong in respect of the annuity. The whole of the transaction and the deed itself shews, that the parties were proceeding on the supposition that it was the interest of the husband alone which they were dealing with, and which was the subject of the contract. The effect of the deed is not to touch the separate estate, but to pass the interest supposed to exist in the husband. A married woman, having a separate estate, may undoubtedly deal with it as a *feme sole*, but unless she contracts in that character her deed is wholly void. To charge her estate apt words must be used, and the *onus* of proving the intention of creating a charge, lies on the party alleging it.

The annuity deed is also invalid under the Annuity Act, and has not been duly proved before the Master.

Mr. Wray, for Mrs. Armstrong.

Mr. Kindersley, in reply. That it was intended to bind the separate estate, is shewn from the fact of Mrs. Armstrong's joining in the deed, otherwise it would have been [322] useless. It is therein stated to have been agreed "between the parties" (of whom Mrs. Armstrong was one), that Cox should hold the property in trust to secure the annuity; this clearly shews an intention to charge that estate, which was separate property, and which could not be effected by the husband's act alone.

THE MASTER OF THE ROLLS [Lord Langdale]. The case comes on upon exceptions to the Master's report, on which it is contended by the assignees of Izod, that even if the deed be proved, and has all the requisites of a valid deed of this nature, yet still, upon its true construction, it is not such a deed as can be considered as binding the separate estate of this lady. Now assuming the validity of the deed, and that it has been duly proved, there never was a deed in which it appeared more apparent what it was the intention of one of the parties to grant. It is perfectly clear that Armstrong was to grant his own interest, though he covenanted for himself and his wife.

The question is, whether the separate estate of Mrs. Armstrong is to be bound by this deed. If she had been a covenanting party, I apprehend it would clearly create a charge upon her separate estate, or even if the deed had recited an agreement that she should be a surety for her husband, and that her separate estate should be made liable to this annuity, I apprehend, that the Court, according to all the rules upon which it acts, would have held that the deed extended far enough to bind her separate estate and create a charge thereon, although there might not have been any formal words to that effect. But the only circumstance relied on in this case, is, that Mrs. Armstrong was a party to the deed. I apprehend however it was not her estate, but the right and interest of her husband in her [323] right, which the parties had in their contemplation; and I cannot possibly read this deed without seeing that the party who prepared it, himself supposed that it was the interest of the husband in the estate of the wife that he was dealing with. There is nothing which can bear a contrary construction; the husband alone grants and conveys, and he alone covenants that she shall do certain acts.

It is perfectly clear that when a woman has property settled to her separate use,

she may bind that property without distinctly stating that she intends to do so. She may enter into a bond (*Hulme v. Tenant*, 1 B. C. C. 15; *Healley v. Thomas*, 15 Ves. 596), bill (*Coppin v. Gray*, 1 Y. & C. (N. C.), 205), promissory note (*Bullpin v. Clark*, 17 Ves. 365; *Field v. Soule*, 4 Russ. 112), or other obligation (*Murray v. Barlee*, 4 Sim. 82, and 3 Myl. & K. 209; *Owens v. Dickenson*, Cr. & Ph. 48, and *Crosby v. Church*, 3 Beavan, 485), which, considering her state as a married woman, could only be satisfied by means of her separate estate; and, therefore, the inference is conclusive, that there was an intention, and a clear one on her part, that her separate estate, which would be the only means of satisfying the obligation into which she entered, should be bound. Again, I apprehend it to be clear, that where a married woman having separate estate, but not knowing perfectly the nature of her interest, executes an instrument by which she plainly shows an intention to bind the interest which belongs to her, then, though she may make a mistake as to the extent of the estate vested in her, the law will say that such estate as she may have shall be bound by her own act. But in a case where she enters into no bond, contract, covenant, or obligation, and in no way contracts to do any act on her part:—[324] where the instrument which she executes does not purport to bind or to pass anything whatever that belongs to her, and where it must consequently be left to mere inference, whether she intended to affect her estate in any manner or way whatever, the case is entirely different either from the case where she executes a bond, promissory note, or other instrument, or where she enters into a covenant or obligation by which she, being a married woman, can be considered as binding her separate estate. Though Mrs. Armstrong was a party to this deed, there is nothing in it which shews, on her part, an intention to bind her separate estate; on the contrary, the conveyance and agreement is wholly on the part of the husband. Unless it can be shewn that Mrs. Armstrong, acting entirely independent of her husband, voluntarily joined him in a deed, and contracted or covenanted to bind her separate estate, the claim against her cannot be maintained. To create a charge she must either enter into some obligation which can only be satisfied by resorting to her separate estate, or must convey, or agree to convey, some benefit, estate, or interest belonging to her in her separate character. My opinion is, that her separate estate is not bound by the deed. The exceptions must therefore be overruled, and the Master's report confirmed.

[325] THE CORPORATION OF ARUNDEL v. HOLMES. HOLMES v. THE CORPORATION OF ARUNDEL. July 6, 19, 24, 26, August 10, 1841.

[S. C. 5 Jur. 884.]

Bill by a corporation, to have a lease of the corporation property delivered up, as void under the Municipal Corporation Act (5 & 6 W. 4, c. 76), dismissed with costs, on the ground that the objection was legal, and that the question of its validity ought to be first determined at law.

Cross-bill by the lessee to have an inquisition finding the lease collusive quashed, and delivered up to be cancelled, as being irregular and fraudulent, dismissed with costs, on the ground of want of jurisdiction.

A cause and cross-cause being dismissed with costs, Held, that the costs of evidence, taken in the former cause, but used in both, should be paid for in the cause in which it was taken.

The first was a suit by the corporation against the lessee, and the second a cross-suit by the lessee against the corporation, for the purpose stated in the judgment of the Court.

Mr. Pemberton, Mr. Bethell, and Mr. Rogers, for the corporation.

Sir C. Wetherell and Mr. Wray, for the Defendant Mr. Holmes.

August 10. THE MASTER OF THE ROLLS [Lord Langdale]. This case comes on upon bill and cross-bill. The original bill was filed by the Corporation of Arundel for the purpose of having it declared, that the Defendant was bound to make and declare his option, either to restore the lands held by him under a lease from the corporation,

or to pay an additional rent for the same:—that, in the one event, he might be ordered to restore and reconvey the land to the corporation, and deliver up the lease now held by him, and account for a proper rent; or, in the other event, that he might pay the additional rent due on the footing of the lease, and such endorsement as he might have made thereon. The cross-bill prays, that if the lease in question shall be held to be within the Municipal Corporation Regu-[326]-lation Act,(1) or if the Court

(1) 5 & 6 W. 4, c. 76, s. 94, 97. The ninety-fourth section of this Act is as follows:—

“And be it enacted, that it shall not be lawful for the council of any body corporate to be elected under this Act to sell, mortgage, or alienate the lands, tenements, or hereditaments of the said body corporate, or any part thereof, except in pursuance of some covenant, contract, or agreement *bond fide* made or entered into on or before the 5th day of June in this present year (1835), by or on behalf of the body corporate of any borough, or of some resolution duly entered in the corporation books of such body corporate on or before the said 5th day of June, or to demise or lease, except in pursuance of some covenant, contract, or agreement *bond fide* made or entered into on or before the said 5th day of June, by or on the behalf of such body corporate, or in pursuance of some resolutions duly entered in the corporation books of such body corporate on or before the said 5th day of June, or except in the cases hereinafter mentioned, any lands, tenements, or hereditaments of such body corporate, or any part thereof, or to enter into any new covenant, contract, or agreement (except in the cases hereinafter mentioned) for demising or leasing any such lands, tenements, or hereditaments, or any part thereof, for any term exceeding thirty-one years from the time when such lease shall be made, or if made in pursuance of a previous agreement, then from the time when such agreement shall have been entered into; and in every lease which the said council is not hereby restrained from making, there shall (except in the cases hereinafter mentioned) be reserved and made payable during the whole of the term thereby granted, such clear yearly rent as to the council shall appear reasonable, without taking any fine for the same.”

The ninety-seventh section is as follows:—“And be it enacted, that it shall be lawful for the council first to be elected in any borough under the provisions of this Act, to call in question all purchases, sales, leases, and demises not made in pursuance of some such *bond fide* covenant, contract, agreement, or resolution made or entered into as aforesaid before the said 5th day of June, and all contracts for the purchase, sale, lease, or demise of any lands, tenements, and hereditaments, and all divisions and appropriations of the monies, goods, and valuable securities, or any part of the real or personal estate, of which on or before the 5th day of June in this present year, the body corporate of which they are the council, whether in their own right or as trustees for charitable or other purposes, was seised or possessed, which shall have been made or contracted between the said 5th day of June, and the day of the declaration of their election; and for that purpose, if it shall appear to the said council that there is ground for believing that any such purchase, sale, lease, or demise, or such contract, or such division, or appropriation of the premises, was collusively made for no consideration, or for an inadequate consideration, it shall be lawful for the council of such borough, at any time within six calendar months next after the first election of councillors under this Act shall have been declared in such borough, upon notice of their intention being first given in the *London Gazette*, and also affixed on the outer door of the town hall or in some public place within the borough, to cause the value of the lands, tenements, hereditaments, and premises in question to be inquired of and found by a jury of twelve indifferent men of the county in which or adjoining to which in the case of Berwick-upon-Tweed, and of all counties of cities and towns corporate, such lands, tenements, hereditaments, or premises do lie; and in order thereto, the said council is empowered to summon and call before such jury all persons having the custody and possession of any deed or agreement concerning the said lands, tenements, hereditaments, and premises made or entered into since the said 5th day of June, and to cause all such deeds and agreements to be produced before the said jury and examined by them, and to examine upon oath every person who shall be thought necessary to be examined (which oath the mayor is hereby empowered

should have jurisdiction in respect thereof, it may be declared that the lease is valid:—that the inquisition mentioned in the pleadings [327] was irregular, and a fraudulent contrivance by the corporation, and ought to be quashed, and may be delivered up to be cancelled:—that the corporation may [328] be restrained from proceeding at law to recover possession of the lands comprised in the lease; and that the Plaintiff may be declared entitled to be paid certain sums paid by him for the use of the corporation.

The case is, that the corporation of Arundel granted a lease of certain corporation lands to Mr. Holmes, on [329] the 14th day of July 1835; and that the borough council, first elected under the Municipal Corporation Regulation Act, conceiving themselves to be entitled to call the lease in question, took proceedings, under the ninety-seventh clause of the Act, to have the value of the land inquired of and found by a jury: that an inquisition was accordingly held; that the jury found that the rent reserved by the lease was less than the real value, and that the lease was collusively granted. That the corporation, thereupon, called on Mr. Holmes, either to restore or reconvey the land, or to make an indorsement on the lease, acknowledging his liability to pay the additional rent found by the jury to be the real value; and Mr. Holmes having neglected to take any notice of this demand, the bill is filed to obtain the relief I have stated.

On the other hand, Mr. Holmes alleges, that his lease, being a lease at rack rent, is not within the meaning of the Act: that the inquisition was unfairly conducted, the corporation having refused to summon witnesses for the lessees, and having

to administer); and the council shall, by ordering a view or otherwise, use all lawful means for the information as well of themselves as of the said jury in the premises; and the jury shall find the value of the said lands, tenements, hereditaments, and premises, and the consideration which shall have been given, and also that which ought of right to have been given for the purchase, sale, lease, demise, or appropriation thereof, according to the terms of such purchase, sale, lease, demise, contract, or appropriation, and taking into account all the circumstances under which the same shall have taken place; and if the jury by their oaths shall find that no consideration, or a consideration less than that which they shall have so found to be the value which ought therefore to have been given, shall have been collusively given, or contracted to be given, by the terms of any such purchase, sale, lease, demise, contract, or appropriation, the party to such purchase, sale, lease, demise, contract, or appropriation, shall have his option, either to reconvey and restore the lands, tenements, hereditaments, and premises in question, and to abandon the contract to which he shall have been party, upon receipt in each case of the consideration, if any, which he shall have given for the same, or to give, therefore, in each case such additional consideration, so that the whole consideration given shall be that which ought of right to have been given, so found by the jury as aforesaid; and in every such case as last aforesaid, the additional consideration given, or to be given, shall be indorsed on the original deed or conveyance; and unless he shall so do within one calendar month next after the finding of the jury, every such purchase, sale, lease, demise, contract, and conveyance shall be absolutely void and of none effect as against the said body corporate and their successors; and in every case in which any such contract shall have been abandoned as aforesaid, or in which any such purchase, sale, lease, demise, contract, or conveyance shall become void and of none effect, under the provisions of this Act, the party who would otherwise have had the benefit of the same shall be remitted to his former estate, title, and interest (if any) in the premises, as if no such contract, purchase, sale, lease, or demise had been made or entered into; and for summoning and returning such juries, and for imposing fines on the sheriff, his deputy, bailiff, or agent, and on the persons summoned and returned on the said jury, and on any person required to give evidence, who shall in this behalf contravene the provisions of this Act, the Council of every such borough shall have all the powers given in that behalf to the trustees or commissioners of any turnpike road, by an Act made in the third year of His late Majesty George the Third, intituled *An Act to amend the General Laws now in being for Regulating Turnpike Roads in that part of Great Britain called England,* &c.

omitted to bring to the consideration of the jury many circumstances material to the due consideration of the case; and that the subject not being fairly brought under the consideration of the jury, the inquisition is invalid, and not only cannot be made the foundation of any relief in this Court, but ought to be declared invalid, and ought to be delivered up.

For the corporation, it is said, that under the provisions of the Act, the lease is either void altogether, both at law and in equity, or it is void in equity only; that if it be void in equity only, the Plaintiffs are entitled to a reconveyance or surrender; and that if it be void altogether, they are entitled to have it deli-[330]-vered up to be cancelled to prevent its remaining as a cloud upon the title.

I am of opinion, that upon the case stated by the Plaintiffs, supposing the inquisition to be valid, and no indorsement made upon the lease, the lease is, under the Act, absolutely void and of none effect as against the corporation, and such being the case, that the Plaintiffs are entitled to recover possession at law, and need not come into this Court for a reconveyance. The lease, though void, is not invalid upon the face of it, and would therefore, as it appears to me, be a document which the Plaintiffs would be entitled to have delivered up, if they had it not in their own power to have its validity tried at law; but if the lease be void, the corporation may bring their ejectment, and have its validity tried at once; and such being the case, I think that the bill to have the lease delivered up cannot be sustained. (See *Simpson v. Lord Howden*, 5 Myl. & Cr. 97, and the cases therein referred to.) I am therefore of opinion that the original bill must be dismissed; and, considering the charges which it contains, I think that it must be dismissed with costs.

The cross-bill appears to me to be open to objections as strong as those which affect the original bill. No relief is sought, except in the event of the Court having jurisdiction on the subject of the lease; but whatever may be thought of the lease, the inquisition, whether it has been correctly taken or not, is a species of public record or document in the custody of the corporation. The objections made to it are all of them legal objections, properly cognisable in another place; and I think that a Court of Equity has no jurisdiction to [331] quash it, or to order it to be delivered up to be cancelled, or to restrain proceedings founded upon it. I am therefore of opinion that the cross-bill must also be dismissed with costs.

In the circumstances in which the parties were placed, it might have been very proper for either of them to have filed a bill of discovery. They have, I think, both of them erred in seeking for relief in this Court.

The whole of the evidence was taken in the cross-cause, but was read in both causes. A question being submitted to the Court as to how the costs of the evidence should be paid,

THE MASTER OF THE ROLLS said, that it must be paid for in the cause in which it had been taken.

[332] MINCHIN v. NANCE. Feb. 9, August 10, 1841.

The completion of a contract having been delayed for thirteen years, the property became deteriorated by dilapidations. Held, under the circumstances, that the loss must fall on the purchaser, as the state of the title was such, that he ought to have completed his purchase and taken possession.

In August 1828 the Plaintiff agreed to sell a property to the Defendant. The contract was to be completed on the 9th of October following, and the purchaser was to be entitled to possession up to that time, and if the purchase should not be then completed, the purchaser was to pay interest at 5 per cent. from that day until full payment. The abstract having been delivered, all parties seemed to agree that a good title was not shewn; and in November 1828 the time for completion was enlarged to the 21st of February 1829, when the purchase-money was to be paid without interest, and the Defendant let into possession; and if the Plaintiff should fail to make a good title, the deposit was to be returned, with interest at 4 per cent. from the 9th of October. The Defendant refused to complete, and in 1829 brought

an action for his deposit, and the Plaintiff filed his bill for specific performance. The Defendant had not taken possession, and great dilapidation had occurred. It was decided that a good title had been shewn in August 1828. A decree was made against the Defendant with costs; and it was determined that A. should sustain the loss by dilapidation, and should pay interest at 4 per cent. only on his purchase-money from the time of filing the bill.

This was a suit for specific performance, which now came on for further directions. The facts of the case are fully stated in the judgment.

Mr. Pemberton and Mr. Tennant, for the Plaintiffs, the vendors.

Mr. Bethell and Mr. Toller, for the Defendants, the purchasers.

Mr. Briggs, for trustees.

THE MASTER OF THE ROLLS [Lord Langdale]. This was a cause heard for further directions and costs on the Master's report.

The bill was filed by the vendors for the specific performance of an agreement to sell the Crown Inn and other property at Portsmouth.

[333] The estate was advertised for and put up to sale by auction on the 5th of August 1828, subject to several conditions, and, amongst others, to the following:—viz., that the purchaser should pay a deposit of 20 per cent. on the amount of his purchase-money, and sign an agreement for payment of the remainder on or before the 9th day of October then next, at which time the purchase was to be completed, and the purchaser was to be entitled to possession of the premises purchased up to that time. The vendors were to pay all taxes and outgoing; and if, from any cause, the purchase should not be then completed, the purchaser was to pay interest, at the rate of 5 per cent. per annum, for his purchase-money, from that day until its full payment.

James Rands and the Defendant Andrew Nance became the purchasers, at the price of £6940. They paid the sum of £1388 as a deposit, and signed an agreement in writing, for payment of £5552 to the vendors, on the 9th of October then next, in case a good title should be shewn to the premises purchased.

An abstract of title being delivered by the vendors, and certain objections being taken to the title as shewn by such abstract, and both parties conceiving that a good title had not been made, they came to a new agreement in writing, on the 27th day of November 1828; and by such agreement, after reciting that the vendors were not prepared to make out a proper title to the premises, it was agreed, 1st. That the vendors were to make out a good title, and procure all necessary parties to join in a conveyance of the estate, by the 21st of February then next. 2dly. That on a good title being made out, and proper conveyances executed, the purchasers were to pay the remainder of their purchase-money on the said 21st day of February next, but with [334]—out any interest for the same; and were to be let into possession of the premises. 3dly. But if the purchasers should require further time for the payment of their purchase-money, they should have the option of deferring payment thereof, for any period not exceeding three calendar months; but in that case they should pay interest thereon, from the said 21st day of February at the rate of 4 per cent. per annum. And in case the purchasers should elect not to require further time, they were to be let into possession of the premises on the said 21st day of February; but the vendors were to retain the title-deeds till the remainder of the purchase-money should be paid. 4thly. On the completion of the purchase the purchasers were to be allowed to deduct from their purchase-money, interest on their deposit, from the 9th day of October until the time of completing the purchase, at the rate of 4 per cent. per annum; and also interest on the remainder of the purchase-money, at the same rate (on account of its lying unproductive), from the said 9th day of October up to the then present time. 5thly. If the vendors should fail to make a good title to the premises, and to procure the necessary parties to join in the conveyance, by the time above appointed for that purpose, the deposit money should be returned, with interest at the rate of 4 per cent. per annum, from the said 9th day of October last, until the same should be repaid.

After this second agreement had been entered into, the title was further investigated, and the discussion continued till a considerable time after the 21st of February

1829. Mr. Rands, one of the purchasers, died; and on the 8th of June 1829 the solicitor of Mr. Nance returned the abstract of title, and refused to complete the contract; and he afterwards, in July 1829, commenced an action against the vendors, to compel them to pay back the deposit.

[336] On the 2d of November 1829 the present bill was filed, praying for a specific performance of the contract, and to restrain the Defendant, Mr. Nance, from further proceeding in his action for the deposit.

The answer of Nance insisted that the Plaintiffs had not made out a good title; and submitted, that, even if the Plaintiffs could then shew a good title, the Defendant ought not to be compelled to accept the same, and complete the contract: and the answer alleged that the premises had become dilapidated.

The cause was heard on the 27th of July 1830; and it was then referred to the Master, to inquire whether the Plaintiffs could make a good title to the estate; and he should find that they could, he was to inquire at what time it was first shewn to the Plaintiffs could make such good title; and the consideration of further actions and of the costs of the suit was reserved.

On the reference, many objections were taken to the title by Mr. Nance. The Master allowed one of them, and thereupon certified that the Plaintiffs could not make a good title to the estate. And the Plaintiffs having excepted to the report, because was heard on the exception on the 19th of July 1831. On the hearing, the exception to the report was allowed; it was referred back to the Master to review the report; and the deposit was ordered to be returned. This order was affirmed, on appeal, by the Lord Chancellor, on the 16th of January 1832.

The Master having reviewed his report, to which the exception had been allowed, he his reviewed report, dated the 1st of December 1832; and thereby reported, that the Plaintiffs could make a good title to the estate, [336] and that such good title was shewn on the delivery of the first abstract of title, by the solicitor of the vendors to the purchasers' solicitor (which was in August 1828).

The cause came on to be heard for further directions on the 22d day of February 1833; and it being then represented that the Master's finding, as to the time when the title was first shewn, was erroneous, leave was given to file an exception to the report, which exception was filed accordingly, and a petition was presented by the vendors and Finlayson, stating that the vendors could not procure good and sufficient conveyances of the estate to be made; and that the buildings on the estate were in a ruinous state; and that the Petitioners were unwilling to take possession of the estate, or to run the risk of commencing any repairs upon them, until they were satisfied of obtaining a proper and valid conveyance; and it was prayed, if it seemed to the Court that the contract should be performed, that the Plaintiffs might cause a sufficient conveyance to be made, within a limited and reasonable time; and that an account might be taken, of the dilapidations which had taken place, since the time when, under the conditions, the purchasers ought to have been let into possession of the estate, and of the waste committed thereon; and that the amount of the dilapidations should be deducted from the purchase-money. On the 26th of June 1833 the petition was overruled; and it was thereby determined that a good title was shewn on the 5th of August 1828; and the Court declared that the Plaintiffs were entitled to a specific performance of the agreement of the 5th of August 1828, as altered by the agreement of the 27th of November 1828, if they could make a proper conveyance of the estate; and was referred to the Master to inquire whether the Plaintiffs could procure all necessary parties to join in such conveyance; [337] and if they could, he was to cause a proper conveyance, and was to inquire whether the premises had suffered any, and what dilapidations; and to what extent in value, since the date of the agreement of the 5th of August 1828, with liberty to state special circumstances; but the inquiry was to be without prejudice to any question, whether the Plaintiffs were to pay or make compensation for such dilapidations, or as to the costs of the

in making this order, with liberty to state special circumstances, Sir John Stowell intimated an opinion, that if the purchasers had a substantial objection to the title, and had reason to think that the objection could not be removed, they were not bound to take possession.

The Master made his report on the 2d of March 1840, and thereby found that the Plaintiffs could procure all necessary parties to join in the conveyance of the premises, and he settled a proper conveyance accordingly. And he found that the premises were not in a good state of repair at the date of the contract; that they had suffered great dilapidations afterwards; and that the said dilapidations were to the extent of value, since the date of the contract, of £500.

The report contains no statement of any special circumstances respecting the conveyances; and the report that the vendors were able to procure all parties to join in a proper conveyance stands without qualification.

After the date of this report, and on the 30th of April 1840, the Defendants Nance and Finlayson moved for leave to pay into Court the sum of £5552, the amount of purchase-money remaining unpaid; and it [338] was ordered that they should pay the same into Court, and should thereupon be let into possession of the estate; but that was to be without prejudice to any question in the cause. And the money, when paid in, was to be invested, and the interest to accrue due thereon, was to be accumulated.

The cause coming on for further directions and costs, and the Plaintiffs having finally established that they shewed a good title to the property in August 1828, having proved that they were able to procure all proper parties to convey, now that the Defendants may pay interest according to the contract of August 1828, except so far as that contract was varied by the contract of November 1828. They insist that they are in no respect answerable for the dilapidations which have taken place, and having succeeded in establishing that they shewed a good title before the bill was filed, and in maintaining their right to specific performance, they claim the costs of the suit.

Prima facie, the Plaintiffs having succeeded in every point which was in question, are entitled to the relief for which they ask; but the Defendants allege, that they ought not to be compelled to pay any interest, or more than the interest, which accrued between the date of the Master's report, and the time when the purchase-money was paid into Court. They claim interest on the deposit-money and the amount of dilapidations, with interest; and insist, that, except as to such part of the costs of suit as arose from a denial of the Plaintiffs' right to a specific performance, they are entitled to the costs of suit; and this claim, very extraordinary, no doubt on the part of a Defendant, who has wholly failed in making out his case, is founded on the alleged construction of two contracts, on the allegation that the [339] was not good till it was made so by the decree, and that the objections to the conveyance were not removed, till more than ten years after the date of the contract.

The difficulty in the case arises from the common mistake under which both parties laboured, with respect to the title. In the result of the long and expensive investigation which has taken place, it has appeared and is now established, that a good title was shewn in the month of August 1828; and, although there was considerable difficulty in procuring all proper parties to join in the conveyance, there is nothing in the case from which I can infer that if the title which afterwards appeared to be good, had been accepted, a good conveyance might not have been procured, even within the time first limited for the performance of the contract. Both parties, however, at that time, concurred in the opinion that a good title was not then shewn, and consequently the second contract was entered into. By the time for performing the contract was enlarged till the 21st of February 1829, but at that time, and for some time afterwards, both parties, in common error, continued to think that a good title was not shewn; and the negotiation for making the title good continued, till at length, on the 4th of May 1829, the purchasers, in their intention of putting an end to the business, and desiring to have the deposit returned with interest; and the vendors desiring an answer to some questions, making any arrangement for repayment of the deposit, and being told in reply that the purchasers entirely declined the purchase, and being afterwards again urged to the payment of the deposit money, with interest, then, for the first time, and on the 18th of May 1829, expressed doubts whether the objections taken to the title were tenable, and stated their determination to [340] take the opinion of counsel, and giving a decisive answer as to the return of the deposit. Mr. Randa, one

purchasers, having died; it seems to have been hoped that the objections to the title might have been waived; but the deposit being still pressed for, and an action being maintained for the recovery of it, the opinion of Mr. Humphreys, a conveyancer, was shewn on the 6th of June 1829; and the vendors, being then advised that they had already shewn a good title, communicated to the purchasers their intention of filing a bill for a specific performance of the agreement, and to stay proceedings in the Court. The answer of the 14th of July 1829 to this communication was, that the vendor of the purchasers had no objection to accept service of *subpoena*, and so the litigation was given for the litigation which has since taken place.

A good title was shewn in August 1828. If the title had been admitted, there is, I think, anything to shew that a good conveyance might not have been procured before the 21st of February 1829, the time fixed by the second contract. And the vendors had insisted on the title, as shewn by the abstract, there seems to be no reason, why the purchasers should not have been held responsible for not taking possession at the time when, under such circumstances, they ought to have done.

But the vendors, instead of insisting on the title as shewn by the abstract, pressed in the objections; and it was not till May or June 1829 that it occurred to them, that the objections might not be tenable. In this state of things, it does not appear to me that it was the duty of the purchasers to take possession at that time. As since appeared that they might have taken possession with safety, and that it was against their own interest that they did not; but, looking at their situation [341] at the time (the vendors then admitting that the title was not satisfactorily made out), I do not think that the purchasers were bound to take possession on the 21st of February 1829, or even after the opinion of Mr. Humphreys was communicated to them; but I conceive that the rights of the parties, as declared by the decrees, must be considered to have relation to the time when the bill was filed, and I think that, on the very peculiar circumstances of this case, I must consider it to have been the duty of the purchasers to take possession on the 2d of November 1829, the day when the bill was filed.

Thinking that it must be deemed to have been their duty to take possession on that day, and that they are not answerable to the vendors for not taking possession on that day, yet, as they might safely have taken possession before, and might, and in consequence ought to have known, from the abstract, that the title was shewn to be good, I think that the vendors are not to be deemed answerable to them for withholding the possession, or for the consequences of their not taking possession; and on the whole, I am of opinion that the vendors are not answerable for the dilapidation which the property suffered.

By the first contract the purchase was to be completed on the 9th of October 1828, and if from any cause it could not then be completed, the purchaser was to pay interest at 5 per cent. per annum from that day until full payment.

Under the common error as to the title, the second agreement was entered into. The time was enlarged till the 21st of February 1829, and on a good title being made, the remainder of the purchase-money was to be then paid, without any interest for the time.

[42] On the supposition that a good title might be shewn and possession given on the 21st of February, and that the purchasers might require further time for the payment of their purchase-money, they were to have the option of deferring payment three months from the 21st of February, paying interest at 4 per cent. And on completion of the contract, the purchasers were to deduct from their purchase-money, interest at 4 per cent. on the deposit (of £1388), from the 9th of October to the time of completing the contract, and interest on the remainder of the purchase-money, from the 9th of October to the 27th of November 1828.

I think that the effect of this second contract, was to supersede that part of the first contract, which provided for the payment of interest on the residue of the purchase-money, at the rate of 5 per cent.; but it appears to me, that the vendors are not to interest on the unpaid purchase-money, at 4 per cent. from the time when, under the circumstances, it appears to me the contract ought to have been completed, or the filing of the bill; and that, under the second agreement, the purchasers are not to interest, at the same rate, on the unpaid part of the purchase-money, from

the 9th of October to the 27th of November 1828, and on the deposit money, from the 9th of October 1828 to the 2d of November 1829.

From the commencement of the suit the purchasers have failed in every point and I am of opinion that they must pay the costs of the suit.

See as to deterioration of an estate between the contract and its completion, *Pat v. Deacon*, 3 Mad. 394; *Binks v. Lord Rokeby*, 2 Swan, 222; *Ferguson v. Tadmor*, 18 530; *Lord — v. Stephens*, 1 Younge & C. 222.

[343] MEYER v. MONTRIOU. August 5, 9, 1841.

[For subsequent proceedings, see 5 Beav. 146; 9 Beav. 521.]

An order, on motion, for payment into Court by a trustee of trust funds admitted to have been sold out under a power of attorney executed by him, refused, on ground that there was not a sufficient admission of the misapplication, and trustees being authorized to vary the investments.

In a suit against trustees for a breach of trust, one of them admitted that the fund had been sold out, by means of a power of attorney executed by him for the purpose, as he stated, of investing it on more advantageous securities; he stated that he was not concerned in the receipt of the produce, but he had been informed that it had been received by his co-trustee, or by J. M. by his permission. The settlement contained a power to vary the investments. Held, that there was not the answer, a sufficient admission to justify an interlocutory order on this trust for payment of the money into Court.

This was a suit instituted against trustees by their *cestui que trusts*, for the purpose of making them responsible for a breach of trust, in selling out and misapplying trust funds.

A motion was now made, on behalf of the Plaintiffs, that Mr. Montriou, one of the Defendants, might pay a sum of £5300 into Court.

The facts are so fully stated in the judgment of the Court, that it is unnecessary to repeat them.

Mr. Pemberton and Mr. Hetherington, in support of the motion.

Mr. Kindersley and Mr. Randall, *contra*.

Mr. Pemberton, in reply. *Beaumont v. Meredith* (3 Ves. & B. 180), *Vigors v. Binfield* (3 Mad. 62), *Collis v. Collis* (2 Sim. 365), *Rothwell v. Rothwell* (2 Sim. 217), *Richardson v. The Bank of England* (4 Myl. & Cr. 174), and see *Wyatt v. Shaw* (3 Beavan, 498).

[344] August 9. THE MASTER OF THE ROLLS [Lord Langdale]. This motion asks that the Defendant, Mr. Montriou, may be ordered to pay a large sum of money into Court, under the following circumstances.

By a settlement, made in contemplation of the marriage, which afterwards took effect, between John Meyer and Margaret Ancrum, several sums of stock were transferred for the benefit of the intended husband and wife, and the children of the marriage.

Henry Martin Ancrum, George Gilbert Currey, and George Meyer were named as trustees of the settlement, which contained powers to change the trustees, and to change the securities, on which the trust monies were invested.

By deeds, executed pursuant to the power in the month of November 1824, George Meyer, one of the original trustees, together with William Ancrum, and the Defendant William Montriou, became the trustees of the settlement; and the sum of £2334, 0s. 7d. 3 per cent. Bank annuities, five several sums of £3648, 15s. £243, 0s. 10d., £246, 18s. 3d., £264, 2s. 9d., and £100 (making together £4000) 3 per cent. Reduced annuities, and the sum of £1000 Navy 5 per cent. annuities, were transferred into their names, on the trusts of the settlement.

In the year 1824 a part of the Reduced annuities (£2624, 13s. 5d.) were assigned, as it is said, under a power of attorney granted to George Meyer, by the two original trustees, William Ancrum and William Montriou.

In the year 1825 the sum of £1050 New 4 per cents., into which the £1000 Navy 5 per cents. had been con-[345]-verted, was sold by Montrion, under a power of attorney executed by George Meyer and William Ancrum.

And in the year 1826 the remainder of the Reduced annuities (£1878, 6s. 7d.), and the sum of £2334, 0s. 7d. 3 per cent. Bank annuities, were sold by George Meyer, under a power of attorney executed by William Ancrum and William Montrion.

The bill alleges, that the sums produced by the sales amounted altogether to £6882, 13s. 1d. Mr. Montrion says, that, from the information he has received at the bank, they amount to £6300 only. He says further, that of this sum £1063, 16s. 9d. was the produce of the New 4 per cents. sold by him; and that he duly applied £1000, part thereof, in a manner authorized by the trusts of the settlement; and that he paid the remainder of the produce of the New 4 per cents. (£63, 16s. 9d.) to John Meyer.

The Plaintiffs allege, that the whole of the £6300, with the exception only of the £1000, was misapplied; and by this motion, they call upon Mr. Montrion, to pay into Court the sum of £5300.

It is contended for Mr. Montrion, first, that to whatever extent he may be made liable at the hearing, he cannot, upon motion, be called upon to pay into Court, more than the money which actually came to his hands, and has not been duly applied; and secondly, that £1063, 16s. 9d. was the only sum which came into his hands; and the sum of £63, 16s. 9d., the only part of it which was not duly applied.

Mr. Montrion, in his answer, admits that all the stocks in question were transferred to, and standing in [346] the joint names of himself and George Meyer and William Ancrum. He says, that the stocks were sold and converted into money, for the purpose of investment in more advantageous securities, yielding a large income. That he received the £1063, 16s. 9d., but was in no other way concerned with the sale of any of the stocks (except the Navy 5 per cents.) than as having joined in securing powers of attorney for that purpose; and was in no way privy to such sale, or to the receipt of the money arising therefrom; but he has been informed, that the monies arising from the sale of the other funds, were received by George Meyer, or by his permission, by John Meyer.

Mr. Montrion has given no satisfactory account of the application of the sums of money, the produce of the sale of the trust stock, which, as he has been informed, were received by George Meyer or John Meyer; and if the facts appear at the hearing, no otherwise than they now appear, I think that Mr. Montrion will be held liable to replace the stock, which he enabled George Meyer to sell, and the produce of which will not appear to have been duly applied.

But upon the answer, I do not find that Mr. Montrion admits any misapplication of those monies. He gives, as I think, an unsatisfactory account of several sums which appear to have been employed by John Meyer, and of some investments in the names of the trustees of the settlement; but there being only an admission that he executed a power of attorney, whereby, in fact, he enabled one of his co-trustees to receive the money, and no admission that the money was misapplied, I am of opinion, but I cannot, consistently with the practice of the Court, order him to pay the money which has not been in his hands into Court.

[347] The case of *Collis v. Collis* (2 Sim. 365) was referred to as an authority for his application. But in that case, a part of the trust fund consisted of £2231, 10s. 5d. per cent. Bank annuities, purchased with £2000, the amount of Shackle's mortgage. The trustees were Edward Shackle, Robert Fennell, and William Hinds. In the 25th of June 1825 Charles Collis, Matthias Dupont King, and Henry King became trustees. The report does not say, that the funds were transferred into the names of the new trustees. But in July 1825 the stock was sold, and Charles Collis and Matthias Dupont King lent the produce to Henry Collis, on his personal security. Henry King admitted the loan, but did not admit that he was any party to it. The order was made, on motion, for payment of money into Court, by Matthias Dupont King, Henry Collis, and Charles Collis. Henry King was not included. Now, if the stock never was transferred into the names of the new trustees, the sale was made by the old trustees, and the case has no application to the present; and if it was so transferred, the sale must have been made by the new trustees, of whom Henry King was

one, and yet he was not ordered to pay the money into Court; and the order is no authority for that which is now asked.

The Plaintiffs allege that Mr. Montrieu appears by his answer to have received £2500, in addition to the sum of £1063, 16s. 9d., the receipt of which he distinctly admits.

The first sale of stock was in October 1824. The sum sold was £2624, 13s. 5d. Reduced 3 per cent. annuities; and supposing the fact to have been, as Mr. Montrieu has been informed it was, that the money [348] was received by George Meyer, or by his permission, by John Meyer; under these circumstances, the statement in the answer is, that in or about December 1824, John Meyer advanced to Henry Hoghton £2500 at interest, on the security of his bond, and a deposit of two policies of insurance, one for £2000 on the life of Henry Hoghton, and the other for £4500 on the life of Catherine Meyer, and the lease of a house in King's Arms yard.

Mr. Montrieu states that he is unable to set forth, whether or not this sum of £2500 was the produce of the trust funds.

In a subsequent part of his answer he states that, in December 1826, Henry Hoghton died; that the Defendant and Jeremiah Hoghton being his executor, received the £2000 due on the policy, which was part of the security for the £2500 lent by John Meyer to Henry Hoghton, and sold the leasehold house in King's Arms yard, other part of the security, for £500; that Henry Hoghton died insolvent, and Jeremiah Hoghton, the co-executor of the Defendant, being a large creditor, and disposed to dispute the validity of the security held by John Meyer, it was agreed between John Meyer, the Defendant, and Jeremiah Hoghton, that only £1000, part of the sum paid on the policy for £2000, should be applied in reduction of the debt arising out of the loan of £2500, and that the remaining sum of £1000 should remain a charge on the other policy of £4500, the remaining part of the security. That the £1000, part of the policy for £2000, was accordingly paid over or duly accounted for to John Meyer. The Defendant then says, that the policy for £4500 remained in his hands until December 1837, when the policy was redeemed, and he received the £1000, which remained charged upon it. From [349] the statement, there is considerable probability that the £2500 was trust money; but considering that Mr. Montrieu was the solicitor of John Meyer, and had other money transactions with him, and might have had the policy in his hands as solicitor, or on other accounts, it does not appear that there is such a statement of facts respecting the £2500, or any part of it, as to justify me in concluding that it was so clearly trust money as to be applied, that I ought to order it to be brought into Court.

The sum of £171, 7s. appears to have been money which it was the duty of the trustees to invest upon the trusts of the settlement. It was received by Mr. Montrieu, and by him paid to John Meyer. If included in the notice, it should be brought into Court; but if not, I think that the order must be confined to the sum of £63, 16s. 9d.

NOTE.—At the hearing, on the 20th of July 1842, the Defendant Montrieu failing to shew that the funds sold out had been properly invested, was held liable to make good the amount. See 5 Beav. 146.

[350] SANDERS v. BENSON. April 24, 26, Nov. 13, 1841.

[See *Cox v. Bishop*, 1856, 57, 26 L. J. Ch. 394; 3 Jur. (N. S.), 500.]

Liability of an equitable assignee of leaseholds, in possession, to the covenants in the lease.

The liability of an equitable assignee of leaseholds is that of simple contract, and the Statute of Limitations limits his liability to six years after the cause of suit.

Bill dismissed without costs, on the ground of the Defendant not having (in a simple case) raised his defence by plea.

The question in this cause was as to the liability of an equitable assignee of leaseholds, who had taken possession, to the covenants in the lease. The defence made

was, first, that there was no liability in equity; and, secondly, that, as the breaches had occurred six years before the filing of the bill, the Statute of Limitations barred the remedy.

The facts are so fully stated in the judgment of the Court, that, to prevent repetition, they are not here stated; but the reader is referred to the first part of the judgment. The lease determined in 1830, and this bill was filed in 1838.

Mr. Pemberton and Mr. L. Wigram, for the Plaintiffs, relied, as to the Defendant's liability as equitable assignee, on the cases of *Jenkins v. Portman* (1 Keen, 435), *Close v. Wilberforce* (1 Beavan, 112), *Willson v. Leonard* (3 Beavan, 373), *Lucas v. Comerford* (3 B. C. C. 166, and 1 Ves. jun. 235, and 8 Sim. 499); and as to the defence of the Statute of Limitations, they contended, that the Defendant was liable on an equitable covenant, and that the Defendant had incurred, in equity, the same liability, which he would have been subject to at law, if he had taken a legal assignment.

Mr. Kindersley and Mr. Bacon, for the Defendant Benson.

[351] The Defendant is in no way responsible to the Plaintiffs. He has incurred no legal liability, and there is no equity to render him subject to the claim of the Plaintiffs.

The case of *Lucas v. Comerford* does not bear out the principle which it had been supposed was laid down in that case. There, the Defendant was in possession and claimed the benefit of the lease, and he merely disputed his liability in equity to the covenant to repair; he admitted his liability on all the other covenants, and "submitted to perform and fulfil the same as long as he should remain in the actual possession and enjoyment of the premises" (8 Sim. 504). The case of *Flight v. Bentley* (7 Sim. 149) was expressly overruled by *Moores v. Choat* (8 Sim. 508).

The lessor has all he contracted for, viz., the liability of the lessee, and his other legal remedies. What right can he have, to acquire an additional security through a contract or dealing between two other parties, by which he is not bound. Not giving a party to the contract, he could not compel its specific performance (8 Sim. 23), as none but persons parties to a contract can be parties to a suit for a specific performance. (*Wood v. White*, 4 Myl. & Cr. 460.) And the lessee might release his equitable assignee without the concurrence of the lessor.

Possession does not affect the question. In *Jenkins v. Portman*, the Court said, "It does not appear that the fact of a mortgagee by assignment of a leasehold interest giving actual possession of the mortgaged property, is more important in equity than it is at law." [352] If the point depends on the possession, then an under-lessee would be liable in equity for the covenants in the original lease, but there is no authority for such a proposition.

Mr. Pemberton, in reply.

Nov. 13. THE MASTER OF THE ROLLS [Lord Langdale]. This bill, in substance, says, that the Defendant Thomas Starling Benson may be decreed to repay to the Plaintiffs several sums of money, which they have been compelled to pay, in consequence, as they allege, of Mr. Benson having neglected to perform the covenants of a lease, in which he was equitably interested.

In the year 1769 Richard Salway, being entitled for his life to the premises in question in this cause, with a leasing power, in a manner not authorised by the power, granted a lease thereof to George Upporn and Thomas Main, for a term of years which expired on the 19th of July 1830.

Although the lease was invalid, the title of the lessees was not disputed, and they, and the persons claiming under them, continued in the enjoyment of the property, paying the rent reserved.

Subject to the lease, the property, after certain devolutions of title, became vested in Thomas Beale and Job Walker Baugh. The lease itself, which contained the usual covenants to repair, became vested in Samuel Sanders, under whose will it passed to the Plaintiffs and Defendants (except Thomas Starling Benson), for the interests whereby severally given to them.

[353] Samuel Sanders, the lessee, in 1781, granted an under-lease for fourteen years to James John Haig and John White. This under-lease became vested in John Haig and Frederick Teush; and on the 28th of September 1795 Sanders granted an under-lease of the premises to Oxley and Teush, for a term which was to expire

on the 24th of June 1830; and in this under-lease, Oxley and Teush covenanted to keep the premises in repair, and give them up in good repair at the end of the term.

The under-lease was never assigned, and such legal interest as was given by it, remained in Oxley and Teush during their joint lives, and after the death of Oxley, was vested in Teush alone. The beneficial interest in, or the equitable title to, the under-lease, belonged, in the first instance, to Oxley and Teush the under-lessees. It afterwards became the property of Oxley, Teush, and John Ferard, as part of the effects of a partnership which subsisted between them; and, in the year 1809, the persons beneficially interested in the under-lease were Oxley, Ferard, and Thomas Green, who were partners in the business of vinegar makers, and held the property comprised in the lease, as part of their partnership effects. In the beginning of the year 1810 a partnership was formed between the Defendant Thomas Starling Benson and Oxley, Green, and Ferard; and upon that occasion, it was agreed, amongst other things, that the under-lease should be taken as part of the partnership effects; and accordingly, although the premises were not used in the partnership business, the rent, arising from them, was brought into the partnership account.

It seems that, in May 1812, an under-lease of the premises was granted to John James, and the Defendant Mr. Benson states, that this under-lease was not executed [354] by him, but by his partners Oxley, Green, and Ferard only. The rent continued to be brought into the partnership account during the lifetime of Oxley; and after his death, to the account of the firm in which Benson, Green, and Ferard were partners, till the dissolution of that firm in 1820; and, under arrangements made upon and subsequent to the dissolution, at first between Benson and Green, and Ferard, and afterwards between Benson and Green and Thomas Champion, Mr. Benson, in January 1822, became entitled to the rents reserved by the under-lease granted to James; and he paid the rent which, from time to time, became due to the persons claiming under Sanders, by virtue of the under-lease to Oxley and Teush of September 1795; and in this state things remained until the expiration of that under-lease at Midsummer 1830.

The reversion in fee was in those who derived title from Salway. The legal interest in the lease granted by Salway, so far as it could be made available for any purpose, was vested in the Plaintiffs, as claiming under Sanders. The legal interest in the under-lease granted by Sanders, so far as it could be made available, had survived to Teush, who is said to have died insolvent; the beneficial interest in the same under-lease had been enjoyed and dealt with, as partnership property, by Oxley and Teush, by Oxley, Teush, and Ferard, by Oxley, Ferard, and Green, by Benson, Oxley, Green, and Ferard, and by Benson, Green, and Ferard, successively; and ultimately, Benson alone became entitled to the rents reserved by the under-lease, which, during the partnership subsisting between him and Oxley, Ferard, and Green, had been granted to John James.

Before the expiration of the under-lease, great dilapidations were permitted to take place on the property; [355] and in 1829 one John Barton, being in the occupation of the premises, and having pulled down a part of the buildings, the Plaintiffs filed a bill and obtained an injunction against him, to restrain further waste, and in this proceeding, they allege, that they expended a sum of £133, 18s. 2d. which they were unable to compel Barton to repay.

Very soon after the expiration of Sanders's under-lease, it was the duty of the Plaintiffs to deliver up possession of the property to Beale and Baugh, the owners of the reversion. Barton, who was in the occupation, refused to deliver up possession to the Plaintiffs, and the Defendant Benson declined to interfere. The Plaintiffs were therefore compelled to resort to legal proceedings, and they ultimately recovered possession from Barton, at an expense, as they say, of £276, 17s. 4d. Having delivered possession to Beale and Baugh, the Plaintiffs were required to make compensation, and in the result of an action prosecuted against them, they were compelled to pay to Beale and Baugh, for damages and costs, £692, 11s. 6d., and they incurred costs of their own to the amount of £159, 11s. 7d.

The Plaintiffs, by their bill, allege, that all the acts in respect of which these several costs and damages were incurred, were done during the time when the Defendant Benson was equitable owner of the under-lease granted to Oxley and

Tenah, and whilst he was either in possession of the property, or in possession and receipt of the rents and profits thereof; and they, therefore, contend, that the Defendant Benson was bound to keep the premises in repair, and to deliver up the possession on the expiration of the under-lease: that his neglect to perform that duty, has occasioned all the loss and expense which have been incurred by the Plaintiffs; and [356] that he is now liable to repay them; and that is, in substance, the relief sought by this bill.

The Defendant Benson admits that he had an interest, at first jointly with his partners, and afterwards, individually, in the rents payable by the occupying tenants; but he denies that he ever became liable to perform the covenants contained in the under-lease to Oxley and Teush; and moreover, he insists, that if he was ever liable to do the acts intended to be secured by those covenants, it could only be by an obligation in the nature of an *assumpsit*:—that the right of the Plaintiffs, if any, against him, accrued on the expiration of the under-lease:—and that the bill was not filed for more than six years afterwards. And therefore he insists, that the Plaintiffs' remedy, if any they ever had, is lost by the lapse of time.

Under the provisions of the agreement of the 1st of January 1810, and by reason of the dealings with and under the lease to Oxley and Teush, which afterwards took place, I am of opinion, that Mr. Benson became beneficially interested in that lease. I cannot concur in the argument that he was only entitled to an account of the rent by the occupier, without having any interest in the premises. The Defendant had, I think, all such beneficial interest in the estate as could be acquired under the lease; and having that beneficial interest, I think that he could not be exempted from the duties or burthens which appear to me, to be annexed to the beneficial interest; but as he never executed the lease, or any covenant to perform the covenants contained in the lease, it does not appear to me, that his obligation was in the nature of a covenant, or special contract. I think that the Plaintiffs were entitled to require Mr. Benson to perform the duties attached to his beneficial [357] interest in the lease, but that there being no covenant, the remedy of the Plaintiffs had no higher or stronger foundation than simple contract. Now the beneficial interest of Mr. Benson ceased on the 24th of June 1830, and the bill was not filed till the 11th of June 1838. The expense incurred in restraining Barton from committing further waste was incurred in April 1829. In the ejectment the writ of possession was obtained on the 7th of June 1831; and the right to damages for dilapidations, accrued on the expiration of the lease. It is true, that the amount of dilapidations was not ascertained till some time afterwards, but the right of the Plaintiffs accrued at the expiration of the lease, and the time must be reckoned from that period. I am, therefore, of opinion that the Plaintiffs, even if they might otherwise have been entitled to relief, are not so entitled, in consequence of their having so long delayed in filing of their bill. And the bill must be dismissed.

I have considered the costs of this case, which, *prima facie*, would belong to the Defendants; and if they had put in a plea, stating that point of objection which has prevailed, undoubtedly, they would have been entitled to costs; but they have put in a long defence, and stated that the Defendants had no interest whatever in the lease, and have raised points which, it appears to me, are not sustainable. I therefore think the justice of this case is satisfied by dismissing the bill without costs.

[358] WITHEY v. MANGLES. Dec. 10, 1840; July 28, 1841.

1 C. 10 L. J. Ch. 391; affirmed on appeal, 10 Cl. & Fin. 215; 8 E. R. 724; 8 Jur. 69. See *Baker v. Gibson*, 1849, 12 Beav. 101; *Lucas v. Brandreth*, 1860, 28 Beav. 273. Distinguished, *Halton v. Foster*, 1868, L. R. 3 Ch. 507. Commented on, *White v. Springett*, 1869, L. R. 4 Ch. 303. See *Harris v. Newton*, 1877, 46 L. J. Ch. 270; *Keay v. Boulton*, 1883, 25 Ch. D. 217.]

By the settlement made on the marriage of E. M., the ultimate limitation of personal property was, "to such person or persons as at the time of the death of E. M. should be her next of kin." E. M. died leaving a father, mother, and a child.

Held, that, under this limitation, the father, mother, and child took as her next of kin in joint-tenancy.

By a marriage settlement, the wife's portion was limited to the wife for life, with remainder to the husband for life, with remainder to the children of the marriage, to be vested at twenty-one or marriage; and in case none should attain that age or marry, then in trust for the brothers and sisters of the wife or their issue, as she should appoint, and in default of appointment, in trust for her next of kin. Held, that the children of the marriage were not excluded from taking under the ultimate limitation.

The Plaintiff in this cause claimed to be entitled to the sum of £10,000 comprised in the settlement made on the marriage of Henry Withy and Emily Mangles.

By the settlement, dated the 23d of August 1825, it was, amongst other things, provided, that within six months after the death of Robert Withy (the father of the intended husband), his executors should pay to the trustees of the settlement the principal sum of £5000; and that within six months after the death of James Mangles (the father of the intended wife), his executors should pay to the trustees of the settlement, the principal sum of £10,000; and the trustees were to invest the two sums, and pay the interest of the £5000 to Henry Withy for life, with remainder to Emily Mangles for her life, and the interest of the £10,000 to Emily Mangles for life, with remainder to Henry Withy for life; and after the death of the survivor, the trustees were to hold both sums, in trust for the children of the marriage, in such manner as the parents or the survivor of them should by deed or will appoint, and in default of appointment, for the only child of the marriage, if there should be but one, and if more than one, in equal shares; but the share of shares to be considered interests vested in a son or sons at twenty-one, or in a daughter or daughters at twenty-one or marriage. And in case there [359] should be no son living to attain twenty-one, and no daughter living to attain twenty-one or be married, the trustees were to stand possessed of the two sums of £5000 and £10,000, upon the trusts following, that is to say:—the sum of £5000, on trust for the executors, administrators, and assigns of Robert Withy, and the sum of £10,000 in trust for such of the brothers and sisters of the said Emily Mangles or any of their issue, in such shares, &c., as she should by will appoint; and in default of such appointment, *upon trust for such person or persons, as, at the time of the death of Emily Mangles, should be her next of kin.*

The marriage was duly solemnized, and there was issue of the marriage one child only, Emilius Henry Withy, who was born on the 5th of February 1828. On the 8th of February 1828 the wife died, leaving that child and her father James Mangles and her mother, her surviving; and in the course of a few days afterwards, viz., on the 15th of February 1828, Emilius Henry Withy died, leaving his father and James Mangles, his grandfather and his grandmother surviving.

Under these circumstances, the limitations of the two sums of £5000 and £10,000, in default of any child living to acquire a vested interest, took effect: and the question in this cause was, to whom the sum of £10,000, limited to "such person or persons as, at the time of the death of Emily Mangles, should be her next of kin" belonged. At the time of her death, her father, her mother and her only child were living.

The Plaintiff, the legal personal representative of Henry Withy the father, who died in 1837, and who also represented the child, insisted that the child was the next of kin, and claimed the £10,000 by virtue of the limitation.

[360] The Defendants insisted, in the first place, that by the intentions of the settlement the child was excluded; and that if the child was not excluded, then upon the construction of the settlement, the father, mother, and child were equally near of kin; and taking as joint-tenants, the representative of the child, who died first, was not entitled to anything.

Mr. Tinney, Mr. Pemberton, and Mr. Geldart, for the Plaintiff. The questions in this case are these, who, according to the law of England, is to be considered the next of kin of Mrs. Henry Withy living at her death, and whether the child of a deceased person does not take as next of kin, in priority of the parents of the

deceased? "The nearness or propinquity of degree is reckoned according to the computation of the civilians." (2 Black Com. 504.) By the law of England, as well as by the civil law, in the distribution of an intestate's property, descendants are first entitled, then ascendants, and lastly, collaterals. (4 Burge's Com. 31, and see *Keilway v. Keilway*, Gilb. Ch. Rep. 189.) In the fourth volume of Burge's Commentaries, the rule of the civil law is thus stated, "Although the father and son are distant from the deceased in an equal degree, yet it has been seen that the son is preferred. The respective degrees in which a person is of kin to the intestate, are important only when they are of the same line. But if there are claimants of different lines, the line to which they belong is the first consideration, that of the degree is of secondary consideration. The descendant entirely excludes the ascendant, and thus the grandson, who is of the third degree, excludes the father who is of the first. The inheritance descends, rather than ascends. [361] But on failure of descendants of the deceased, the father and mother are next called to the succession, and they exclude all collaterals, except his brothers german and their children." (4 Burge's Com. 37.)

Again, by the 31 Edw. 3, c. 11, administration is to be granted to the next and next legal friends of the intestate; and by the 21 Hen. 8, c. 5, s. 3, it is to be granted to the widow of the deceased, or to the next of kin, or to both," and administration is granted in respect of interest: *Crooke v. Watt* (2 Vern. 124). And the right to the administration of the effects of an intestate follows the right to the property in person: *In re Gill* (1 Hagg. 342). It is necessary only to see who would be preferred to administration, in order to ascertain who would, as *next of kin*, be entitled to the property of an intestate. As to this Blackstone observes (Com. vol. 2, p. 504), "In the first place, the children, or (on failure of children) the parents of the deceased are entitled to the administration, both of which are, indeed, in the first degree, but as the children are allowed the preference." (See Godolphin's Orphans Legacy, 16.) So, the right line is, in administration, always preferred. (See 12 Mod. 623.) As in *Smith's case* (2 Strange, 891), a *mandamus* to grant administration to the father, in respect of the son's estate, there being an infant grandson, was refused. So the grandmother, being in the right line, is entitled to administration in preference to the aunt: *Blackborough v. Davis* (1 P. Wms. 48, and 12 Mod. 619).

Gifts to the next of kin have been held to entitle the persons who would take a personal estate in case of [362] intestacy under the Statute of Distributions (Barman's Powell's Devises, vol. i. p. 280, n., and see 3 Swinburne, 911 (7th edition)); and expressions similar to that of next of kin, have been held to mean the next of kin under the statute. Thus in *Cruys v. Colman*, (1) a gift "to her own family" was held to be equivalent to own kindred, and to point out the persons entitled under the statute.

The child is not excluded under the gift to the next of kin of the mother, merely because he had a provision under a previous limitation: *Elmsley v. Young* (2 Myl. & K. 780), *Pearce v. Vincent* (2 Myl. & K. 800, 2 Bing. N. C. 328, and 2 K. 230).

Mr. Kindersley and Mr. Lovat, for the representatives of the father of Mrs. Henry Withy, and Mr. J. Humphry, for the mother of Mrs. Henry Withy. By the intention of the parties to the settlement, which "is the truth and honour of the law," *Woodcock v. The Duke of Dorset* (3 B. C. C. 568), the children of the marriage are excluded from taking under the ultimate limitation to the "next of kin;" the only provision intended for them being that which precedes the power of appointment amongst the brothers and sisters of Mrs. Henry Withy; *Bird v. Wood* (2 Sim. & St. 80), *Elmsley v. Young* (2 Myl. & K. 780).

Secondly, under the limitation to the next of kin of the wife, her father, mother, and child took the £10,000 [363] as joint-tenants. The limitation being by deed, the construction may be different from that which would take place if the question arose under a will. It may, however, be admitted, that in the right of administering

(1) 9 Ves. 319. Similarly a gift to "relations," *Thomas v. Hole*, Forrester, 251; "near relations," *Whithorne v. Harris*, 2 Ves. sen. 526; and "nearest relations," *Gooding v. Gooding*, 1 Ves. sen. 231, and Belt's Sup. 128, have been held to mean next of kin within the Statute of Distributions.

the estate of an intestate, the child and the descending line are usually preferred to the father; and that (under the statute) the children, and the representative deceased children, are, in the distribution, preferred to the parents; but the right to administer or to the succession, does not determine who are next of kindred to an intestate, for a husband would be entitled, though he be not of kindred to his wife. The question is, who are the *personæ designatæ*, within the terms of "next of kin" contained in the settlement. This point was finally settled by the case of *Elms v. Young*, which decided, that in ascertaining what parties are to take under a limitation contained in a deed, to "the next of kin," the artificial and changeable rules of distribution of an intestate's estate, are not to be regarded; but that you must go only to the fact in nature, and thus ascertain who are the nearest of kindred, and alone will be entitled to the property. In that case the question was this, who was entitled, under a limitation to the "next of kin" of Peter Elmsley; the claimants were his brother Alexander, and the children of a deceased brother John, and it was held, that the nephews, being more remote in kindred than the brother, had no right to share in the property under the limitation to the "next of kin." The same principle had been previously decided by Sir Thomas Plumer in *Brandon v. Brandon* (33 L. J. 312, and 3 Wilson, C. C. 14).

In the present case, the parents and child of the wife were equally next of kin to her at her death, for "a father is [364] certainly as near of kin to the son as the son to the father;" *Collingwood v. Pace* (1 Vent. 414). The consequence is, that on the death of the child the parents became entitled by survivorship, and the Plaintiff's interest.

They also cited *Gardner v. Sheldon* (Vaughan, 259), *Carter v. Crawley* (Raymond, 496), *Cowden v. Clerke* (Hobart, 29), and Co. Lit. 10 b.

Mr. Tinney, in reply.

July 28. THE MASTER OF THE ROLLS [Lord Langdale]. Upon the consideration which I have been able to give to the settlement, I cannot collect any intention to exclude the child. The particular event which occurred was not contemplated; and as to the sum of £10,000 no provision was made, otherwise than by the limitation to the next of kin of Mrs. Withy. Whether a child should be next of kin, does not appear to me to have been thought of, and there was no expressed intention, and as far as I can discover, no constructive intention to include or exclude the child, I find myself under the necessity of inquiring under the circumstances, ought to be deemed to be the next of kin of Mrs. Withy at the time of her death.

The Plaintiff alleges, that according to the meaning of the expression "next of kin," which is adopted by the law of England, the child of any proposed person should be deemed his next of kin, in exclusion of his [365] father and mother. The Defendants admit, that by the law of England, the child of an intestate person is entitled to administration to the effects of such person, in preference to his father or mother, and is also entitled to the succession of the intestate's estate in preference to his father or mother; but they say, that this preference, or, as it is sometimes called, does not confound the nature of things, or make the child nearer of kin to his parent, than the parent is to his child: that the law does not administer an intestate's estate, and the right of succession to it, are the same in the civil and municipal law, and may be arbitrarily determined, in such manner as will best promote the public interests; but they allege that nearness of kin, or proximity in degree of consanguinity, is a fact in nature, and admits of no regular qualification; and the Defendants, therefore, found their claim upon this, that persons who fall properly under the description of next of kin, must be standing in equal degree of propinquity, and that the father and mother must necessarily be deemed as near of kin to their daughter, as the child of the father to her mother; and, if this were not a fact in nature, they allege, that, by the law of England, the parents and the children of any proposed person are to be deemed equally near of kin to him.

I conceive that the consideration is not what is or ought to be deemed to be the nature, but what has been understood by the law of England to be the meaning of the term "next of kin." The Defendants contend that, by the law of Eng-

parents and the children of any proposed person, are to be deemed equally near of kin to him.

"The next of kin, according to the Statute of Distributions," is an expression frequently, though inaccurately, used. The statute of 22 & 23 Car. 2, c. 10 orders distribution among children and representatives of deceased children, or amongst brothers and representatives of deceased brothers; and the term "next of kin, according to the statute," comprehends persons who are of kindred in one degree, and children of children who are of kindred in a degree more remote, and brothers who are of kindred in one degree, and children of brothers who are of kindred in a degree more remote. The term "next of kin" is not accurately used in such cases, because persons, other than the next or nearest of kin, are comprised in it. And, although it has sometimes been considered, that this extended and inaccurate meaning of the term has become so far prevalent and of common use, that it might be properly attributed to the expression in a case where it was not controlled by the context, yet, in deeds and wills, the expression is often used in such a way, as to exclude any supposed intention, of comprising, amongst the next of kin, those, who being in a degree of propinquity more remote, might, under the statute, take by representation. And it has now been settled, that the expression "next of kin," when used *simpliciter*, does not include such persons as could only take by representation under the Statute of Distributions. To this extent, therefore, it has been determined that the persons who are entitled to distribution in case of intestacy, are not, for that reason only, to be deemed next of kin of a person deceased.

By the statute of 21 H. 8, c. 5 the Ordinary, in cases of intestacy, is to grant administration to the widow or next of kin of the deceased; and where there are several persons equal in degree of kindred, and more than one require the administration, the Ordinary is to elect [367] which shall have it. Under this statute the child is preferred to the parent, and in the passage which, in the argument, was cited from Blackstone (2 Com. 504), it is said, "In the first place the children, or (on failure of children), the parents of the deceased are entitled to the administration; both of which (i.e., the children and the parents) are indeed in the first degree, but still us, the children are allowed the preference." The child, which has preference in administration, has also preference in distribution, and it has become a rule in the Ecclesiastical Courts, that the right to administration follows the right to the property. But unless the preference can be considered as given, on the ground that the child is, by law, deemed to be nearer of kin to the intestate than the parent, we have made no advance towards a legal interpretation of the term "next of kin;" and although it does appear to me, that the common use which is made of the term "next of kin," in connection with the administration and distribution of personal estates in cases of intestacy, may occasionally have given rise to a notion, that the persons to whom the law gives the succession are legally and for all purposes to be considered as the next of kin, yet this does not appear to be a notion which can be supported in law. The instruction given to the term, "next of kin," with reference to the statute of Car. 2, shows, that the next of kin entitled to administration and distribution, are not deemed to be next of kin for all purposes; and I apprehend, that in all other cases, the term "next or nearest of kin" must be construed according to their simple and obvious meaning, or according to the legal construction of the whole instrument in which they occur.

[368] Whatever arbitrary distinctions may have been adopted in computing collateral degrees of consanguinity, all writers upon the law of England appear to concur in stating, that in the ascending and descending line the parents and the children are in equal degree of kindred to the proposed person; and I think, that, except for the purposes of administration and distribution in cases of intestacy, and except in cases where the simple expression may be controlled by the context, the law of England does consider them to be in equal degree of consanguinity.

The law of England gives a preference to the child over the parent in distribution, but I think we cannot therefore conclude, that with respect to every disposition of property, made in words to give the same to persons equally near of kin, the parents are to be held more remote than the child. If, in this case, the words of the

limitation had, in any way, referred to the law of distribution, there would have been a guide to the interpretation; but there is no such reference. The will stands by themselves simply, the limitation is to the next or nearest of kin, and cannot take upon myself to say, that the settlor had in his contemplation the law of distribution of intestate's effects, and intended a limitation in conformity with the law. To act upon such an hypothesis, would be, in effect, to introduce into the settlement an implied reference to the law of distribution of personal estates in case of intestacy, and it does not appear to me that this can safely be done.

Conceiving, therefore, that by the law of England, the father, mother, and any of any proposed person are equally near of kin to such person, I am of opinion, that at the time of Mrs. Withy's death, her father, mother, and child being next of kin, the limitation took effect in their favour; and I think that they took property limited to them as joint-tenants, and consequently, that the Plaintiff has an interest in the fund in question. The bill must therefore be dismissed.

[369] THE REV. JOHN HALE v. GEORGE HALE. July 7, 8, 21, 1841.

A receiver of a partnership granted in a case where no misconduct in management was alleged, on the ground that the Defendant insisted on a legal objection as denying all right of his partner to a share in the partnership.

Receiver of a brewery granted on the application of a spiritual person who was a dormant partner therein.

This was a motion, on behalf of a dormant partner, for a receiver of partnership property, against the partner in possession.

The testator Joseph Hale, who, in his lifetime, carried on the trade of a brewer in partnership with the Defendant George Hale and two other persons, was entitled to one-fourth of the stock and profits.

In 1810 he made his will, whereby he gave his estate and effects to the Defendant and Pewtress, in trust to pay an annuity to his wife for life, and subject the trust, to pay the dividends and proceeds to the Plaintiff his son; and after the widow's decease upon trust, to transfer and pay to the Plaintiff the whole of the residuary estate. The testator appointed his wife, Pewtress, and the Defendant executors.

The testator died in 1812, and his will was proved by his wife, James Pewtress and the Defendant George Hale.

After the death of the testator, it seemed to have been proposed that the Plaintiff should succeed directly and avowedly to his father's interest in the partnership; and the parties appeared to have been about to enter into a proper agreement for that purpose, when it was suggested that it was not competent for the Plaintiff, being a spiritual person, by law, to enter into partnership in a trade or concern. The consequence was, that expedients were resorted to to vest the interest in another person for his benefit, and the executors of the testator agreed, in respect of the testator's interest, to continue partners in the concern, in relation to the residuary estate which belonged to the Plaintiff. The business continued to be carried on by them in conjunction with the other partners.

In 1815 new articles of partnership were entered into between the other partners and the Defendant and Pewtress, who represented the interest of the testator's estate.

The partnership was continued until 1820, when the two other partners and Pewtress died in 1827, and the widow died in 1832. The partnership continued until the whole interest in the partnership property having become vested in the Defendant and the Plaintiff. The Plaintiff continued to be treated as a partner in the concern, and accounts were from time to time rendered to him, which he examined and signed down to July 1840; and he received from the Defendant his share of the profits, which, from time to time, arose.

The Plaintiff became desirous of putting an end to the partnership and of withdrawing from the affairs; but in consequence of disagreements between the parties, this bill was filed for effecting that purpose. It prayed for an account of the partnership

for a declaration that the Plaintiff was entitled to one-half of the profits, that the concern might be sold, and for a receiver and manager in the meantime.

[371] The Defendant insisted that the testator's share had ceased to form part of his assets, and had become the absolute property of the Plaintiff, and that by virtue of the statutes of the 21 Hen. 8, c. 13, ss. 5, 32, the 57 G. 3, c. 99, s. 3, and the 1 & 2 Viet. c. 106, ss. 29, 31, the Plaintiff was not entitled to the relief prayed by the bill; or, if that defence were untenable, he then insisted, that the accounts which had been signed by the Plaintiff were settled accounts, and that he was hereby barred from any claim to have them opened and examined; but he stated he was willing to come to a fair account with the Plaintiff if the suit was withdrawn.

It should be observed that by the first-mentioned statute (21 Hen. 8, s. 5) it is enacted that no spiritual person shall, by himself nor by any other for him, buy to sell again for profit, any cattle, &c., or merchandise, upon pain to forfeit treble the value; and it is enacted that every such contract shall be utterly void. By the thirty-second section it is provided that no spiritual person shall keep a tanhouse or beerhouse, upon certain penalties.

The 57 G. 3, c. 99 (passed in July 1817) repealed so much of the former Act as related to "buying and selling," and by the third section enacted that no spiritual person should, by himself, or by any other for him, engage in or carry on any trade or dealing for profit under certain penalties; and it enacted that every contract made by him in any such trade should "be utterly void and of none effect."

By the third-mentioned Act, 1 & 2 Viet. c. 106 (passed in August 1838), the 21 Hen. 8, c. 13, was wholly repealed; and by the twenty-ninth section it [372] is enacted, that no spiritual person shall, by himself or by any other for his use, engage in or carry on any trade or dealing for gain or profit, unless the partners shall exceed six, "or in any case in which any trade or dealing, or any share in any trade or dealing, shall have devolved or shall devolve upon any spiritual person, or upon any other person for him or to his use, under or by virtue of any devise, bequest, inheritance, intestacy, settlement, marriage, bankruptcy, or insolvency; but in none of the foregoing excepted cases shall it be lawful for such spiritual person to act as a director, managing partner, or to carry on such trade or dealing as aforesaid in person." The thirty-first section enacts that spiritual persons illegally trading may be punished, and for the third offence deprived, and contains the following proviso: "Provided always that no contract shall be deemed to be void by reason only of the same having been entered into by a spiritual person trading or dealing, either solely or jointly with any other person or persons, contrary to the provisions of this Act; but every such contract may be enforced by or against such spiritual person, either solely or jointly with any other person or persons, as the case may be, in the same way as if no spiritual person had been party to such contract."

A motion was now made on behalf of the Plaintiff for a receiver.

Mr. Pemberton and Mr. Romilly, in support of the motion. The Defendant says that, because the Plaintiff is a clergyman, he has a right to exclude him from partnership property; but whatever may be the construction of the statutes, it is incompetent for the Defendant to do so after acquiescing for years, and making himself a trustee for the Plaintiff. The De-[373]-fendant, as executor, is liable to account on some footing or other.

In the case of *Hall v. Franklin* (3 Meeson & W. 259) one point was not brought under the consideration of the Court, namely, that where a person is a sleeping partner, not interfering with the trade, and neither buying nor selling, he does not come within penal statutes of this description. This was decided in *Raynard v. Chace* (Burr. 2), which was a case for penalties under the 5 Eliz. c. 4, s. 31, forbidding persons exercising trades, unless they have been apprenticed; and the business being wholly conducted by a qualified partner, it was there held by Lord Mansfield and the other Judges, that a dormant partner was not liable to the penalties. Lord Ellenborough was of the same opinion in *Keen v. Dormay* (15 East, 161).

The ground for this application is this, that the Defendant excludes the Plaintiff, and absolutely denies the title of his partner.

They also referred to *Armstrong v. Lewis* (2 Cr. & Mee. 274; and see S. C. 3 Myl. & K. 45).

Mr. Kindersley, Mr. Bethell, and Mr. Goodeve, *contrâ*. No right of suit can arise out of a contract to act in contravention of an Act of Parliament; *Erney v. Osbaldiston* (2 Myl. & Cr. 53); "for no relief can be given in a Court of Justice to those, who shew that they have thought proper to disappoint the policy of the law, and to do that which the policy of the law requires should not be done;" *Harmer v. Westmacott* (6 Sim. 290). Here, the Plaintiff deliberately [374] entered into the partnership with full knowledge of its legal invalidity.

The cases on the statute of Elizabeth do not apply, the object of that statute being to insure trades being carried on by competent and experienced persons, as was the case in *Raynard v. Chace*; but here the object is to prevent the minds of clergymen from being turned from their spiritual duties by becoming interested in the success of a trade.

No misconduct is imputed to the Defendant, and there is no exclusion, so that the grounds for a receiver are wanting.

Mr. Pemberton, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. The defence which is made by the Defendant in this cause is certainly very extraordinary. For thirty years the Defendant has admitted the interest of the Plaintiff in this partnership, and has accounted to him, from time to time, for his share of the profits. Few things then could surprise one more, than to find at the end of such a period, when legal relief is demanded on the behalf of the Plaintiff, the Defendant saying to the Plaintiff, "You are a spiritual person, and by law are entitled to no relief whatever; I admit I have had the management of that which I have considered to be your property for thirty years. I have admitted you to a share of the profits which from time to time have arisen from the concern; but now I say that you are entitled to nothing by law in respect of this property; however, when your legal title is defeated, I am willing to come to a fair account; in other words, I will account to you in such manner as I think just and right when I have established that you [375] have no lawful right whatever." Certainly a defence more singular and more likely to occasion regret to the party making such a defence when he comes seriously to consider it, one has seldom seen.

Let us consider the matter for a moment without reference to the statute. Whether this gentleman is a partner or not, would, in one sense, be entirely immaterial. That which was partnership property at the death of the testator, was continued and employed in the trade, and made profitable to those who were engaged in and had the benefit of it. It is said there was no provision to allow the executor of a deceased person, or the legatee of a deceased partner, to enter into the partnership. This is very true, but what is an executor or the legatee entitled to? Has he a right merely to the pecuniary value at the death of the testator, or has he a right to the profits which have been made by the continuing partners, by the use of the property which belonged to him by virtue of the bequest? Is there anything more clear in the law as administered in this Court, than that he is entitled to the latter? The executor of a deceased partner, or the legatee of his interest, is not obliged to submit to the statement of the account which is made by the continuing partners, clearly not in the absence of all contract to that effect, which is admitted to be the case here. He has a right to say, "I must have the actual value of my share of the partnership assets determined, and although it may be very inconvenient for you to ascertain the value in the mode prescribed by the law, yet, if we cannot otherwise agree, I must have it ascertained by the only mode by which it can be ascertained accurately, namely, by a sale for what it will fetch in the market." I apprehend that there can be no doubt that the executor and legatee have a right to have the partnership property realised, and the real value of [376] their share determined, by ascertaining the value of the surplus after satisfying all demands upon the partnership assets. That being the case, the Plaintiff, whether a partner or not, had a right to have the amount of his share ascertained by realising the whole of the property. If he were a partner, that result cannot in the least degree be doubted, for there was a partnership continuing for an indefinite time, which not having been determined, continued on the terms on which it before existed. Therefore whether he was a partner, or a legatee permitting his property to remain engaged in the partnership,

trade, he would have a right, at any moment, to put an end to the partnership, by merely communicating his will to the other party; and then, of course, he would have a right to have his share of the property ascertained.

I observed in the course of the argument, and I see it warranted in some parts of the answer, that the Defendant sets up this sort of claim: he says, let the amount of the testator's share at his death be ascertained, that is what I owe you, and that I am willing to pay you; and it has been maintained throughout, that he is only entitled to have the value made out in some way, but not in the only way in which the true value can be ascertained. It appears to me that the argument in that respect is without foundation, for whether this be considered to be a portion of the residuary estate of the testator, or whether it be considered to be a share which the Plaintiff is entitled to as a partner, he has either a right to have the affairs of the partnership wound up, or to have the property which is in it ascertained in the only manner in which it can be ascertained.

It is then said, that it must be considered as a partnership, and therefore the statute applies.

[377] That is a matter of so very great importance to everybody, that I had better read the statute over very carefully before I express my opinion upon it. If I should be of opinion that the statute does not preclude the Plaintiff from relief, then the question is what is to be done in the meanwhile.

I think it a most unfortunate thing that the Defendant should have instructed those who act for him to set up this defence, because it amounts to a claim of the whole property to himself. I cannot admit the ingenious construction which is attempted to be put upon this answer. It is a denial of the right of the Plaintiff to relief of any kind, and the result of supporting the defence would be, that for anything that the law can do, the property belongs entirely to the Defendant who claims it.

Then is a partner, being a legal personal representative, having property of his own intermixed with the property of the Plaintiff, to be allowed to say, "I claim this as my own, to do with as I please, and although you have a *prima facie* case in this Court, you shall not interfere with my management of it at all?"

I shall read the statute, and consider of the sort of order which ought to be made. If I think the statute does not preclude the Plaintiff from relief, then I shall ask for a copy of the notice of motion. I cannot but think it would be very expedient if the parties would come to some better arrangement than by means of this Court. It has been said (and I have said it myself) that I am very reluctant to interfere in a case where there is no insolvency or difficulty of that sort. The Defendant does not devote a very large portion of his time to the business, but that may not be necessary: nothing, how-[378]ever, is made out against him as to his management of the property, and, therefore, there is not the least reason, upon the ground of any misconduct, to deprive him of the possession. The reason to deprive him of the possession of the property (if it be a sufficient reason) is, that he claims the whole property for himself by the means which he has set out in his answer.

July 21. THE MASTER OF THE ROLLS said that he had considered the case, and was of opinion that the Plaintiff was entitled to a receiver and manager.

The Defendant appealed, but the cause coming on before the Lord Chancellor on the 21st of December 1841, the matter was referred to arbitration.

[379] BONSER v. COX. March 1, 2, 5, 1841.

B. C. 10 L. J. Ch. 395; 5 Jur. 164; 8 Jur. 387. For subsequent proceedings, see 6 Beav. 110. Distinguished, *Cooper v. Evans*, 1867, L. R. 4 Eq. 47. See *Beckett v. Addyman*, 1882, 9 Q. B. D. 789; *Ward v. National Bank of New Zealand*, 1883, 8 App. Cas. 764; *In re Wolmershausen*, 1890, 62 L. T. 545.]

A. agreed to become a surety for B. in a joint and several bond to C., and B. was to give a counter bond of indemnity to A. The bond to C. was executed by A. only; but B. executed the counter bond to A. Held, that A., the surety, was released.

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A. gave to C. a promissory note, as surety for B., upon an agreement that C. should advance the amount to B. by draft, at three months' date. C. made the advance immediately to B., and not by draft at three months. Held, that the surety was released.

All persons interested in the Master's report are entitled to be heard in support of it, but none but the excepting party can be heard against it.

This cause came on upon exceptions to the Master's report, and related to claims on the estate of Mr. John Cox deceased, for the administration of whose estate this suit had been instituted.

It appeared that Richard Cox (the brother of the testator John Cox) carried on the business of a banker at Oxford, in partnership with Messrs. Morrell, under the firm of Cox & Morrell; and he was also engaged in a colliery business in the Forest of Dean, in partnership with D. Davies, under the firm of Cox & Davies.

Messrs. Cox & Morrell had made considerable advances to Messrs. Cox & Davies, and Richard Cox having applied to his partners for a further advance, it was agreed that they should advance a further sum upon his brother John Cox becoming security for the repayment of £3000. John Cox agreed, as surety for Richard Cox, to execute a joint and several bond to James and John Morrell for the sum of £3000, upon having a counter bond for the like sum from Messrs. Cox & Davies, to indemnify him.

A joint and several bond, intended to be executed by Richard Cox and John Cox, was prepared, and was carried by a clerk to John Cox for his execution, and was accordingly executed it. The same clerk afterwards went to the house of Richard Cox, to obtain his execution, but he, being from home, did not then execute it, and the bond having been mislaid, was never, in fact, executed by Richard Cox.

[380] The counter bond was, however, given by Richard Cox and Davies to John Cox, and the further advances were made by the bankers to Messrs. Cox & Davies. Some time after Richard Cox ceased to be a partner in the bank.

In this suit Messrs. Morrell claimed before the Master the sum of £3000 and interest, as due upon the bond, from the estate of John Cox. The claim was resisted, on the ground that John Cox was a mere surety, and that the bankers, having neglected to obtain a bond from the principal debtor, had released the surety.

The claim was disallowed by the Master, and Messrs. Morrell took exceptions to the Master's report, which now came on for argument.

Mr. Bethell and Mr. Anderdon, in support of the exceptions. The ground on which the Master decided is this; he was of opinion that the bond was valid, but he decided, that, not being executed by Richard Cox, the surety was placed in a condition less favourable than he ought to have been; on that ground alone he disallowed the claim of Messrs. Morrell. This might have been so if there had been no counter bond given, but here the rights and interests of the surety were preserved and protected by the counter bond given by Richard Cox and Davies. Though not executed by Richard Cox, the instrument, being joint and several, is valid as against the estate of John Cox, who executed it (*Sheppard's Touches*, 69): *Mathewson's case* (5 Coke, 23 a.), *Elliot v. Davis* (2 Bos. & P. 338), *Hawkshaw v. Parkins* (2 Swan. 539), *Underhill v. Horwood* (10 Ves. 225), *Prendergast v. Devey* (6 Mad. 124), *Hulme v. Coles* (3 Sim. 12), were cited.

[381] If John Cox had paid the amount of the bond, he could not have enforced it against Richard Cox; *Copis v. Middleton* (Turn. & Russ. 224).

Mr. G. Richards and Mr. Dixon, for the executors. John Cox, being a mere surety, became released, in consequence of the creditor not having obtained the signature of Richard Cox to the bond; for the former only agreed to execute a bond, in which Richard Cox, the principal, was to join. The remedies of Messrs. Morrell against Richard Cox were not therefore such as were contracted for by the surety, who is consequently released. Such it is admitted would be the case if no counter bond had been given, but that cannot have the effect of affixing Richard Cox's signature to the bond to the bankers, which was contracted for by the surety.

If John Cox had paid the bond, he would, according to the practice stated in *Copis v. Middleton*, have got it assigned to a friend and have kept it on foot. *Leaf v.*

Gibbs (4 Car. & P. 466), *Calvert v. The London Dock Company* (2 Keen, 638, and 7 Ad. & E. 143), *Bowmaker v. Moore* (7 Price, 223), *Capel v. Butler* (2 S. & S. 457), *Samuel v. Howarth* (3 Mer. 272), were cited.

Mr. Pemberton and Mr. Keene, for the Plaintiff, were proceeding to argue against the exceptions, when

Mr. Bethell objected, that they could not be heard on this occasion. He argued that, as in the Master's office the contest was between the exceptant and the executors alone, another creditor had now no right to be heard.

[382] THE MASTER OF THE ROLLS. The rule is, that all persons interested in the Master's report are entitled to be heard in support of it; but nobody but the party who has excepted can be heard in support of the exceptions.

Mr. Pemberton and Mr. Keene then proceeded. The surety can only be charged upon the contract which he has agreed to enter into, and is released if it be varied. A surety agreeing to enter into a bond which is joint and several, cannot be made liable on one which is several only; *Whitcher v. Hall* (5 Barn. & C. 269), *Parsons v. Cole* (2 Vern. 608), *Mayhew v. Crickett* (2 Swan. 185), *Boulbee v. Stubbs* (18 Ves. 20).

Mr. Bethell, in reply, insisted that the surety had not been damnified.

THE MASTER OF THE ROLLS [Lord Langdale]. I think that it cannot, upon any principles on which this Court acts, be doubted, that the surety has an interest, and a most material interest, in the rights and remedies which the creditor has against the principal debtor; he is not to be held bound where the situation of circumstances, in respect to the rights and the remedies which the creditor has against the principal debtor, are different from that which was contemplated by himself and all other parties. I do not think that it is material to enquire in what way the surety contemplated benefit or protection to himself, by stipulating that a particular remedy should be held by the creditor against the principal debtor. A man may reasonably say, I will be surety to you for payment of such a sum, [383] provided you have it secured by the bond of the principal debtor, but I will not be surety upon any other terms. The surety in this case has a right to say, "The arrangement was, that Mr. Richard Cox as well as myself should be held bound by bond to the creditor: that arrangement never was carried into effect." The circumstance of Mr. Richard Cox being held by bond to the surety, does not appear to be material in this case.

I think that this exception cannot be sustained; that the Master is right, because the surety had not that which he contemplated, and that which was a material portion of the contract stipulated for by him at the time when he entered into this obligation. In the contract, as existing between the principal debtor and the creditor, there is a departure from that which the surety stipulated for, and in a matter in which, I conceive, the surety had a most material interest. This exception must therefore be overruled. (This decision was affirmed by Lord Cottenham, June 25, 1841.)

March 5. There were two other exceptions argued, in which the Master of the Rolls reserved judgment, the facts of which are fully stated in his judgment.

THE MASTER OF THE ROLLS. In October 1831, two bills for £500 each, drawn by Davies on Richard Cox, at three months' date, and accepted by him, were nearly due. And at the same time, another bill for £750, drawn by David Davies on John Cox, and accepted by him for the accommodation of Davies, was nearly due. John Cox, to enable Richard Cox to obtain from Cox and Morrell, money [384] wherewith to meet the two bills for £500 each, and to enable Davies to provide for the bill of £750, joined Richard Cox in signing two promissory notes, one for £999, 10s., and the other for £750, to Cox and Morrell. Each of these notes was expressed to be given "for value received, by a draft at three months' date."

In giving these notes, John Cox was a mere surety; the purposes for which the notes were given are admitted, and from the words of the notes, it is plain, that the surety became liable upon a contract, whereby Cox and Morrell were to advance the money upon a three months' credit.

A question was raised, whether the money advanced upon the notes was applied for the purposes intended by the surety; and if it were necessary to decide that question, I should have considerable difficulty in doing so upon the evidence as it now stands; but, upon consideration, it does not appear to me that it is necessary to come

to any determination upon that point; for taking the fact to be, as alleged by the Messrs. Morrell, that in both cases their advances upon the notes were made for and applied to purposes intended by the surety, still those advances were not made by drafts upon a three months' credit, but directly in cash, within that time, and in such a way as to give to them, upon each advance, an immediate demand against the principal debtor. I conceive the intention to have been, that the principal debtor should have the means of obtaining money, without being liable to any proceedings to compel repayment till the expiration of three months, and that by the mode of advance which was adopted, the principal debtor became, on each advance, immediately liable to a proceeding for the recovery of money paid to his use.

[385] The right of the creditor against the principal debtor was thus materially different from that which was intended by the surety; and I think that it was not a sufficient answer to say, that no demand was made upon the surety within the three months for which credit was to be given.

In the case of *Bacon v. Cheony* (1 Stark, 192), before Lord Ellenborough at Nisi Prius he said, "If I engage to guarantee, provided eighteen months' credit be given, the party is not at liberty to give twelve, and after the expiration of six more to call upon me;" and so in this case, John Cox having become surety provided three months' credit were given, I think that Messrs. Morrells were not at liberty to pay upon less credit, and after the expiration of three months to call upon John Cox.

If the drafts had been given as intended, they might have been discounted; but in that case the payments would have been on the discounts, and the drafts would have been on the discounts, and the drafts would have run their course, and have afforded the credit contracted for; but as Messrs. Morrells did not give the credit, on the faith of which the surety became liable, I think they released him, and, consequently, these exceptions must be overruled.

NOTE.—The Lord Chancellor, on appeal, referred these exceptions back to the Master, and (as I have been informed), without overruling the principle of this decision. [10 L. J. Ch. 395.]

[386] HENLEY v. STONE. March 26, 1841.

Liberty to amend was given to the Plaintiff, on the terms of his doing so within three weeks. The amendment was however made after the expiration of that time. The Court, though of opinion that leave ought to have been obtained to file the amended bill, refused to direct the amended bill to be taken off the file, on the ground of the conduct of the Defendant, who had promised to draw up the order, but had neglected doing so, and had thereby created the delay.

An order, giving costs to the Defendant, and liberty to amend to the Plaintiff, though bespoken and paid for by the Defendant, may nevertheless be obtained by the Plaintiff.

On the 4th of December, a plea to the whole bill having been allowed with costs (3 Beavan, 355), liberty was given to the Plaintiff to amend her bill, she amending the office copies, and "undertaking to amend her bill within three weeks from that time."

On the 7th of December the Defendant's solicitor bespoke and paid for the order.

On the 21st of December the Plaintiff's solicitor, having obtained the intended amendments of the bill from his counsel, applied at the registrar's office for the order, and found it had been bespoken and paid for by the Defendant's solicitor. He thereupon informed the Defendant's solicitor, that if he did not take away the order, he (the Plaintiff's solicitor) would do so. On the 29th of December the Defendant's solicitor, in answer, stated that he had the order, and would pass the same at the opening of the offices. The Christmas vacation then intervened; the Plaintiff's solicitor afterwards made several applications to the Defendant's solicitor to get him to pass the order, but which was not done until the 20th of January. The Plaintiff obtained a copy and filed the amendments on the 23d.

It was now moved, on behalf of the Defendant, that the amended bill might be

taken off the file for irregularity, on the ground that it had been filed after the [387] expiration of the three weeks mentioned in the order of the 4th of December.

In answer to the application, the Plaintiff's solicitor stated on affidavit, "that he desired to be allowed to pass the said order himself, and offered to pay for it accordingly, but was informed by the registrar that the said order having been bespoken by the Defendant's solicitor, could not be passed by the Plaintiff's solicitor, nor could he have an office copy of it until it should be passed by the Defendant's solicitor; and that he, the Plaintiff's solicitor, thereupon enquired of the said registrar, how he could compel the Defendant's solicitor to pass the order, and was informed that the only way was to apply to the Court for that purpose."

Mr. Pemberton and Mr. James Russell, in support of the motion.

Mr. Kindersley and Mr. Mylne, *contra*.

THE MASTER OF THE ROLLS [Lord Langdale]. The Plaintiff obtained an order to amend on the 4th of December, undertaking to amend within three weeks. The order having been obtained, I apprehend it was open to either party to have it passed and entered. Both parties had an interest in it, the Defendant to obtain the costs, and the Plaintiff to obtain the authority to amend. The course pursued by the Plaintiff was to prepare to act on the order before she applied for it. The draft bill was amended by counsel on the 21st of November, and before she had made any application for the order. The Defendant had applied for the order on the 7th of December, and I have not the least doubt but that, with using due diligence, he might have ob-[388]-tained the order on the 9th, perhaps on the same day on which he applied for it. However, he bespoke the order and paid for it. This was unknown to the Plaintiff who had prepared the amendments, and she was afterwards told that the order had been bespoken and paid for by the Defendant. She seems to have then understood that she could not obtain the order, because it had been ordered and paid for by the Defendant. I find that is not so, for, though bespoken by one party, it may be obtained by the other party. The consequence was, that she did not use all the means in her power to obtain the order. It is clear that she relied, and had some reason to rely, on the Defendant to prosecute the order, for a communication was made to the Plaintiff's solicitor, which, if made in good faith and prosecuted, would most probably have obtained the order in time to comply with the exigency of the order.

When, however, the time had expired, and when the Plaintiff could not comply with the order, the bill was amended.

The time having expired, the amended bill was not regularly filed, and I think that leave ought to have been obtained by the Plaintiff, to file the bill notwithstanding the lapse of time.

The question, however, now is, whether the conduct of the Defendant was such that he ought to avail himself of the irregularity; I am of opinion that he has so conducted himself, that he has not a right to avail himself of that irregularity; and I must therefore refuse the order, but without costs.

[389] HENLEY v. STONE. July 6, 1841.

A second plea for want of parties is valid where the objection is first introduced by an intermediate amendment of the bill.

A plea, that A. B., an equitable mortgagee by deposit of title-deeds, was not a party, overruled, the bill alleging that the deeds were in the Defendant's possession, but the plea, though alleging a deposit generally, not stating distinctly that they were deposited with A. B., or that they still remained in his hands.

This bill was filed to set aside a purchase alleged to have been fraudulently obtained, and the vendor having got in an old mortgage, the bill also sought a redemption of that mortgage.

The Defendant, on a former occasion, had pleaded that certain persons interested in the equity of redemption had not been made parties to the suit, and the plea, on argument, was allowed. (3 Beavan, 355.)

The Plaintiff amended her bill by adding these parties and otherwise; whereupon the Defendant Stone filed a second plea for want of parties; by which, after tracing the devolution of the mortgage, and after stating how it became vested in the Defendant Thurley, it stated, that before the filing of the bill, Thurley applied to W. E. Johnson to lend her £200; which he agreed to do, upon having the same secured to him by a deposit of the said thereinbefore mentioned indenture. It then stated as follows:—"and Thurley, on the 3d of July 1840, deposited the same accordingly, and at the same time received the sum of £200 from the said W. E. Johnson; which said sum, together with an arrear of interest, is now due and owing to him on such security as aforesaid." And therefore he pleaded that Johnson was a necessary party to the suit.

The plea now came on for argument.

Mr. Pemberton and Mr. Giffard, in support of the plea, contended, that under these circumstances, Johnson [390] was a necessary party, and that the suit could not proceed in his absence.

Mr. Kindersley and Mr. Mylne, *contra*, contended, first, that this was a second dilatory which could not be allowed. *Rawlins v. Dalton* (3 Y. & C. 447), *Anon.* (Moseley, 207), *Ritchie v. Aylwin* (15 Ves. 79. See *Bosanquet v. Marsham*, 4 Sim. 573; *Robertson v. Lord Londonderry*, 5 Sim. 226; *Prosser v. Edmonds*, 1 Y. & C. 481; *Rowley v. Eccles*, 1 Sim. & St. 511).

Secondly, that there was no general rule that all incumbrancers ought to be made parties.

Thirdly, that the plea was to the whole relief and discovery, and the Defendant, by giving part of the discovery by his plea, had overruled it.

Fourthly, that the statement was not sufficient as to the deposit; for the deeds were by the bill alleged to be in the possession of the Defendant, and it did not appear by the plea in whose possession they now were.

Mr. Pemberton, in reply. This does not come within the rule of a second dilatory, because the bill has been amended, and the Plaintiff's case has been varied; besides which, the Court cannot look out of the present record to take notice of a former plea. Secondly, though prior incumbrancers may not be necessary parties, yet all persons having a claim in respect of the same charge, which is sought by the bill to be redeemed, must be made parties to the suit. Thirdly, the discovery objected to is given as part of the averments of the plea, and therefore does not come within the rule. And fourthly, the deeds are distinctly stated to have been deposited with [391] Johnson at the time of the advance of £200; they must, therefore, be assumed to be still in his possession. (*Ellice v. Goodson*, 3 Myl. & Cr. 653.)

THE MASTER OF THE ROLLS [Lord Langdale]. Nobody can doubt that it is the duty of a Defendant who puts in a plea for want of parties, to state plainly and distinctly what his objections are; and if his case is, that the suit is defective for want of several parties, then, if he makes his objections as to one, two, three, and four persons, but retains a fifth whom he may bring forward by plea at a subsequent occasion, such a proceeding would be extremely improper.

Where, however, a Defendant puts in a plea for want of parties, which is allowed, and liberty is given to the Plaintiff to amend his bill, it may happen that the amendment of the bill may bring forward additional circumstances to shew that some other persons are necessary parties, in addition to those brought forward in the plea. There could not be a greater injustice than to preclude a Defendant from taking the objection for want of parties, which is for the first time introduced by the amendment.

If such be the rule, that fact must be the subject of consideration, and the Court must look to the former plea and to the record; and I apprehend that the Court has always a right to look to its own records to see what has taken place in the case. (*Ellice v. Goodson*, 3 Myl. & Cr. 653.)

In this case the objection formerly made for want of parties, was not because a person entitled to a mortgage had not been made a party, but because one interested in the equity of redemption had not been [392] brought before the Court. The objection now is, that there is a person interested in the mortgage sought to be redeemed who is not a party. It is however unnecessary for me to decide the other question and the objections raised to the plea, because I think that the plea is defective

in point of form. A Defendant, objecting by plea that a certain person is a necessary party, is bound to state the transactions in respect of which he had become a necessary party. I think that the circumstances of this equitable mortgage ought to be clearly and distinctly set out, so as to shew that when the party is added, the defect will be cured, and an end will be put to it.

It is impossible to ascertain now whether, if Johnson were made a party, the objection would be removed; it is only to be ascertained by inference in whose hands the deposit was made, and if this person were made a party, the Defendant might again object that some other person in whose hands the deeds now are is still a necessary party. The plea is defective, and must be overruled.

[392] HENLEY v. STONE. June 26, 29, 1841.

Proper form of order on obtaining further time to answer, on condition of a serjeant-at-arms, under the 21st Order (1833).

Where a Defendant obtains further time to answer, on condition of his entering his appearance with the registrar and consenting to a serjeant-at-arms, but neglects so to do, the Court cannot compulsorily direct it to be done.

The Defendant Stone appeared to the bill on the 29th of March, and his time for answering would consequently have expired on the 24th of May; but in the meantime he applied to the Master and obtained a month's further time to answer, from the 10th of May, upon the conditions mentioned in the 21st General [393] Order, 1833 (Ordines Can. 50), viz., of entering his appearance with the registrar, and consenting to a serjeant-at-arms, as in the case of a commission of rebellion returned "*non est inventus*."

The Defendant accepted the terms, and on the 20th of May procured the order to be drawn up; by which it was ordered that Stone should have a month's time from the 10th of May "to plead, answer, or demur, not demurring only, but that the Defendant should enter his appearance, and consent to a serjeant-at-arms," &c.

The Defendant, however, neither entered his appearance nor consented, although his solicitor, being threatened with an attachment, by letter dated the 1st of June, promised to enter the appearance and file the answer in due time.

On the 9th of June the Defendant filed a plea, and on the same day the Plaintiff gave notice of motion "that it might be ordered that Stone should forthwith enter his appearance with the registrar, pursuant to the order of the 10th of May."

The motion was now made.

Mr. Kinderley and Mr. Mylne contended, that the Defendant was now bound to perform his undertaking and to perform the condition of the order, the benefit of which he had accepted on those terms.

Mr. C. P. Cooper and Mr. James Russell, *contra*. The appearance with the registrar must be voluntary, as the whole proceeding is founded on consent. The order [394] ought to have been drawn up by the Defendant, and not by the Plaintiff, and if the Defendant neglects doing so, the Plaintiff is at liberty to proceed as if no order had been made. In *Judd v. Wartonaby* (2 Myl. & K. 813), Sir C. C. Pepys decided that he could not compel a Defendant to enter his appearance, &c., under such an order, and he was of opinion "that a compulsory consent could not be the effect of any conditional order." A party cannot be compelled to consent.

[THE MASTER OF THE ROLLS. I do not understand how it was that this order came to be drawn up before the appearance and consent had been entered with the registrar.]

Mr. Kinderley, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. I will not decide this case now, though I confess I should have great difficulty in making the order asked.

I presume the Master intended to make the ordinary order, but I cannot say that I think he has done so. If this had been the ordinary order, it would have been, "That upon the Defendant entering his appearance with the registrar by his clerk in Court in six days" (see *Hinde*, 144), he should have the month's time; that is, he

is to have the time on submitting to the condition imposed; but until he has submitted, he is not to have the benefit of the order. The order ought not to be available until the condition has been performed, and he cannot have the benefit until his Six Clerk has signed the consent and appearance. The consequence of not accepting the condition is, that the Defendant loses all the benefit of [396] the order, and is subject to all the consequences of not answering as if no order had been made.

The communication made by the Defendant's solicitor, unless made *bond fide*, is improper, and requires explanation; but the order which is asked against the Defendant, cannot be granted for the purpose merely of punishing the bad faith of the solicitor. I should have the greatest difficulty in making the order which is asked, and my present impression is, that I cannot make it.

His Lordship added, "I have frequently said, in this place, that I never knew an experienced solicitor consent to a serjeant-at-arms in order to avoid an attachment for want of answer. Nobody would, on consideration, subject himself to such stringent conditions to avoid an attachment."

The case stood over, but ultimately no order was made.

[395] PARKER v. BULT. August 9, 1841.

The term "injunction causes," in the Fifth Order of April 1828, means those cases only in which the injunction depends on the exceptions; and not causes in which an injunction is prayed, or has been dissolved.

Where, therefore, an injunction had been obtained and dissolved, the Plaintiff cannot refer the exceptions for insufficiency until the expiration of eight days.

In this case the Plaintiff obtained the common injunction for want of answer, which, on the 22d of April, was extended to stay trial. The Defendant put in an answer on the 18th of June, and on the same day obtained an order nisi to dissolve the injunction. On the 10th of July the Plaintiff attempted to shew cause [396] for the merits, but, having failed, the injunction was dissolved.

On the 26th of July the Plaintiff filed exceptions to the answer of the Defendant and referred them the same day.

By the 5th Order of April 1828 (Ordines Can. 6), it is ordered, "that where exceptions, taken to an answer for insufficiency, are not submitted to, the Plaintiff may, at the expiration of eight days after the exceptions are delivered, but not before, unless in *injunction causes*, refer such answer for insufficiency."

Mr. Pemberton and Mr. Colvile, for the Defendant, now moved to discharge the order of reference for irregularity, contending that the Plaintiff was not at liberty to refer the exceptions until the expiration of eight days after their delivery, inasmuch as that the Defendant might have an opportunity of putting in a further answer. They contended that the term "injunction causes," in the 5th General Order, did not mean causes in which an injunction was prayed, or had been obtained, but causes in which the obtaining or continuing of an injunction depended on the fate of the exceptions. They cited *Candler v. Partington* (6 Mad. 102) and *Brooks v. Brooks* (8 Sim. 558).

Mr. James Russell, *contra*. A Plaintiff in possession of an injunction cannot refer the exceptions *instantly*; but that is not the present case. This motion must be decided on the express terms of the 5th Order, which gives the Defendant eight days to put in a further answer, except "in *injunction causes*:" [397] this case comes within the exception, being an injunction cause, and moreover one in which an injunction was actually obtained.

Mr. Pemberton, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. It seems to me that the expression "injunction causes," in this General Order, means those causes only in which the injunction depends on the exceptions. The order must therefore be discharged.

[397] CHARLTON v. RICHMOND. May 7, 1842.

the twelve days for setting down a demurrer under the 34th General Order of August 1841, are not *office* days.

By the 34th of the orders of August 1841 (Ordines Can. 174) it is ordered "That where the Defendant shall file a demurrer to the whole bill, the demurrer shall be held sufficient, and the Plaintiff be held to have submitted thereto, unless the Plaintiff shall, within twelve days from the expiration of the time allowed to the Defendant for such demurrer, cause the same to be set down for argument."

In the present case the Defendant filed a demurrer to the whole bill on the 28th March. The Plaintiff never set it down for argument, but on the 11th of April obtained an order of course to amend on payment of 20s. costs; and he amended the bill accordingly.

[398] The Defendant now moved to discharge the order of the 11th of April, that the bill as amended might be taken off the file for irregularity with costs.

An affidavit was filed in opposition, stating that the Defendant's time for demurring expired on the 29th of March, and that the registrar's office was shut for the Easter days from the 25th of March to the 4th of April, on which day the demurrer was filed at the registrar's office.

Mr. Pemberton, in support of the motion. The Defendant's time for demurring expired on the 29th of March, and therefore the demurrer ought to have been set down by the Plaintiff for argument within twelve days after the 29th of March, or at latest on the 10th of April. This was not done, and therefore by the express words of the General Order referred to, the demurrer must be held sufficient, and the Plaintiff be held to have submitted thereto. It was consequently irregular to obtain an order to amend.

Mr. Tinney and Mr. Bagshawe, *contrâ*. The order of August 1841 must be construed with reference to the old practice. By the 14th of Lord Coventry's Ordinances (Ord. 77) the demurrer is to be set down within eight days after it is put down to be allowed without motion. Now it has been held that these eight *days* are eight *office* days; *Bullock v. Edington* (1 Sim. 481; and see *Boys v. Morgan*, 9 Sim. 262). The twelve days, therefore, in this case must mean twelve *office* days, since the Defendant would have eight office days, while the Plaintiff would not have the same advantage. If any other construction were put on this order, then if twelve days elapsed while the offices were closed [399] it would be impossible to comply with the exigency of the order.

In all events, an opportunity ought to be given to the Plaintiff of setting the bill right.

THE MASTER OF THE ROLLS [Lord Langdale]. A very ingenious argument has been used to shew that the General Order ought not to have been expressed as it is, in cases may arise in which the operation of the order would produce the greatest inconvenience. But has there been anything in this case which ought to deprive the Plaintiff of the benefit of the order? The demurrer was filed on the 28th of March, and in the regular course of business the Plaintiff must have had some notice of it, and must have had an opportunity of doing what was necessary. The duty of the Plaintiff was to enter the demurrer with the registrar within eight days, and he did so on the 4th of April; the complaint is, that he did not take all the time he might have taken under the decision referred to. On the 11th of April, and after the demurrer had under the Thirty-fourth Order become sufficient, the Plaintiff obtained an order to amend, and the question is, if this proceeding was regular; I think it is so according to the terms of the Thirty-fourth Order, the demurrer was then set, and I cannot think, if the order is to be applied at all, that there is any inconvenience in this case. The proceeding of the Defendant was quite regular, and though I regret the consequences, yet it is absolutely necessary, if these General Orders are to be obeyed at all, to act strictly on them. The motion must be granted with costs, but the Plaintiff will not be prevented filing a new bill if he should be so minded.

Ordered with costs by L. C. 3d of December 1842.

R. II.—13*

[400] STUBBS v. SARGON. April 16, 1841.

A party consenting to the alteration of a date of an order after it had been served cannot object that the order, as altered, has not been served on him.

And order was made on Horner, a purchaser under the Court, to pay his purchase money into Court before the 10th of March.

This order was duly served, and the time expired without Horner having obeyed the order. The Accountant-General would not receive the money after the expiration of the time and by consent between the parties, and to prevent the necessity of a new order the registrar altered the order, and substituted the 17th of March for the 10th.

Horner still made default, and

Mr. Pemberton now moved for the four-day order.

Mr. Cooper, *contra*, objected that the order directing the payment of the money before the 17th had not been served, and contended that this application could not be granted.

Mr. Pemberton, in reply. There was but one order, altered, it is true, with the consent of all parties, and for the convenience of Horner.

THE MASTER OF THE ROLLS [Lord Langdale] said he could not allow the purchaser to take advantage of this objection, as it would be a positive fraud upon the parties.

[401] ADDIS v. CAMPBELL. May 3, 4, 5, 8, 1841.

[S. C. 10 L. J. Ch. 284.]

B. purchased a reversionary interest of A. at a gross undervalue, and under circumstances which rendered the transaction void in equity, C. had notice of the invalidity of the contract, but ten years afterwards he purchased the reversion of B., paying to B. the full value; A. joined in the conveyance and confirmed the sale. The Court, being of opinion that C. had not taken proper steps to protect A. in the second transaction, set it aside, and decreed a reconveyance, on repayment of the consideration given by B. to A. in the first transaction.

This suit was instituted for the purpose of setting aside a sale of a reversionary interest, on the ground of fraud and inadequate consideration, under the following circumstances:—

In the year 1818 a freehold and copyhold estate in Norfolk, stated to produce about £600 a year, stood limited to the following uses: i.e., to the use of Francis Gostling for life, with remainder to his first and other sons in tail, with remainder to his daughters in tail, with remainder to Mildred Addis for life, with remainder to Henry Joseph Addis, her son in tail, &c., &c. Trustees were in the usual manner interposed to preserve contingent remainders.

[402] Mildred Addis died in July 1818. Francis Gostling, the first tenant for life, was then a widower without children, and of the age of sixty-four years. Subject therefore to the life-estate of Francis Gostling, and the contingency of his having issue, Henry Joseph Addis was then entitled in remainder in tail to the estate in question.

Henry Joseph Addis was, at this time, of the age of thirty-eight, of a reckless, improvident and abandoned character; and having, in April 1818, committed a felony at Margate, he absconded, and was in a state of great destitution. In the following month of August he entered into a treaty with John Crook, a Quaker residing at Norwich, for the sale to him of his contingent reversionary interest in the lands in question.

The opinion of an actuary was taken by Crook as to the value of the reversion, the age of the tenant for life and the rental being somewhat understated. The actuary was of opinion, that, exclusive of the contingency of Francis Gostling having issue,

the value was nearly £8000, and stated that the contingency referred to was not capable of computation, but that not more than one-third of the price ought to be deducted for the contingency. This deduction being made, the value appeared to be between £5000 and £8000. This treaty having become known to Charles Addis, a solicitor, who was the cousin of Henry Joseph Addis, he endeavoured to cause the sale of the reversion to be made by auction, and this course was also advised by Francis Gostling, as the mode by which it would fetch its value. During a short period John Crook affected at least to concur in this object; instructions were given to an auctioneer, and the property was advertised for sale by auction; but before the day of sale had arrived, Crook succeeded in [403] obtaining a private contract for the sale of the reversion of the greatest part of the land to himself for £500, Henry Joseph Addis covenanting to suffer a recovery on the death of Francis Gostling, and to levy a fine in the meantime. This contract having been communicated to Charles Addis, he "upbraided Crook with having made an unconscionable bargain, and of acting unfairly in procuring Henry Joseph Addis to sign a contract in the absence of any professional adviser;" and he prevailed on Crook to give his bond to Henry Joseph Addis for the payment of £800 when he, Crook, should obtain possession of the land under the contract. The remainder of the property was afterwards subjected to the contract, the consideration money was then increased to £625, and the money secured by the bond was increased to £1000. In the result, on the 20th of April 1819 Henry Joseph Addis received £650 and the bond for £1000 payable when Crook should obtain possession of the estate, and conveyed his interest to Crook by deed and fine.

Francis Gostling appeared to have been perfectly well aware of the fraudulent nature of the sale to Crook, and he expressed in strong terms his opinion of the transaction. In letters written by him in the years 1818 and 1819, he, amongst other things, expressed a hope "that some of the family would dispute the sale," and stated also, "that by filing a bill in Chancery it might be set aside," and that Henry J. Addis "had sold the reversion for less than one year's rent."

In 1820 Henry J. Addis returned to Margate, where he was apprehended, tried, and convicted of the felony, and was sentenced to seven years' transportation. Subsequent to the expiration of his imprisonment, he returned [404] to Margate, and in 1827 became an inmate in the workhouse.

In 1828 a communication seemed to have taken place between Mr. Costigan, a Catholic priest, resident at Margate, and Francis Gostling, respecting Henry J. Addis; and in a letter written by Mr. Gostling to the former, he expressed himself as follows:—"The attempt was made to file a bill in Chancery against the man who bought Henry's reversion by private contract, as the Chancellor sets aside all purchases of this nature, in which he must have succeeded. It was advertised to have been sold by public auction, but the Quaker attended on Henry some weeks in London, and paid for £500; nothing like one year's rent of the estates. A more rascally transaction was hardly ever known. A further bond was procured by Mr. Charles Addis for £1000, payable when this man got possession of the property, which bond Henry sold to the Quaker's friend for £50, as I am well informed."

On the 15th of May 1828 Gostling contracted with Crook to purchase the reversionary interest in the property (with an inconsiderable exception) for £6500; at which sum it was then valued by a land agent and valuer, and Crook engaged to procure the signature of Henry Joseph Addis. The necessary deeds were prepared by Crook's solicitor at Norwich, and were also perused and settled by him, on behalf of Henry Joseph Addis, but no communication appeared to have taken place between this solicitor and Henry Joseph Addis. In these deeds Henry Joseph Addis joined and he concurred in the conveyance to Gostling. The deeds being engrossed, were carried by Crook to Margate, and on his arrival at that place Henry Joseph Addis, who was an inmate in the workhouse, was sent for to the inn. [405] What then took place was detailed in the evidence of the landlord, as follows:—

"Henry Joseph Addis came to my house, and an interview took place there between the said John Crook and the said Henry Joseph Addis, in my presence, in which the said John Crook took out a bundle of parchments, and said, that he had got some writings which he wanted him, the said Henry Joseph Addis, to sign, and he

added, addressing the said Henry Joseph Addis, 'If you behave honourably to me, I will to you.' They then left my house together, for the purpose of going to the office of Mr. Dearn, a solicitor of Margate, and returned, in a short time, to my house; upon which, I asked the said John Crook, whether the business had been accomplished to his satisfaction, and whether the said Henry Joseph Addis had complied with his wishes, to which the said John Crook replied in the affirmative; and upon my asking him whether the purchase which he had made of the said Henry Joseph Addis was an advantageous one, he replied, that it was very much so, and stated that he had cleared £6000 by it, and that he had given the said Henry Joseph Addis, £640 for his right to the property. I then observed, that the said Henry Joseph Addis was in very distressed circumstances, and that I hoped that, as he the said John Crook had made so good a bargain, he would bear him in mind; and upon the said John Crook asking me what I thought he ought to do for the said Henry Joseph Addis, I replied, that I thought that he could not do less than allow him £1 a week during the remainder of his the said John Crook's life. This the said John Crook readily consented to do, and he requested me to take the trouble of making the payment to the said Henry Joseph Addis weekly, which I agreed to do."

[406] The deeds were executed on the 5th of September 1828, and in pursuance thereof three recoveries were suffered of the property, which became thereby limited to Gostling in fee-simple.

It appeared that Crook, from time to time, and particularly about the time of the second contract, doled out small sums of money to Henry Joseph Addis, and from the execution of the second conveyance to the time of Crook's death, the £1 a week and other trifling sums were paid by him to Henry Joseph Addis. He also bought up his £1000 bond for the sum of £400.

Crook died in 1841, Addis died in the workhouse in 1832, and the Plaintiff, his eldest son, attained twenty-one in 1834. Mr. Gostling died in July 1835, aged eighty, and his interest was represented in this suit by the Defendant Mr. Campbell and others.

This bill was filed in May 1838 against the representatives of Crook and the representatives of Gostling, for the purpose above stated. The estate was now valued at £20,950. The valuation now made of the reversion in 1818, independent of the contingency, was somewhat above £11,000.

The case is reported, on an interlocutory application, in 1 Beavan, 258. The case now came on for hearing on the merits.

Mr. Pemberton and Mr. Piggott, for the Plaintiff. First, as to the original purchase by Crook. A purchaser of a reversionary interest is under an obligation to prove that he gave full value for his purchase. This is now a perfectly established rule of the Court. [407] *Gowland v. De Faria* (17 Ves. 20), and *Hinckman v. Smith* (3 Russ. 433). It has not been attempted to shew that Crook gave full value; the contrary is expressly proved by the valuation taken by Crook on the occasion. The Defendants will, however, say that inasmuch as the estate of Henry J. Addis depended on the contingency of Mr. Gostling dying without issue, it is not capable of valuation. It may, perhaps, be impossible to make an accurate valuation; but at the same time the consideration may, as in the present case, be shewn to be so grossly inadequate as to invalidate the transaction. There are, however, cases where sales of reversions depending on similar contingencies have been set aside. In *Barnardiston v. Lingood* (2 Atk. 133) the contingency on which the reversion depended was the death of Sir Samuel Barnardiston without issue male. A similar contingency existed in the case of *Bowes v. Heaps* (3 Ves. & B. 117), and the sale was avoided. Sir William Grant there observed, "Whether any individual will marry and have issue, is an event not easily reducible to calculation: but a man in such a state of health as George Bowes is described to have been, was not, according to ordinary probabilities, likely to have children. The Court has not held, that a bargain depending on such a contingency is wholly out of its reach. *Lord Ardglass v. Muschamp* (1 Vern. 237), *Wiseman v. Beake* (2 Vern. 121), and *Barnardiston v. Lingood* (2 Atk. 133), were cases in which death without issue male was the contingency, upon which the lender, or purchaser, was to reap the stipulated advantage: yet the uncertainty of such a risk did not prevent the Court's setting aside the bargain in each of those cases."

[408] In *Baker v. Bent* (1 Russ. & Myl. 224), the reversion depended upon the contingency of the tenant for life, who was sixty-three years of age, and a bachelor, dying without issue; the purchaser had deducted one-half of the contingency; Sir John Leach adopted that principle, and referred it to the Master to compute the value on that basis. Here the Court may adopt the principle stated in the valuation of the actuary, of deducting one-third for the contingency; but in any view the consideration on the first purchase was so grossly inadequate that it cannot stand.

As to the second purchase it appears that Gostling had full notice of the invalidity of the transaction with Crook; nothing can be stronger than the expressions used by Gostling respecting it; yet in the face of this he became the purchaser from the man who had committed the fraud, and paid into his hands the whole consideration. The circumstances under which Crook prevailed on Henry J. Addis to concur in the conveyance, are such as to render it ineffectual as a bar to the claim of the Plaintiff. Addis appears to have been in the greatest distress in a poorhouse, and entirely under the influence and pressure of Crook, who doled out small sums to obtain his concurrence.

They also cited *Boswell v. Mendham* (6 Mad. 373).

Mr. Kindersley, Mr. S. Sharpe, and Mr. Roupell, for the parties claiming under Mr. Gostling. It is not necessary for the Defendant to maintain the first transaction with Crook, that is not the case relied on by the Defendant; but even in that there is great exaggeration; there is no evidence of misrepresentation [409] or fraud; the property was valued and the valuation was communicated to Henry Joseph Addis and his solicitor, and every exertion was made by that solicitor and by Mr. Gostling to induce Henry Joseph Addis to effect a sale by public auction; but Henry Joseph Addis insisted (as he had a right to do) on selling by private contract. After the contract had been entered into, the solicitor of the vendor again interfered, explained the transaction, and got better terms for his client; it is evident that he had full knowledge as well as professional assistance.

Assuming the first transaction between Crook and Addis to have been wholly void, still the subsequent transaction, in which Gostling was guilty of no fraud and paid the full value, cannot be impeached. Addis had full knowledge of the invalidity of the first transaction, and seems to have taken some proceedings to set it aside, but which he declined prosecuting. Eleven years after the first transaction, he solemnly confirmed it, by a deed which shews to him that Mr. Gostling was paying the full consideration to Crook, on the faith of that confirmation. Could Addis, who by his confirmation induced Gostling to pay his purchase-money, turn round and insist on the invalidity of the transaction, to which he, by his conduct, led him to enter? It would be a fraud that this Court would not endure. The transaction was confirmed eleven years after, when the parties had full knowledge, and full value was then paid by Gostling.

The time which has elapsed is of the greatest importance in this case. The bill was filed nearly twenty years after the transaction took place, when all the parties and most of the witnesses were dead. A few letters are picked out from a correspondence to shew [410] the transaction; but how is it possible for a Defendant to meet the case fairly after such a lapse of time, when the witnesses are dead, and he has no means of procuring the other part of the correspondence? The circumstances, too, have altered, and it is not until, in the result, it is found that the contingency has not happened, that the parties come forward to question the transaction. If Gostling had had issue, then nothing would have been said of the matter, but the purchaser would have been allowed to sustain the loss. The contingency, too, was such as rendered it perfectly impossible to put any value on the reversion; and the dealings between a tenant for life and one having a subsequent estate tail, which can only be barred with the consent of the tenant for life, is not regarded with the same strictness as other transactions by this Court.

Throughout the transaction Gostling did all he could to get Addis to set aside the first purchase; he, however, refused; and then Gostling became naturally desirous of preventing the family estate passing to strangers, and he purchased it from the only parties from whom he could obtain it, for the full value.

M'Queen v. Farquhar (11 Ves. 479), was cited.

Crook's representative did not appear.

Mr. Pemberton, in reply.

May 8. **THE MASTER OF THE ROLLS** [Lord Langdale]. This bill is filed for the purpose of setting aside certain conveyances, made by the Plaintiff's father to [411] John Crook, deceased, and Francis Gostling, deceased, on the ground of the same being obtained by fraud. And the bill prays, that the Defendants or some of them may be decreed to execute all proper conveyances for vesting the hereditaments in question in the Plaintiff.

It appears that in the year 1818, and under the will of Francis Gostling the elder who died in 1806, Francis Gostling the younger, the testator of the Defendant Alexander Francis Campbell, and of the other Defendants, except William Crook, was entitled for his life to the freehold and copyhold estates, which are the subject of the suit; with remainder to trustees, to preserve contingent remainders; with remainder to the issue of the body of the same Francis Gostling; and at the same time, under the same will, Henry Joseph Addis, the father of the Plaintiff, was entitled to the same estates for an estate in tail general, in remainder expectant on the death of Francis Gostling, and the failure of the limitations in favour of his issue.

Henry Joseph Addis, at the time referred to, was about thirty-eight years of age, a person of an unsteady, reckless, and improvident character, who had been reduced by profligate and extravagant conduct, to a state of great destitution; and is shown to have resorted to guilty and dishonest means to relieve himself from the wretched state of distress to which he was sunk. It is not shewn, in this cause, that he was absolutely of unsound mind; but it is plain, that such a person is prone to temptation, and if not incapacitated from binding himself in legal transactions, is incapable of protecting himself with ordinary prudence, and very liable to be imposed upon; and this state of mind, though not sufficient to make his transactions void, is an element most important to be considered, upon a question [412] whether a deed has been obtained by fraud, circumvention, and undue influence.

[His Lordship here shortly stated the circumstances of the sale and conveyance to Crook, and proceeded.] I have not thought it necessary to state the particulars of this transaction in minute detail. It is not denied, that the consideration was grossly inadequate to the value; and the evidence shews a case of fraud, such as can lead to no doubt that the transaction must have been set aside, if due application for the purpose had been made to this Court. The attempt made by Charles Addis to prevent the transaction, and to procure some additional benefit for Henry Joseph Addis, cannot, in my opinion, be considered as any confirmation of such a transaction.

Mr. Francis Gostling was tenant for life in possession of the property; he was desirous to keep it in the family; and, if Addis's reversionary interest had been sold by auction, was willing to purchase at a fair price; he was consequently disappointed by the transaction with Crook, and being acquainted with the particulars, he expressed himself highly indignant at the conduct of both Crook and Henry Joseph Addis, and on various occasions stated his impression, confirmed by Mr. Charles Addis, and probably by others (for it appears he was in communication with other solicitors), that by filing a bill the transaction might have been set aside.

Upon the evidence which is given in this case, I am of opinion, that Francis Gostling perfectly well knew that Crook had committed a gross fraud upon Henry Joseph Addis, and that the transaction might be set aside in equity. He was at the same time greatly offended with Henry Joseph Addis, for making a sale by private contract, instead of by auction, which would [413] have given him an opportunity of purchase at a fair value.

From a letter, which was written by Francis Gostling to Mr. Costigan on the 14th of April 1828, it appears that Mr. Gostling not only retained his opinion of the fraudulent nature of the transaction, but had even been endeavouring to prevail on Henry Joseph Addis to take proceedings to set it aside; which, he says, must have been successful, and the expression he uses is, that "a more rascally transaction was never known."

Up to this time no imputation rests on Mr. Gostling. Knowing the transaction to be voidable, and wishing it to be avoided by the act of Henry Joseph Addis, and at the same time entertaining a rational and fair desire to become the owner of

property himself, it is very probable that he wished the transaction to be set aside, in order that he might become, as he had originally intended to be, the purchaser from Addis.

What were the inducements which he offered to Addis to file a bill; what, if any, assistance he proposed to give, or what influenced Addis to refuse to interfere, is unknown; but I think it may reasonably be inferred from the letter of the 19th April 1828, that Addis had not consented to take any proceedings; and it seems, that very soon afterwards, Mr. Gostling became desirous of purchasing the estate from or through the means of Crook. He was owner of the estate for life; he was desirous of being owner in fee; from Crook he could only obtain a base fee, in addition to his own life-estate; but if Addis could be induced to join, recoveries might be suffered, and an estate in fee-simple might be obtained.

[414] In this state of things, it is said, that he was advised that he might safely and properly make the purchase, if he paid to Crook, the full and fair value of the interest to be purchased; provided also, that Addis was made a party, and joined in and confirmed the conveyance, and was made a party to suffering the recoveries.

It seems to have been justly considered, that the transaction with Crook required confirmation; but it is not easy to conjecture, how it came to be supposed, that a consideration paid to the party who had committed a fraud, could have any effect in binding the rights of the party against whom the fraud had been committed.

The question in the cause is, whether Mr. Gostling took the requisite means of making a safe and proper purchase; and it is very extraordinary, that knowing, as he did, that the purchase of Crook was voidable, by reason of the fraud which Crook had practised, he should contract with Crook alone, not only for the interest which Crook professed to have purchased, but also for the acts which were required to be done by Addis, for the purpose of acquiring the title, which Gostling desired to have. Addis was a person destitute, and peculiarly liable to be imposed upon; Crook was a person, not only capable of practising a fraud, but who actually had practised a fraud, in this very matter; and yet Gostling, wanting an act to be done by Addis, and knowing the fraud already practised by Crook, engages Crook to procure from Addis the further act which was required to be done, and in no way concerned himself with the means by which the concurrence of Addis was to be obtained. Addis, with his reckless and improvident habits and disposition, was not only left exposed, but was knowingly subjected to the influence of the same person who had already imposed upon him. That [415] Gostling intended to commit a fraud, or to procure a new fraud to be committed, on Addis, is, in my opinion, very unlikely. I think it most probable, that he intended to give the true and just value for the property, and thought that Addis would never attempt to enforce his rights; but contracting as he did, with Crook alone, knowing the fraud which had been practised by Crook, paying to Crook alone what he may have thought the true and just value of the estate, he was, in fact, paying to Crook the full price of his fraud: and whatever consideration he paid, seeing that it all moved to Crook, and no part of it to Addis, except through the means of Crook, I am of opinion, that by such dealing as this, Gostling could not place himself in a better situation than Crook stood; and that by the whole transaction, notwithstanding his payments, he subjected himself, as towards Addis, to the same responsibilities to which Crook was already subject.

Crook, by a continuation or repetition of fraud, similar to that which he had previously practised, obtained from Addis that concurrence in the conveyance which Gostling desired, and for which he paid Crook alone. Gostling, I think, not designedly, but in effect, and with knowledge which ought to have put him completely on his guard, procured Crook to continue or repeat that fraud. With the knowledge he possessed, and after his mode of dealing, I think that it became incumbent upon him, and upon those claiming under him, to shew that the transactions between Crook and Addis were fair, and that Addis received a just consideration. Nothing of this kind is even attempted. Addis was left a victim to the contrivances of Crook; and those who advised Gostling never concerned themselves to see whether Addis was fairly dealt with, or received any consideration whatever. I infer from the letter of the 29th of July [416] 1828, that some communication, by letter, had taken place between Addis and Crook; but the evidence appears to me to shew, that

Addis was as much defrauded by Crook in the second transaction, as he had been in the first: he conveyed away a reversionary interest which was worth several thousand pounds, and in return, received no title to anything, and remained dependent on the voluntary performance by Crook of a verbal promise to pay him £1 a week.

Not thinking it important, whether the sum paid by Gostling to Crook was the value of the reversionary interest, subject to the contingency or not, I have not thought it necessary to consider very minutely the evidence of value, which has been tendered. Whatever was the payment to Crook, I think, that by the transaction, Gostling placed himself only in the situation in which Crook stood in relation to Addis; and that as Crook's transactions with Addis were fraudulent, and Gostling was under all the circumstances affected by them, the Plaintiff, as the person who would have been entitled if the fraud had not been practised, is now entitled to be relieved.

EXTRACT FROM DECREE.—Decree, the indentures of 1819 and the fine, and the indentures of 1828 and the recoveries, fraudulent and void against Plaintiff. And upon payment by Plaintiff of all the sums paid by Crook for the reversionary interest, and in respect of the bond with interest at 5 per cent., direct a reconveyance. Account of rents, of monies paid, and of lasting improvements, &c. (Reg. Lib. 1840, A. 1486.)

[417] BOURNE v. MOLE. Nov. 3, 1841.

A Defendant had been ordered by the Vice-Chancellor in another suit to give inspection of documents. The order had been made two years, but had not been acted on. Held, that this did not prevent an order for production in the present suit.

Mr. Pemberton and Mr. Rogers, for the Plaintiff, moved for the production of documents, admitted by the Defendant's answer to be in his possession.

Mr. Cockerell, *contra*, stated that the Defendant had been ordered by the Vice-Chancellor, in another suit, to produce these documents at his office for the inspection of the Plaintiff in that suit, at all reasonable times; and he contended that he was disabled from leaving them with his clerk in Court in this suit.

He admitted, however, that the order had been made by the Vice-Chancellor two years back and had not been acted on.

THE MASTER OF THE ROLLS ordered their production.

[417] SMITH v. MASSIE. Nov. 3, 1841.

The costs of affidavits, used to qualify the answer of a Defendant, so as to excuse him from the production of documents, must be paid for by the Defendant.

Mr. Pemberton, on a former day, moved for the production of documents admitted to be in the Defendant's possession. The motion coming on,

Mr. Kindersley appeared for the Defendant, and was permitted to produce affidavits qualifying the statements [418] in the answer, and shewing grounds for excusing the production of some of them. (*Hughes v. Biddulph*, 4 Russ. 190; *Parkhurst v. Loudon*, 1 Mer. 394; *Parsons v. Robertson*, 2 Keen, 605; *Morrice v. Swaby*, 2 Beav. 500; *Curd v. Curd*, 1 Hare, 274; *Llewellyn v. Badeley*, 1 Hare, 527.)

Affidavits were filed on both sides; but ultimately it appeared that the Defendant was not bound to produce the documents in question.

Mr. Pemberton now asked for the costs of the affidavits.

THE MASTER OF THE ROLLS [Lord Langdale]. Affidavits have been made to correct a mistake in the Defendant's answer, and which were absolutely necessary to relieve the Defendant from the necessity of producing the documents. This led to considerable expense, and was wholly occasioned by the omission or mistake in the answer. The Defendant has also brought forward, by affidavit, information, which it appears was in his possession at the time of filing his answer, and if he had stated

the Plaintiff, we must assume, would not have asked for more than he was lawfully entitled to. By the mistake of the Defendant he has created additional expense, and the clear justice of the case requires that this additional expense should be paid by him. The costs of the affidavits must therefore be paid for by the Defendant.

[419] WOOD v. VINCENT. Nov. 3, 1841.

Requisites for obtaining the stop order under the General Order of April 1841.

Mr. Bird applied for a stop order under the General Order of the 3d of April 1841 (Ord. Can. 161). A question having been raised as to the sufficiency of the affidavits to warrant the order,

THE MASTER OF THE ROLLS [Lord Langdale] observed. Two things are necessary under this General Order. First, you must shew generally the title of the assignor, it is not absolutely necessary to shew the particular share of the fund to which he is entitled. Secondly, you must shew the assignment, either by proving its validity in the usual way, or by the assignors appearing and admitting it.

[419] RANELAGH v. RANELAGH. Nov. 8, 1841.

[For other proceedings, see 2 My. & K. 441; 39 E. R. 1012; 12 Beav. 200.]

Test of pecuniary legacies to each of four persons for life, interest at £5 per cent., to be paid till the heir attained twenty-one; and "in case of the demise of any of the above parties without legitimate issue, then his or her proportions to be divided equally amongst the survivors." After the testator's death, one of the legatees died without having been married. Held, that the survivors were absolutely entitled to the legacy.

The testator, Lord Ranelagh, by a codicil to his will, expressed himself in the following words:—

"My daughter, Mary Ann Jones, having a fortune of £10,000, which I hold in trust for her, &c., I give her for the present only £200 to buy mourning. I give to my two daughters Sarah Antonia Jones and Louisa Jones, during their natural lives, £4000 each. I give to my two sons Thomas Cowley Jones and Thomas Edward Jones £2000 sterling each, during their natural lives; legal interest at 5 per cent. to be paid to all of them in equal quarterly payments, commencing from the day of my decease, till my son the Honourable Thomas Jones or my heir in entail dies his or her twenty-first year of age. To prevent any mistake or misconception in my directions, I repeat my intentions respecting the above legacies in figures:—

Mary Ann Jones £200 to be paid forthwith.

Sarah Antonia Jones	£4000	{ £5 per cent. interest to be paid quarterly till my heir is twenty- one years of age.
Louisa Jones	4000	
Thomas Cowley Jones	2000	
Thomas Edward Jones	2000	

In case of the demise of any of the above parties *without legitimate issue*, their respective proportions to be divided equally amongst the survivors."

The testator's eldest son, now Lord Ranelagh, was appointed residuary legatee.

By another codicil the testator appointed Lady Ranelagh and his daughters Mary and Sarah Antonia Jones his executrices.

At a former hearing of the cause (2 Mylne & Keen, 441) it was contended on behalf of the two daughters and the two younger sons, that they took an absolute interest in their respective legacies, on the ground that the gift over in case of the death of any of them without issue, was to be re-ferred to an indefinite failure of issue. Sir John Leach, and Lord Brougham on appeal, did not adopt that con-

struction; and it was declared that the legatees were entitled to interest in the legacy until the Plaintiff attained twenty-one, and it was ordered that the several legacies should be carried over to the separate accounts of the several legatees, and the dividends were to be paid to the legatees for life, or until further order; and upon the deaths of any or either of the legatees, liberty was given to any person interested to apply.

The sum of £4149 Reduced annuities was accordingly carried over to the separate account of the Defendant Sarah Antonia Jones. She died in 1840, without ever having been married.

Petitions were now presented by her personal representative and by the other legatees for payment to them of the £4149.

Mr. Pemberton and Mr. Romilly, for the legal personal representative of Sarah Antonia Jones, claimed the fund in question, contending, that the order on the former hearing did not exclude her claim to an absolute interest, and that the fund had been carried over to a separate account, because the question was doubtful, and to enable the parties interested, when the event contemplated happened, to contest the right. They argued that the rule was settled, that where there was a gift of personality to A. for life, and a gift over on a general failure of his issue, A. would take an absolute interest. (See *Lepine v. Ferard*, 2 Russ. & Myl. 387, and the authorities there referred to.)

Mr. Tinney and Mr. Bigg, for one of the surviving legatees, and

[422] Mr. Kindersley, for another, contended they were absolutely entitled by survivorship to the fund.

Mr. G. Turner, for Lord Ranelagh, contended, that as the first gift was for life only, the surviving legatees would take by survivorship for life only, and not absolutely.

Mr. Pemberton, in reply:

Barlow v. Salter (17 Ves. 479), *Massey v. Hudson* (2 Mer. 135), *Nicholls v. Skinner* (Prec. Ch. 528), *Hughes v. Sayer* (1 P. Wms. 534), were cited.

THE MASTER OF THE ROLLS [Lord Langdale]. The question depends upon the construction of the codicil; I must assume in the absence of any statement to the contrary, that the very point contended for to-day was raised in the pleadings: beyond doubt it was discussed on the hearing of the cause, for a claim being made by Sarah Antonia Jones to be entitled absolutely to this fund, the Court was of opinion that she was only entitled to an order that it should be placed to her account, with a direction to pay her the dividends, and liberty to apply on her death. By this I consider that the claim of the lady was negatived, though the rights were not further declared, because of the possibility of claims being made by any children she might have. As regarded her claim, it was incumbent upon the Court to declare it specifically, or to do what amounted to a negative of that right; this I think was done. In consequence, therefore, of the former order of this Court, I consider myself precluded from making the order asked; if I were not, I should have great difficulty in deciding, except in conformity with the former decision, when all [423] the previous authorities appear to have been carefully examined. I do not think it advisable to say more, because if the parties should be advised to take the case before another tribunal, they may do so unfettered by anything which has passed here.

I consider that the survivors take the fund absolutely, and an order must be made for payment to them; but the costs of all parties ought to be paid out of the fund.

[423] HEMPSTEAD v. HEMPSTEAD. Nov. 9, 1841.

A. having a lien on the testator's estate, established his debt under the decree; but his claim for interest was disallowed by the Master, whose report stood confirmed. The estate was sold, subject to A.'s lien, and A. having refused to accept from the purchaser his principal without interest, was not allowed to participate as a creditor in the purchase-money.

Messrs. Ware had acquired from the testator in the cause a lien on the leases of certain property belonging to him.

By the decree made in June 1838 in this cause, which was for the administration of the testator's estate, the Master was directed to take an account of the testator's debts, and to compute interest on such of the debts as carried interest; and he was ordered to inquire whether there were any and what incumbrances affecting his real estates, and he was to take an account thereof.

In July following Messrs. Ware gave notice under the Act, to the executors, that they should claim interest on their debt from that time, unless immediately paid.

The Master reported the lien and debt due to Messrs. Ware, and that there was due thereon the sum [424] of £252, 12s. 4d., but he disallowed the claim for interest. The report was confirmed, no exceptions having been taken thereto.

By a subsequent order, the property was ordered to be sold subject to the incumbrances of such persons as would not consent thereto; and the same was afterwards sold, subject to the lien of Messrs. Ware. The purchase-money was paid into Court.

The purchaser tendered the principal sum found due to Messrs. Ware, who refused to receive it without interest.

The Plaintiff presented this petition, praying a declaration that Messrs. Ware were not entitled to participation with the other creditors in the fund in Court, and that the same might be divided between such other creditors.

Mr. Pemberton and Mr. Sheffield, in support of the petition.

Mr. Kindersley, *contra*, for Messrs. Ware.

THE MASTER OF THE ROLLS [Lord Langdale]. The prayer of this petition must be granted. The Master under the decree has found the amount due to Messrs. Ware; and the report having been confirmed, I must take his finding to be right. The estate was then sold subject to their lien, and the purchaser has tendered the amount found due by the Master, which Messrs. Ware have refused to accept. There may be a [425] question between them and the purchaser, but there is none under the decree. Having refused to accept the tender, can they come against the general assets?

Order made.

[425] RAVENS v. TAYLOR. Nov. 12, 1841.

A testator devised an estate X, and other estates to A., charged with annuities and an estate Y, and his residuary real, and personal estate to B., *subject* to the payment of his debts, funeral expences, and legacies. He afterwards revoked so much of the second devise as included Y., and devised it, *subject* to the same annuities, and in the same manner as the estate X. Held, that the charge of debts, &c., on Y was revoked.

The testator, W. Martin, by his will devised four closes of land situate in Welbarston, containing fifty acres, purchased of W. Humfrey, and a close situate in Welbarston purchased of W. Dixon, to the third son of his niece, in fee charged with certain annuities.

He also gave and bequeathed all the residue of his real estate, if any, including an estate at Welbarston, which he had contracted to purchase from Sir J. H. Palmer, Bart., and his son, and all the rest and residue of his personal estate of what nature or kind soever, *subject to the payment thereof of his just debts, funeral and testamentary expences and legacies*, unto Thomas Stanbrough, Samuel Talbot, and W. Notcutt, their heirs, executors, administrators, and assigns, to be equally divided between and among them, share and share alike.

By a codicil, the testator, after reciting that he had, by his will, in the devise therein contained of the residue of his real estate, unto Thomas Stanbrough, Samuel Talbot, and W. Notcutt, included an estate at Welbarston, in the county of Northampton, which he had lately contracted to purchase from Sir J. H. Palmer and son, he did thereby absolutely revoke so much [426] of his said last-mentioned devise as included the said estate so contracted to be purchased, and in lieu thereof, he gave and devised the same estate to the same uses, and subject to the same annuities,

and in the same manner in every respect, as he had in and by his said will given and devised his four closes of land in Welbarston aforesaid, therein described as containing fifty acres purchased of Humfrey, and his other close at Welbarston aforesaid, containing eight acres, purchased of Dixon.

The testator died in 1832.

The question was, whether the estate purchased of Sir J. H. Palmer and son, was charged with the debts, funeral expenses, and legacies of the testator.

It was contended by some of the parties, that the codicil only revoked the beneficial devise to the residuary devisees, and that this part of the testator's estate remained *subject* to the debts, &c. *Beckett v. Harden* (4 M. & S. 1).

Mr. Pemberton, Mr. Tinney, Mr. Kindersley, Mr. Neate, Mr. Chandless, Mr. Phillips, Mr. Freeling, Mr. Blunt, Mr. G. Turner, Mr. James Russell, Mr. O. Anderdon, and Mr. Spurrier, appeared for different parties.

THE MASTER OF THE ROLLS [Lord Langdale] was of opinion, that the estate in question was not charged with the debts, funeral expenses, and legacies.

[427] LINCOLN v. WRIGHT. Nov. 12, 13, 1841.

[Reported on other points, 4 Beav. 166. See *Chillingworth v. Chambers* [1896], 1 Ch. 704.]

Two executors permitting their co-executor to retain in his hands the ascertained residue, held liable as for a breach of trust.

Enquiry refused as to the concurrence of *cestui que trust*, where it was not alleged by the answer, and was unsatisfactorily proved by the evidence.

Executors liable for the default of their co-executor, who had become bankrupt, held entitled, upon payment by them, to the benefit of the proof in bankruptcy against his estate.

The testator, by his will, "gave and bequeathed the remainder and residue of his property to his trustees after named, to be put out on real or Government securities, in the name of his trustees;" and he gave the interest to his daughter Susan Lincoln, and her husband William Lincoln, for their maintenance and support during their natural life, or the life of the survivor, with remainder to their children; and he appointed Wright and Rust "executors" of his will.

The testator made a codicil, whereby he appointed Boughen, with the said Wright and Rust, "executors" of his will.

The testator died in November 1826, and his will was proved by his three executors. Wright was appointed the active executor by his co-executors: and, in 1827, a sale by auction took place of the testator's property, the greater part of which was sold to John Andrews Lincoln, one of the children of the tenants for life.

In 1830 the residuary account, signed by the three executors, was passed at the Stamp Office, shewing a residue of £808 on which duty was paid. At the end of the year 1830 J. A. Lincoln paid the remainder of what was due on account of his purchases to the Defendant Wright. Wright had, in fact, received the whole of the residue, amounting to about £800, which he never invested in Government securities as directed by [428] the will, but retained in his hands, and he, from time to time, paid, yearly, £32 as interest to the tenants for life. From the evidence in the cause, the Court came to the conclusion, that he had received and retained the £800 with the knowledge and concurrence of his co-executors.

This bill was filed in 1839 by Mr. and Mrs. Lincoln and some of their children, and it sought to make the executors responsible.

Wright became embarrassed, and after he had filed his answer he was declared a bankrupt, and, having obtained his certificate, was examined as a witness.

There was no allegation in the answer, that Mr. and Mrs. Lincoln concurred in the breach of trust; but the evidence of Wright stated as follows:—"I believe the said Plaintiffs (Mr. and Mrs. Lincoln) did know that the said capital was not invested pursuant to the trusts of the said testator's said will; I have no particular reason for

that belief, because I had no conversation with them on the subject; but my impression is, that they were aware that it was not invested."

Mr. Pemberton and Mr. Jemmett, for the Plaintiffs. Where personal property is bequeathed to executors as trustees, there, by proving the will, they accept the trusts, *Mucklow v. Fuller* (Jacob, 198); and the retainer by one of the amount of the clear residue, with the knowledge and concurrence of the others, render them all liable to the loss that has happened; *Booth v. Booth* (1 Beavan, 125). As the amount seems ascertained, the Plaintiffs were taking the accounts, and ask for a declaration of the Defendants' [429] liability for the sum of £797, 19s. 10d., the balance shewn by Wright's answer, with the costs of the suit.

Mr. G. Turner and Mr. Steers, for the Defendants Rust and Boughen. One executor in trust is not answerable for the receipts of the other, merely by taking probate, permitting the other to possess the assets, and joining in acts necessary to enable him to administer; *Hovey v. Blakeman* (4 Ves. 595). Boughen was not appointed a trustee by the codicil, but merely an executor, and one executor is not liable for the receipts, &c., of the other. It appears that two of the Plaintiffs acquiesced, and consequently this bill cannot be maintained either by them or by the other Co-plaintiffs; *Jacob v. Lucas* (1 Beavan, 436). If there be any doubt as to the fact, an inquiry ought to be directed.

The bill is not so framed as to entitle the Plaintiffs to an immediate decree: the amount must be ascertained, as the account passed at the Legacy Duty Office, is merely *wind facie* evidence of the balance. If the Defendants Rust and Boughen are compelled to pay, they ought to have the benefit of the proof against Wright's estate.

Mr. Cooper, for Wright.

Mr. Rolé, for the assignees.

Mr. Pemberton, in reply. The objection of the concurrence of the *cestui que trusts* is not raised by the pleadings, and is not borne out by the evidence.

THE MASTER OF THE ROLLS [Lord Langdale]. The testator in this cause died in the month of November 1826, having given his residuary estate to his [430] executors, with a direction that it should be invested on real or Government security, and that the income should be paid to the Plaintiffs Mr. and Mrs. Lincoln for life, with remainder over to their children.

The will was proved by the three executors; and it is perfectly clear, upon the evidence, that all three executors acted in the administration of the estate. The residue appears to have been ascertained, and that residue remained in the hands of Wright one of the executors, and in consequence of his bankruptcy the whole or a great part of it has been lost. The principal object of this suit, is to charge the other executors with the amount of that loss, so as to make good to the trust, that which has been abstracted from it, by the breach of trust, or by the disobedience to those main directions which were given by the testator for the security of his residuary estate. It does not appear to me to be very material to consider, whether the three executors, or only two of them were trustees; because the residue was ascertained, the amount of it appears to have been admitted, and it seems to be perfectly clear, upon the evidence, that two of them permitted that residue to remain in the hands of the third. It is a very short case, and on those settled principles on which this Court acts, I can have no doubt whatever, but that the two executors are liable for the loss which was incurred by the bankruptcy of the third.

This bill is filed for the purpose of having an account, in order that the amount of the loss sustained may be accurately ascertained. The bill charges that the amount of the ascertained residue was £800 and upwards. That statement, so far from being denied, is admitted by the answer; and, by the evidence produced, it seems that the three executors sent the residuary [431] account to the Stamp Office, which accords with the statement in the bill and with the admission in the answer; nevertheless, it does not appear that the bill proceeds on the ground of that being an ascertained balance, but alleges that the sum due to the estate was that sum and upwards, and says for the account. The Plaintiffs now desire, with a view to save further expense in the prosecution of this cause, to rest satisfied with the balance charged in the bill, proved in the evidence, and admitted by the answer. The Defendants object to this course, and say that they are entitled to have the account taken; and it appears to

me that they ought if they desire it to have the account taken. I think that they are entitled to have the account taken under the circumstances; but they are not entitled to have the account taken for the purpose of delaying the performance of that duty, which, I apprehend, is fixed upon them by the circumstances and facts of this case. I think that I ought to order them to pay into Court, that which appears to be the admitted balance, nay, the proved balance, due from the three executors, and I ought, as it is desired on the part of the Plaintiffs, to state, that upon the application of the Defendants, the account is directed.

A point which has very frequently been the subject of discussion in this Court is raised, whether, if they are liable for the whole, they are not at least entitled to be relieved from some portion of their responsibility; because, as they allege, the persons who are tenants for life, and some of the persons who have an interest in remainder, acquiesced in that departure from the strict direction of the will, in consequence of which the loss has been sustained. They say, that Mr. and Mrs. Lincoln consented to the arrangement by which the money was left in the hands of Wright; that, at any rate, it [432] was perfectly well known to them, and that they acquiesced in it, and that the same may be said of the Defendant John Andrews Lincoln. Now, nothing can be more clear than the rule which is adopted by the Court in these cases: that if one party, having a partial interest in the trust fund, induces the trustee to depart from the direction of the trust for his own benefit, and enjoys that benefit, he shall not be permitted, personally, to enjoy the benefit of the trust, whilst the trustees are subjected to a serious liability which he has brought upon them. What the Court does, in such a case, is to lay hold of the partial interest to which that person is entitled, and apply it, so far as it will extend, in exoneration of the trustees, who, by his request and desire or acquiescence, or by any other mode of concurrence, have been induced to do the improper act. Now, is there any evidence whatever of such acquiescence or concurrence here? First of all, it does not appear that any such thing is alleged in the answer; next, is there any proof of it? It does not appear to me that there is any proof of it; for the only person who is called on to prove it states, he believes the parties knew that there had not been an investment according to the terms of the trust; but he states "that he had no particular reason for that belief;" and the only reason suggested for believing that he entertained that belief is this, that the tenants for life received the income from Wright, which was, or may have been a larger income than would have arisen from an investment in the funds. I think that this is not sufficient either to prove it or to warrant me in directing an inquiry.

I must declare, in the first place, that these trustees are liable to make good the loss which has been sustained by the bankruptcy of Mr. Smith Wright, and I must order them to bring into Court the sum of [433] £797, 19s. 10d., and upon the application of the Defendants the accounts must be directed to be taken. The claim against the bankrupt's estate should be perfected, and upon payment into Court of the amount by Rust and Boughen, the benefit of the proof against the bankrupt's estate should be assigned to them by the Plaintiffs.

[433] *MASSIE v. DRAKE. Feb. 1, March 30, 31, April 17, 19, Nov. 15, 1841.*

[Affirmed by Lord Chancellor Dec. 20, 1845.]

The mere circumstance that a bill of costs contains items which would be disallowed or reduced on taxation, is not, of itself, sufficient to entitle the party to a taxation of a bill which has been settled and paid.

Costs directed by decree to be taxed as between a solicitor and client, cannot, on petition, be ordered to be taxed on another principle.

Where an account, comprising bills of costs, is settled and paid as between a solicitor and client, and no surprise or fraud is practised, the Court will not direct a taxation of the bill, though it appears to contain items which would be disallowed or reduced on taxation, unless it appears that the overcharges are in themselves so extravagant and improper, as under the circumstances to be considered fraudulent.

Upon the settlement of an account between a solicitor and his client, a sum of £75 was retained by the solicitor, by consent, to answer particular costs not then ascertained. The Court limited the taxation to such particular costs.

There were three several petitions entitled in the above cause, and presented by Captain Drake, Mrs. Drake, and her executor Mr. Lloyd, for an account, and for the taxation of their solicitors' bills, under circumstances which are fully stated in the following judgments of the Court.

Mr. Kindersley and Mr. Koe, in support of the petition.

Mr. Pemberton and Mr. James Russell, *contra*.

The following authorities were referred to. *Horlock v. Smith* (2 Myl. & Cr. 495), *Wright v. Taylor* (*Id.* 526), *Langford v. Nott* (1 Jac. & W. 291), [434] *In re Murray* (519), *Ex parte The Earl of Uxbridge* (6 Ves. 425), *In re Barker* (6 Simons, 476), 1 G. 2, c. 23, s. 23.

The following is the judgment on Captain Drake's petition.

THE MASTER OF THE ROLLS [Lord Langdale]. This petition is presented by Captain W. W. Drake, in a creditor's suit, in which a decree was made for the due administration of the estate of the Rev. William Wickham Drake, and it prays for taxation of the costs of all parties to the suit: that the Plaintiff's costs may be paid as between party and party: and that Messrs. Harper & Jones may deliver to the Petitioner certain bills of costs specified in the prayer (*viz.*, bills amounting to several sums of £415, 4s. 10d., £186, 8s., £47, 2s. 6d., £43, 7s. 2d., £77, 3d., £169, 8s. 10d., and £75); and that the same may be taxed: and for an amount of the monies received by Harper & Jones for the Petitioner and of their taxation thereof, and that the balance may be paid.

As the costs charged have all of them been paid, the Petitioner has undertaken to shew a special case entitling him to the relief which he asks.

The testator William Wickham Drake, the Petitioner's father, by his will bequeathed his personal estate from payment of his debts, and having disposed of his personal estate and part of his real estate, he devised to his son, the Petitioner, a variation in fee in other real estate, chargeable with such of his debts as the [435] before provided would not extend to satisfy. He appointed his wife Susannah Drake, his brothers John Drake and Thomas Drake, and his son-in-law John Edward Tarleton, executors of his will.

At the institution of this suit, Messrs. Harper & Parry Jones acted as the solicitors of the Plaintiff and of the executors. The Petitioner employed Messrs. Foster & Lumley as his solicitors.

A decree was made in May 1836, and various proceedings took place under it. A report was made in July 1838. It would seem, that both before and after the report proposals were under discussion, for the purpose of raising a sufficient sum to pay all the demands upon the testator's estate. No arrangement having been made, and the cause having become abated, a decree in the revived suit was made on the 13th of June 1839; and in that decree, it was ordered that all the costs of the suit should be taxed and paid.

During the discussion of the means of raising money to satisfy the debts, Messrs. Foster & Lumley, the solicitors of Captain Drake, had employed Harper & Jones, the solicitors for the Plaintiff and the executors, to raise £7000 out of Captain Drake's estate. This not being done, afterwards, in 1839, Captain Drake instructed Harper & P. Jones to raise £10,000 for him, and they undertook to do so. They accordingly raised the money; the securities, however, were not executed, and on the 7th of September 1839 Captain Drake wrote to Harper, enclosing a draft of the proposed mortgage and a statement of the manner in which £10,000 was to be appropriated, and when it was done. To this letter an answer was given. It is stated that the bill of costs of Messrs. [436]

Foster & Lumley, the solicitors of the Petitioner, was taxed and paid in October 1839; and that nine other bills, some of them for costs in the suit, and others of them costs of trustees and executors for the expenses of the trust and of administration properly payable out of the estate, were sent to the Petitioner on the 24th of October 1837; and that the bill of Messrs. Raymond

& Still, the solicitors for another party to the cause, being taxed, was paid on the 1st of November 1839. On the 17th of November, Captain Drake wrote to Mr. Harper as follows:—"When we last parted, I understood you that the remainder of the business would be completed in three weeks from that period. It is now six, and I trust you will excuse my impatience in writing to you, and let me know how far you have advanced; what sums you have paid; what remain to be paid (which I hope are none) out of the £10,000, and what residue there is left; how that is to be appointed, and at what time. Also I hope you will be kind enough to allow a compromise in your claims, and let me know the amount of it, so that every point of this lengthy business may be finally and completely settled."

This letter was not answered till the 9th of December, and then not satisfactorily, for only an imperfect account was sent, and there were two items left with the sums in blank.

With this account Captain Drake was not satisfied, and on the 23d of December he desired further explanation; and particularly desired to know what allowance would be made on Mr. Harper's several charges, and how the blanks were to be interpreted; and Mr. Harper having referred Captain Drake to his agents for explanation, Captain Drake expressed his wish rather to communicate with Mr. Harper himself. To this Mr. Harper [437] replied on the 26th of December 1839, by saying, that he believed the charges were the usual charges, and if not, that it was his desire to make them so; and he again referred Captain Drake to his agents, and said he should be happy to meet them in making any allowance which could be expected.

Captain Drake in his next letter, of the 30th December 1839, desired to have the blanks filled up, and to know, whether the account as to the other items was to be considered as correct and final; and he stated his intention of going to the agents of Mr. Harper. To this letter Mr. Harper replied on the 6th of January 1840, that he could not supply the blanks, but that he believed the items of the account delivered to be correct.

It appears that Mr. Matthew Finch, a wine merchant at Deptford, had been employed by the trustees as their receiver and agent, and had also been employed by the Petitioner upon some occasions as his agent, and that the Petitioner had sent the nine bills of costs, which had been sent to him in October, to Mr. Finch; and the Petitioner stated, that Mr. Finch made some representations to Vincent & Sherwood, the London agents of Harper & Parry Jones, as to the large amount of the bills.

Mr. Pell, the managing clerk, as to this matter of Messrs. Vincent & Sherwood, says, that upon Mr. Finch stating the amount of the bills to be greater than Captain Drake expected, he, Pell, said, that if Captain Drake wished it, he would get the bills in the suits taxed, and that there was an order directing such costs to be taxed, to which Finch replied, that Captain Drake did not wish the bills to be taxed, and that his only reason for mentioning the amount was, that a deduction might be made [438] if Harper & Jones could afford to make the same. This statement is positively denied by Mr. Finch. On the 8th of January 1840 Mr. Finch, as he says, in consequence of a communication which Captain Drake had received from Harper & Parry Jones, desired an interview with Vincent & Sherwood. The interview took place, and some time afterwards Mr. Vincent informed Mr. Finch that Harper had authorised him to say, that he would make a deduction of £183 from the amount of the bills of Harper & P. Jones. And on the 22d of January 1840 Mr. Harper wrote to Mr. Finch, and observed, that the delay which had taken place since Captain Drake confided in him, was nothing like the inconvenience which was produced to parties for the seven years whilst the matter was kept open to save his interests. On the 27th of January Captain Drake again desired to have the blanks in the account before delivered supplied. He wished to know to what day the interest on Mrs. Drake's mortgage was calculated, and noticed that interest was charged on the money he had borrowed from the 19th of August. And after further desiring an account of sums paid in the suit, he stated, that he did not include in them the expenses of the suit, in which, he stated, he was much obliged for the deductions Mr. Harper had so kindly caused to be made. The receipt of this letter

was acknowledged, but the accounts not being completed, Captain Drake again, on the 7th of March 1840, pressed for a final statement, adding, "I shall much lament if any circumstance or expression should occur, which might tend to disturb the good understanding which has existed between us; but you must see, situated as I am, the absolute necessity of bringing this long protracted business to a conclusion." Mr. Harper being still, as he stated, unable (on account of proceedings still pending in the Master's office) to complete the account, afterwards, on the 2d of April 1840, in compliance with a renewed request of Captain Drake, sent another account, admitted to be incomplete, accompanied by a letter as follows:—"I am exceedingly sorry that I am not enabled to send you the account quite complete, but I send you the best I can, and immediately after Easter, I am assured, the whole business will be closed." The account sent at the time consisted of the account formerly delivered, with certain additional items, and at the foot of it was a memorandum as follows, viz.:—"Memorandum, that we have stated the above accounts to the best of our judgment and so far as the business has been completed, but of those matters still pending, we are unable to state the sums precisely, although we believe the sums stated will cover them; and we do declare, that the several sums charged as paid were actually and *bonâ fide* paid by us, and that the draft of Captain Drake, to pay which is allowed £547, 18s. as stated in the above account, has been paid by us. As witness our hands, 2d of April 1840." The first items in the additional account were £77, 2s. 8d., and £169, 8s. 10d. for bills of costs therein described. Mr. Harper states that he sent to Captain Drake the particulars of both these bills. Captain Drake denies that he ever received the first. Soon after this additional account had been sent, and on the 10th of April 1840 Captain Drake wrote to Mr. Harper as follows:—"Understanding that it is your intention to be in London in the course of next week, will you let me know when and where I can meet you, so as finally to arrange these protracted affairs. I should feel obliged if you would, when you come to town, bring with you all the receipts and vouchers necessary for the establishment of your accounts, and every other document connected with the estate. I feel gratified by the account you have transmitted me, in which I observe several items which [440] will require some little explanation when we meet, and which I shall be prepared to mention to you at that time."

After all this correspondence, and the long attention paid to the account by Captain Drake, and on the 15th of May 1840, the parties met for the purpose of going through and settling the account; and in the result, Captain Drake and Harper & Parry Jones signed a memorandum in the following words: "We have examined the account this day, and the several vouchers having been produced and delivered to Captain Drake, we allow the same, and acknowledge that it is correct."

The account thus signed is a debtor and creditor account, purporting to debit Captain Drake with several items, amounting in the whole to £9979, 16s. 3d. (nearly 10,000). Several of the items refer to bills, receipts, or other vouchers. One of them is a sum of £75, stated to be "paid agent's further charges (probable only), in obtaining Master's report and other matters." The credit side of the account consists of three items only—the sums amount altogether to £10,720, 11s. 2d., giving a balance of £740, 14s. 11d. in favour of Captain Drake. One of the three items on the credit side is expressed as follows:—"By allowed out of the several bills of costs, £183, 0s. 6d."

The petition, praying that, notwithstanding this settlement, the bills of costs may be taxed, and the account retaken, alleges, that the bills of costs are all of them taxable, and that they contain many charges which would be disallowed on taxation; and considering the situation in which the parties stood towards each other, the money received by Harper & Parry Jones for Captain Drake, and for which they were accountable to him, [441] and their claim to set off the amount of the bills of costs against the balance in their hands, it appears to me, that before the account was settled, Captain Drake was entitled to have all the bills taxed, in order that the true amount of the balance due to him from his attorneys might be ascertained. I consider that, under the circumstances, all the bills were taxable; and looking at the several items which are specified in the petition, and stated to be overcharges, I am of opinion that some of the items contained in the bills would be disallowed on taxation.

But the mere circumstance that bills of costs may contain items which would be disallowed or reduced on taxation, is not of itself sufficient to entitle the party to a taxation of a bill which has been settled and paid. As Sir Thomas Plumer said in *Gretton v. Leyburne* (Turn. & Russ. 412), "Items which would be disallowed do not amount to that fraud, which must be made out, in order to subject to taxation bills that have been so settled."

It has been argued in support of this petition, that a fraud was practised upon the Petitioner, and that the fraud is shewn, not only by the extravagance of the charges, but by the order for taxation, which, if acted upon, would, as to the costs in the suit, have been costs as between solicitor and client, to which the solicitors were not entitled; by the concealment of the order from Captain Drake, by which a still greater advantage was obtained over him; by his being called upon to settle the account without his having the protection of any legal assistance, and without his having had the means of ascertaining whether the charges were just or not.

[442] Amongst the bills sought to be taxed between party and party, are the bills which by the decree were ordered to be taxed between solicitor and client, and also some bills which are not noticed in the prayer of the petition. It is obvious that I have no authority to alter the effect of the decree, and that no relief can be given which is not prayed for. The question is, whether the Petitioner is entitled to have the costs in the suit taxed as between solicitor and client, and an ordinary taxation of the other bills mentioned in the prayer.

It is to be regretted that Captain Drake did not obtain legal assistance in the examination of the bills; but he certainly had the means of obtaining any assistance he thought proper. The account was settled in May 1840. Nine of the bills were sent to him in October 1839; and if he thought fit rather to avail himself of the assistance of Mr. Finch, who seems to have been an active man of business, though not a professional man, he cannot, I think, urge it as matter of complaint against Harper & Parry Jones, that he had not professional assistance. Those nine bills were delivered in ample time to admit of any investigation Captain Drake thought proper to institute. They were examined, though not in the manner they might have been; the amount was complained of, a deduction was requested; and ultimately a deduction of £183, 0s. 8d. was obtained, and Captain Drake afterwards expressed his obligation to Harper & P. Jones for this abatement. Communications in respect of the abatement took place between Mr. Finch and Messrs. Vincent & Sherwood, the town agents of Harper & P. Jones; and Mr. Pell swears, that in the course of them, he distinctly offered to get the bills in the suit taxed, if Captain Drake wished; and that he could do so, as there was an order directing such costs to be taxed. Mr. Vincent also states, that on [443] Finch endeavouring to obtain a deduction from the bills, he informed Finch that it would be more satisfactory to get the bills taxed, and urged Finch that the costs of the suit should be taxed, more especially as an order had been made for that purpose; and that Finch then disclaimed all wish to have the bills taxed, and, on a subsequent occasion, said, that Captain Drake would not hear of such a thing. Mr. Sherwood has also sworn that, in his presence, Vincent offered to get the bills taxed, and that Finch objected, although much pressed by Vincent to assent to the taxation. Mr. Finch has distinctly denied the statement of Pell, and has sworn that he did not know of the order for taxation till he was informed of it by Mr. Williams, some time after the account was settled.

On consideration of all the evidence, it appears to me much less probable that Vincent, Sherwood, and Pell should have committed direct perjury, than that Finch, who was not a professional man, should in some way have mistaken the nature of the communication which he received; and I think that, upon the evidence, I must consider that Mr. Finch, the agent of Captain Drake in this matter, was, before the 30th of January 1840, informed that there was an order to tax the bills in the suit, and that he objected to have them taxed, but desired rather to have the abatement which he obtained without taxation.

With respect to the delivery of the other bills, there is also a conflict of evidence; but, on the whole, I think the evidence shews that they were sent to Captain Drake some time before the meeting to settle the account. It appearing, therefore, that the account had been previously delivered to Captain Drake—that his attention had been

previously directed to the items—[444] that there was no pressure on the part of Harper & P. Jones, who had, indeed, in their hands, money more than enough to pay their demand—that the settlement was (as in that state of things was to be expected) urged on by Captain Drake—that he had the bills of costs in his possession an ample time beforehand—that he might have had them all taxed, those in the suits under the order, the others upon application to the Court—that he applied for and obtained an abatement of £183 in a negotiation through his agent, who, in the course of it waived the taxation—it appears to me that there was no surprise or fraud practised upon him in the settlement, and that he cannot now be entitled to taxation, or to any account, unless it should appear that the overcharges are in themselves so extravagant and improper as, under the circumstances, to be considered fraudulent, or unless the charge of £75, stated to be a probable amount only, should be considered to affect the character of the account as a settled account.

As to the overcharges, I have not only considered the several items complained of, but have also obtained the assistance of an experienced clerk in Court in examining all the bills which were brought into the account. There are overcharges, but none such as can, with any propriety, be deemed fraudulent; and upon a careful examination of the bills, it appears that the sums overcharged, together with the sums charged in items which are questionable, do not, in the whole, amount to the sum of £183, which Messrs. Harper & Parry Jones voluntarily agreed to deduct from the amount of their bills.

The item of £75 is expressed in terms which shew that, at the time when the account was settled, it was not deemed by the parties that all transactions between them [445] were finally closed; but the same was retained, by consent, to answer particular costs noticed in the item stating the retainer: and under the circumstances of this case, and considering that the amount was settled in this way, because of the urgent request of Captain Drake, I think that the account cannot be considered unsettled with reference to anything but the sum of £75.

Messrs. Harper & Parry Jones may be required to deliver their bills of costs for obtaining the Master's report, and the other matters for which credit for the sum of £75 was taken in the account, and such bill may be taxed under the decree; and the present petition is dismissed, with costs.

On the petitions of Mrs. Drake and of Mr. Lloyd, her executor,

THE MASTER OF THE ROLLS afterwards delivered the following judgment:—The first of these petitions prays, that Messrs. Harper & Parry Jones may pay certain sums of money alleged to be due from them: that an account may be taken of all sums of money received by them on account of Mrs. Drake, and of their application thereof: that Mr. Harper and Messrs. Harper & Parry Jones may deliver certain bills of costs, and that such bills may be taxed: that the amount which shall be found due may be paid, and that Messrs. Harper & Parry Jones may deliver up all books and papers belonging to the Petitioner.

The second petition is presented by the executor of Mrs. Drake, and prays the benefit of the former [446] petition, and that two other bills of costs may be taxed.

It appears that Mrs. Drake for some years employed Mr. Harper as her solicitor, and that she afterwards employed Messrs. Harper & Parry Jones in that character. During the employment, several sums of money had been received and paid for Mrs. Drake, by Mr. Harper alone, and also by Harper & Parry Jones; and accounts had been, from time to time, delivered, comprising statements of the monies received and paid, and also of the charges for business done. In June 1839 a decree was pronounced, under which Mrs. Drake became entitled to receive £187, 19s. 7d., and in August 1840 she executed a power of attorney to enable the London agent of Harper & Parry Jones to receive it. This money was accordingly received. She wished to have the money paid to her, and Harper & Parry Jones claiming a bill of costs amounting to £47, 15s. 10d., she did not dispute that, but desired to have the balance of £140, 3s. 9d. paid to her. Mr. Harper having expressed his willingness to pay it, application was made to their agents. Upon this application objections were made, and Mrs. Drake, being very naturally dissatisfied, employed another solicitor, who, failing to obtain the only sum then claimed, examined the former accounts of Harper

and of Harper & Parry Jones; and in the result presented this petition, desiring to have all the accounts taken, and all the bills taxed.

It was objected to the petition, in the first instance, that it was multifarious, in praying relief against Harper separately, and also against Harper & Parry Jones jointly; but it not appearing to me that under the circumstances the objection was valid, evidence was [447] gone into upon the merits, and it appears that five several accounts had been delivered to Mrs. Drake by Mr. Harper, and three by Harper & Parry Jones. The accounts marked with the letters A to E are Mr. Harper's accounts, the accounts marked with the letters F to H are the accounts of Harper & Parry Jones. At the time when the petitions were heard, I stated my opinion that the accounts subsequent to F should be investigated, and the bills of costs there referred to taxed. The questions reserved arise upon Mr. Harper's accounts, and the first account delivered by Harper & Parry Jones. Mr. Harper alleges, that all his accounts were examined and settled by Mrs. Drake after due consideration, and his affidavit having been sworn and filed after the death of Mrs. Drake, has not been answered; so that the circumstances under which the alleged settlement took place, rest entirely upon his statement. Upon the first account which is marked A, a balance of £94, 5s. 1d. appeared to be due to Mr. Harper; Mrs. Drake was charged for costs to a considerable amount, and the amount of those bills of costs was claimed by her against the testator's estate. Mr. Harper says that the bills themselves were carefully gone through by the Master, and thereupon the costs were allowed to her in the suit, and in 1836 she took from Mr. Harper a receipt for the balance appearing to be due to him; and at this time no specific error in any of the bills comprised in those accounts is alleged; and under such circumstances, it does not appear to me that the account ought to be disturbed.

The second account, B, was delivered in the year 1834. In it Mrs. Drake is not charged with the amount of any bill of costs, and the balance of £158, 19s. 2d. was then paid to her; and no specific error being alleged, [448] I am of opinion that this account ought not to be disturbed.

The third account, C, was delivered in the month of December 1835, and Mr. Harper in his affidavit states, that in this account there are contained by mistake three items of £4, 7s., £6, 8s. 10d., and £5, 9s. 8d., which had been previously charged to Mrs. Drake. The relation of solicitor and client continued between Mr. Harper and Mrs. Drake. When the account was delivered, Mrs. Drake having the opportunity of examining it, there were three overcharges amounting together to £16, 5s. 6d. to her prejudice, and yet she signed it. The item of £4, 7s. is distinctly complained of by the petition as an overcharge, and although Mr. Harper states, that in the subsequent account between Mrs. Drake and Harper & P. Jones, Mrs. Drake has credit for the several items so erroneously charged, yet it does not appear to me that this voluntary offer, subsequently made by Mr. Harper, or Harper & Parry Jones, can entitle Mr. Harper to consider the account as finally settled at the time. It is now clear that the sum of £44, which Mr. Harper claimed to be due to him of the balance of this account, was, in fact, not due, but was an overcharge, by the sum of £16, 5s. 6d. at the least.

The next account, D, commences with the erroneous balance of £44, and ends with a sum retained by Mr. Harper towards his bill and stamps, and I think that it cannot be considered as an account finally settled. And with respect to the account E, the last between Mr. Harper and Mrs. Drake, the two last items are a sum of £57 retained towards a bill, and a sum of £57, 10s. 3½d. retained to pay Mr. Fraser Drake's debts, [449] and it does not appear to me that this can be considered as finally settled.

The next account, in order of time, is the first between Mrs. Drake and Harper & Parry Jones. It appears to have been settled and signed in March or April 1833, the balance appearing on the account was paid to Mrs. Drake; and it being discovered that two sums of £31, 9s. 7d. and £15 were erroneously charged, those sums were paid to Mrs. Drake, in addition to the apparent balance; and it being distinctly sworn that each and every of the bills of costs mentioned in this account was delivered to Mrs. Drake, and no error in them being specified, I think that the account must be considered as finally settled. The subsequent accounts appear to me to be open.

Refer it to the Master to tax Mr. Harper's bills of costs subsequent to those commenced in account A, and to take an account of his receipts and payments on account Mr. Drake, not disturbing the accounts A and B.
And refer it to the Master to tax the bills of costs of Harper & P. Jones subsequent to those mentioned in account F, and to take an account of the receipts and payments of Harper & Parry Jones on her account, not disturbing the account F.

[450] ROBINSON v. HUNT. Nov. 15, 16, 17, 1841.

Test of an annuity to A. and B., and to the survivor for life; and if A. should have any "children," then to be equally divided between them; but if A. should die "without lawful issue," then to A. and his heirs for ever. Held, that the children of A. took absolute interests in a perpetual annuity.

The testator, by his will, bequeathed to his brother Samuel Hunt an annuity of £50 to be paid by two half-yearly annuities of £50 each, and after his decease he bequeathed the same annuity to Catherine Hunt, the testator's sister-in-law, and Charles Hunt, the testator's nephew, to be equally divided between them during their lives, and to the survivor of them; and he then "charged his estate (excepting the land in his will described) for the due payment of the said annuities of £50 on the 5th day of April and 10th day of October in every year after his decease during their lives, or the life of the longest liver of them, his said brother, his wife, or his nephew, and in case of non-payment, thirty days after the said annuity should have been properly demanded, he authorised his said brother, during his life, to seize the said estate, and to receive the rents and profits until he should be paid the said annuity; and also, after his decease, the same power and authority to his said sister-in-law, or his nephew, during their joint lives, or the longest liver during his life." The testator then expressed himself as follows:—"And if my said nephew should have any children lawfully begotten, then the said annuity to be equally divided between them; but if only one child, then that child to receive the said annuity; but if my nephew aforesaid should die without issue lawfully begotten, then I will and bequeath the said annuity of £100, to be paid as aforesaid, should be given to my son Charles Westley, and to his heirs for ever."

[1] Samuel Hunt, Samuel Hunt the younger, and Catherine Hunt were all children of the testator, the latter being the last survivor. There were several children of Samuel Hunt the younger, and the question was, what interest they took in the annuity of £100. Pemberton, Mr. Kindersley, Mr. Bichner, and Mr. F. Calvert, for the several

MASTERS OF THE ROLLS said, the only doubt seemed to be, whether the parent intended to create the nature of an estate tail; but he reserved judgment.

[17.] THE MASTER OF THE ROLLS said, that the decisions did not appear to him; but he thought in this case that the word "issue" ought to be read "such issue" meaning "children," and that the children took absolute interests in a perpetual annuity of £100 a year. (See *Tweedale v. Tweedale*, 10 Sim. 453, and *Blewitt v. Roberts*, 10 Ves. 491, and Cr. & Ph. 274.)

THE COURT—Declare the children of Samuel Hunt, the son, "entitled or acquired interests in perpetuity, in equal shares, as tenants in common, to or in the annuity of £100 bequeathed by the will of Charles Hunt, the testator."

[452] PERRY v. WALKER. (Ex relatione.) Nov. 18, 1841.

A pauper's notice of motion should be signed by his clerk in Court.

The court opened a motion on behalf of a party suing *in forma pauperis*. Pemberton, *contra*, objected that the motion had not been signed by the clerk in Court: *Gardiner v. —* (17 Ves. 387).

THE MASTER OF THE ROLLS referred to *Perry v. Walker* (2 Keen, 665).

Mr. Glasse, as *amicus Curie*, stated that in a recent case of *Baxter v. Pitcher* the Vice-Chancellor of England had not followed that decision, and that in a subsequent case of *Empringham v. Short* (July 23, 1841) before the Lord Chancellor, his Lordship had restored the old rule.

THE MASTER OF THE ROLLS [Lord Langdale] said that, on the former occasion, he had acted on a certificate received from the Six Clerks' Office. He was, however, glad that the Lord Chancellor had thought fit to revive the old practice, which he was now bound to act on.

NOTE.—Since the abolition of the Six Clerks the solicitor of a pauper must sign the notices of motion; but if the pauper proceeds in person, the signature of the pauper *himself* seems now sufficient. (16th General Order, October 1842. See Ordinance Can. 212.)

[453] THE ATTORNEY-GENERAL v. THE SOUTH SEA COMPANY. Nov. 17, 18, 1842

[See *In re Mason's Orphanage* [1896], 1 Ch. 60, 596.]

Lease for 999 years of charity property, at a fixed rent, upheld, the arrangement appearing free from fraud, and for the benefit of the charity.

In a proper case, charity trustees have the power of alienating the charity property.

The object of this information was to set aside a lease of charity property, which had been granted for a term of 999 years, at a fixed rent of £45.

By an indenture dated in 1667, Margaret Taylor conveyed to Matthew Smalwood and other parishioners of the parish of St. Martin Outwich, in the City of London, as their heirs, "eight messuages, with a tenement, coal-hole, and premises, situate in Hammond's Alley, in or near Bishopsgate Street, in that parish," to be received of the churchwardens, and applied, with the advice and assistance of the parson and ancients of the parish who should have borne the office of churchwarden, upon certain charitable trusts, for the benefit of the poor of the parish; and as to some small sums for two sermons to be preached yearly.

By an indenture dated in 1725, the churchwardens, parson, and several other persons, being parishioners and trustees, in consideration of £135 paid them, demised the property to the South Sea Company, for 999 years, at a clear yearly rent of £50, with liberty to pull down the buildings and erect new ones. The lease contained a covenant, on the part of the lessees, to keep the buildings to be erected thereon in repair.

It appeared that the property was, at the time of making the lease, let to tenants at small rents, which, together, amounted to about £77 a year; but it was proved by the parish books, that the expenses for [454] repairs, rates, &c., paid by the landlords, were such as to reduce the average of the net rents received during the previous years to the sum of £24, 7s.

After obtaining the lease, the old houses were pulled down, and part of the South Sea House and other valuable buildings were erected on the site.

The particulars of this case being certified by the Charity Commissioners under 59 G. 3, c. 81, this information was filed in 1830, against the South Sea Company and other persons alleged to be in possession of the property; it submitted, that the lease ought to be set aside, and that the full rent ought to be accounted for; charged, that the rent in 1725 was greater than £45 a year, and that even if the reserved rent was the full value of the premises, the lease was a very improvident lease, by reason of the length of time for which the same was granted. It charged also, that it was a fraud and breach of trust on the part of the trustees, and it prayed that the lease might be delivered up to be cancelled, and that the Defendants might account for a fair rent.

The Defendants insisted on the validity of the lease, and stated, that so far from being improvident and improper, the arrangement was beneficial and advantageous to the charity; that the premises were at the time in a ruinous and dilapidated state.

and were situate in an obscure alley, having no thoroughfare or frontage to any principal street, and that it afforded no prospect of improvement.

At the hearing the parish books were produced, from which it appeared, that several meetings of the rector, churchwardens, and parishioners had taken place between the years 1720 and 1725, for the purpose of considering the best mode of disposing of the charity property.

One was held in June 1720 "to hear the proposal of a Mr. Carpenter to build upon the estate, who promised to give his proposal in writing within fourteen days." Another was held in October following, to consider whether it was for the interest of the parish to let the ground and houses on lease, and if so, what price to set thereon, and for what term of years; when it was agreed to make an offer to Mr. Gore to let it by lease for sixty-one years, he building thereon to the value of £1500 and upwards, he paying £35 per annum clear of all taxes, provided Mr. Gore returned his answer in two months.

Mr. Gore having given no answer, and the houses being very much out of repair, a committee was appointed in March following, for arranging with workmen to put the houses into repair in December 1721.

What became of this proposal did not appear, but another meeting took place on the 11th of March 1724, at which, as it appeared from the parish books, "Mr. Gore acquainted the vestry that he had some discourse with a committee of the South Sea Company, about taking a lease of the parish houses and ground in Hammond's Alley, and that the South Sea Company had made the following offer to the parish:—First, to take a lease of all the premises, at the yearly rent of £45 per annum, to be paid clear of all taxes and deductions whatsoever now due or hereafter to be laid on the premises; second, the lease to be for the term of 999 years; third, the rent to be paid half-yearly; fourth, to commence from Lady Day 1725. It was resolved *n. d. c.* that the vestry [456] agreed to the said proposals; and that Mr. Gore, Mr. Bedle, Mr. Martin, Mr. Knight, and Mr. Nichols, or any three of them be desired to attend and conclude this affair." It also appeared from the books that on the 10th of April 1724 new trustees of the property were appointed, and it was agreed, "that the said new trustees with the churchwardens should forthwith grant a lease of the said estate to the South Sea Company, pursuant to the agreement proposed and agreed on at the last vestry."

Mr. Turner and Mr. Blunt, in support of the information, contended that the case in question amounted to an absolute alienation of the property, and could not, on any principle, be supported. They asked that it might be set aside without making any allowance to the Defendants for their expenditure on the charity land.

Attorney-General v. Green (6 Ves. 451), *Attorney-General v. Owen* (10 Ves. 555), *Attorney-General v. Brettingham* (3 Beavan, 91).

Mr. Tinney, Mr. Lovat, and Mr. Bosanquet, for the South Sea Company, insisted on the validity of the lease, contending that there was no law or rule of this Court which prevented the absolute alienation of charity property, provided it were beneficial. That here the arrangement was fair and open, and free from all fraud, and was found to be one most beneficial to the charity.

That if the lease were set aside, allowance ought to be made by the charity to the Defendants for their permanent and lasting expenditure on the property, which would be manifestly destructive of the charity.

[457] *Attorney-General v. Hungerford* (8 Bligh. 437, and 2 Cl. & F. 357), *Attorney-General v. Cross* (3 Mer. 540), and *Attorney-General v. Warren* (2 Swan. 302).

Mr. Pemberton and Mr. J. Russell, for the executors of Mr. Mellish.

Mr. Lloyd and Mr. Bayley, for the Defendant Irving.

Mr. Kinderaley and Mr. R. D. Thompson, for the Defendant Simpson.

Mr. Turner, in reply.

THE MASTER OF THE ROLLS said, he must carefully look over the admissions before he decided the case.

Nov. 18. THE MASTER OF THE ROLLS [Lord Langdale]. The object of this information is to set aside a lease granted by the trustees of a charity to the South Sea Company.

The lease, being for a term of 999 years at a fixed rent of £45 a year, is admitted

to be an alienation of the property; and it is contended in support of the information, that in this Court it ought to be considered as void, if not simply because it is an alienation, yet because it is an alienation for want of sufficient consideration, and injurious to the charity.

It is the duty of the trustees of a charity so to manage and dispose of the property intrusted to them, as may best promote and maintain the charitable purposes of the founder.

[458] It is plain that, in ordinary cases, a most important part of this duty is to preserve the property; but it may happen, that the purposes of the charity may be best sustained and promoted by alienating the specific property. The law has not forbidden the alienation, and this Court, upon various occasions, with a view to promote the permanent interests of charities, has not thought it necessary to preserve the property in specie, but has sanctioned its alienation.

That which the Court might have done, upon its own consideration of what would have been beneficial to the charity, might have been done by trustees, upon their own authority, in the exercise of their legal powers; and however imprudent it may have been in trustees to take so great a risk upon themselves, and in other parties to contract with them and take conveyances from them under such circumstances; yet if upon consideration it should appear upon subsequent investigation, that the transaction was fair and beneficial to the charity at the time, it does not appear to be the duty of the Court to set it aside, merely because circumstances have occurred, which, at the time of inquiry and after the lapse of many years, it may be supposed that a greater revenue might have been derived from the specific property, than from the property substituted on the alienation complained of.

The Court must consider the original fairness and prudence of the transaction.

There is necessarily a great difference between the dealing of an individual with his own property, and the dealing of a trustee with trust property. The trustee is not permitted to act as he pleases, or upon his own view of what is best: he is to act as to be always [459] prepared to shew to the satisfaction of a Court of Equity that he has acted fairly and prudently in the administration of the trust, and for the benefit of the *cestui que trusts*. The difficulty of doing this after a great lapse of time is obvious; but if the difficulty is overcome, the trustees and those dealing with them are not to be charged as in the case of breach of trust, merely because there was an alienation of the specific property comprised in the trust.

In this case, the circumstances only appear from certain entries in the books of vestry; and having carefully examined them, I am of opinion that there was no fraudulent contrivance. It appears that the subject was discussed publicly, not only before the trustees, but before the clergyman and parishioners, who, from their position, were best qualified to consider what was most beneficial to the trust:—the mode of managing with the property was frequently discussed, and that the present one was not adopted until the others had all failed; nothing like fraud therefore be imputed: the property was of a nature likely to produce considerable difficulty in the receipt of rent; the tenements were small, and the rents irregularly received, there being instances of three or four years' arrears, so that the steady rental for the charity could not be relied on, and a considerable outlay for repairs had become necessary. In addition to this the clear rents received for many years before the transaction were greatly less than the rent obtained.

Taking into consideration the nature of the property, the difficulty in collecting rents, the outlay which had become necessary, and the other circumstances of the case, I think it may be reasonably inferred that a greater income was secured to the charity than any [460] ever received, or likely to be received; and, on the whole, without saying that the evidence is strong, I think I must conclude that the arrangement was prudent and beneficial to the charity.

If I thought it likely that further evidence or information could be produced, should be disposed to direct an inquiry before the Master; but as that is improbable, I think there is enough to warrant me in saying that the transaction was beneficial and the information must therefore be dismissed.

[460] KING v. BRYANT. Nov. 18, 19, 1841.

[S. C. sub nom. *King v. Hammett*, 11 L. J. Ch. 14; 5 Jur. 1052.]

A simple contract creditor who had instituted and prosecuted a suit for administration, in the face of information furnished by the legal personal representative (which turned out to be correct), that there were no assets for the payment of simple contract debts, was ordered to pay the costs of the suit.

This was a creditor's suit, instituted by the Plaintiff on behalf of himself and all other creditors of Mr. Hammett against the Defendant, his administratrix.

The intestate was indebted to the Plaintiff in the sum of £42, and to one Mrs. Tredy in the sum of £159, both being debts on simple contract. The Defendant, however, being pressed by Mrs. Tredy, gave her a warrant of attorney to confess judgment, and on which judgment was entered up. The intestate was also indebted £60 for rent, and his assets amounted to about £200.

The Plaintiff applied to the Defendant for payment of his debt, and was informed that the assets were insufficient, and an account was promised. The Plaintiff read his bill, and the Defendant before putting in her answer, remonstrated with the Plaintiff on the proceeding, and furnished an account, shewing the deficiency of the assets after payment of the rent and judgment debt. The Plaintiff, however, persisted in prosecuting his suit, and compelled the Defendant to put in her answer, which she made the same statement. The Plaintiff afterwards obtained an order for payment of a sum of £91, then in the Defendant's hands, into Court. He proceeded to obtain a decree, and had the accounts taken in the Master's office. The state of the assets turned out upon the Master's report, as represented by the Defendant, so that there appeared to be no fund for the payment of simple contract creditors.

The cause came on for further directions on the Master's report, which found no money due from the Defendant.

Mr. Kindersley and Mr. Lewis asked for the costs of suit out of the fund in Court. Mr. Pemberton and Mr. Glasse insisted, that the Plaintiff, having rashly prosecuted the suit, from which it was clear from the beginning that he could obtain no advantage, and having wholly failed, ought to pay the costs; *Barker v. Wardle* (Myl. & K. 818), *Bluet v. Jessop* (Jacob, 240), *Anonymous* (4 Mad. 273), *Robinson v. Burt* (1 Russ. 599), were cited.

THE MASTER OF THE ROLLS [Lord Langdale]. Where a creditor's suit is properly commenced and prosecuted by a simple contract creditor, and the assets are realized in the suit, he will be entitled to payment of his costs, although the estate is deficient for the payment of the specialty creditors. (*Lechmere v. Brazier*, 1 Russ. 72; *Larkins v. Aston*, 2 M. & K. 320; *Barker v. Wardle*, 2 M. & K. 818.) Every creditor has a right to have an account of the assets, but it does not follow that he is to be satisfied, out of the assets of others, against every expense which he may rashly and judiciously incur.

Here the suit was neither properly commenced or prosecuted. The Plaintiff has not fit to carry it on in the face of information as to the state of the assets which turned out to be perfectly correct, for the state of the assets, the existence of the simple debt, and the Master's report are not now questioned. The Plaintiff has, therefore, proceeded at his own peril, and the representations made before suit, and in his answer, turning out to be perfectly accurate, he must pay the costs of the suit. The Defendant must have her extra costs out of the fund, and the remainder will go to the judgment creditor.

[462] THE ATTORNEY-GENERAL v. PRETYMAN. Nov. 16, 17, 21, 1841.

[For subsequent proceedings, see 8 Beav. 316; 19 Beav. 538.]

Master of an ancient hospital held liable to refund fines, which, according to custom of his predecessors, he had received for renewals of leases. Discretion of the Court in limiting the enforcement of the strict rights of charities how regulated. Reference to the Attorney-General.

By a deed, dated in 1244, Simon de Roppell, "gave, granted, and by that present charter confirmed, in pure and perpetual alms to God and the Blessed Mary and to the Hospital of St. John the Baptist, which he had erected in his court of law for the perpetual support of thirteen poor persons as well in bed and food as clothing, and other things belonging to competent food and clothing, and of a chaplain there ministering and his household, all his land which he had in the Manors with all the appurtenances" and other property therein described, and he gave and granted to the Bishop of Lincoln and his successors, the right of patronage of said hospital, so that the Bishop of Lincoln, whosoever he was for the time being might appoint a fit chaplain warden of the said hospital, who might wear any religious habit according to the disposition of the said bishop, and should there perform service for the salvation of his soul, and of his wife Alice, and of his father, mother, and of his predecessor and successors, and of Hugh his son; and he gave "that the warden chaplain, once in the year, should render an account to the Bishop of Lincoln or to his attorney," and should be removed "if he should not conduct himself as it beseemed him, as well in spiritual as temporal matters;" and in case of the death of any of the poor persons, others were to be substituted by the chaplain with the consent of the bishop.

For a long series of years, the chaplain wardens had been in the habit of granting leases of the property at a rent of £32, taking, however, large fines for the renewals which they retained for their own benefit.

In 1817 the then Bishop of Lincoln appointed the Defendant, his son, to be chaplain warden.

In 1819 the Defendant renewed the lease for twenty-one years, reserving the rent of £32, and taking a fine exceeding £9000; he subsequently, in the years 1822, 1834, again renewed the lease for twenty-one years, taking fines of £2200, £1742, 10s., and which he retained for his own use, according to the custom of his predecessors, and he had received about £750 for timber.

[464] The Defendant out of the annual rent of £32 applied £24 to the use of the poor persons, and retained the remainder.

The building of the hospital had ceased to exist, and it appeared that no services were performed by the Defendant.

The property consisted of 874 acres of tithe free land, the annual value of which was admitted to exceed £1200.

The case having been investigated by the Charity Commissioners in 1839, information was filed in May 1839, to have it declared that the Defendant was entitled to the whole rents beyond the £24; to establish the charity on a new footing; and to make the Defendant account for his receipts in respect of the rents and timber. A transcript book containing a copy of the charter was in the possession of the dean and chapter, which they refused to produce to the Charity Commissioners without the assent of Pretyma, which he refused to give, but he stated by his evidence that the contents were well known, and easily ascertained from other sources, and that material advantage would have resulted from the production of the copy.

Mr. Pemberton and Mr. Blunt, for the Attorney-General, asked that the Defendant might be decreed to pay the amount of the fines and timber money with interest, which together amounted to about £13,700; or at least, that he might be decreed to the charity for the full annual value of the property until the expiration of the lease in 1855. They further asked that Pretyma might pay the costs; and that

dean and chapter [465] might not have costs, on the ground of their refusal to assist in the investigation of the matter.

Mr. Kindersley and Mr. Loftus Wigram, for the Defendant Pretymán, contended, that in cases of this kind, where parties had erroneously followed the practice of their predecessors, the Court was inclined to act leniently. *Brenthwood School case* (1 Myl. & K. 376), *Attorney-General v. Corporation of Exeter* (Jacob, 448), *Attorney-General v. Leachbury* (3 Myl. & K. 647). That it would be ruin to the parties to make them find that, which, having every reason to believe their own, they had spent; and that, if liable, the Court or the Attorney-General ought under the circumstances to prevent the strict rights of the charity from being enforced.

They argued that, under the stat. 32 H. 8, c. 28, the masters of hospitals had the same power of taking fines on renewals as bishops.

Mr. Faber, for the Bishop of Lincoln.

Mr. Barlow, for the dean and chapter.

Mr. Pemberton, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. This case must, in a great degree, depend on the conduct of the Defendant: I will therefore read his answer, in order to satisfy myself on that point. It is however a great mistake to suppose that the Court has any discretion in determining the right of a charity. The discretion is only in considering how far that right [466] is to be enforced. These sums of money, upon all doubt, belong to the charity; but whether it is expedient and proper, in the exercise of that discretion to which Sir Thomas Plumer adverted, in the case cited, and to which discretion I have myself very often resorted to enforce the full right, must, in this as in all these cases, be the subject of serious consideration.

I have always considered, that where a party has, quite innocently, possessed charity property which ought to have been applied according to the directions of the Court, and has so continued for a number of years, until by some incidental circumstance he has been apprised of the erroneous application, if he then comes forward, I give every facility to the future due application of the trust money, it is by no means an improper exercise of the discretion of this Court to save him as much as is possible from a by-gone account. I have very frequently acted on that principle, which I consider for the benefit of charities in general; for by acting on that principle, great facility has been afforded in realizing charity property, which otherwise might not have been recovered from misapplication. The promptitude of the Defendant to set in setting the matter right, is an important element to be considered in the exercise of that discretion; if there has been a resistance to the establishment of the right or a concealment of the evidence, which concealment would lead to the presumption that there may have been more previous knowledge than is admitted, it becomes much more difficult thing to give to a Defendant the benefit of that discretion.

It is not to be forgotten, also, that instances have occurred in cases of this description in which the Court, however hard it might think the case, has not thought [467] right to act on the discretion which it sometimes thinks fit to exercise. There is a case in which Lord Eldon did not think fit to exercise it himself, but referred the matter to the Attorney-General, and in that manner obtained from that public officer, who was prosecuting for the Crown, the benefit of his opinion upon the matter. I have read over this answer, and see what ought to be done in this case.

Nov. 17. THE MASTER OF THE ROLLS said he had examined the answer, and that he thought, under the circumstances, the more lenient course proposed by the counsel for the information might be pursued in this case, and that the Defendant ought to be charged with the rack rent, after deducting the reserved rent of £32 from the sum of the Commissioners' report down to the expiration of the leases.

It was afterwards found that the amount to be paid by the Defendant would, according to this principle, amount to so considerable a sum, that the Defendant would be utterly unable to pay it, and the case was, after some, not very hostile discussion, referred to the consideration of the Attorney-General. (See *The Attorney-General v. Brettingham*, 3 Beav. 91.)

[468] PAINE v. HYDE. Nov. 24, 25, 1841.

A testator gave a legacy to A. in the event of B. dying unmarried, but upon express condition that A. should within three years from the testator's death, to the executors all monies due from him to the testator. Held, that the condition was substantially performed by a payment after the expiration of the three years and that the legacy was payable.

In this case the testator, by his will, gave the income of his residuary estate to Catherine Paine during her life, if she continued unmarried. If she married, he gave her only an annuity of £30, and gave the residue of his estate to the children of Thomas Hyde by his wife Hannah; but in case Catherine Paine died unmarried (which event happened), he directed his trustees to transfer sums of £600 consols each one of four persons, viz., John, Edward, Thomas, and George Fowle; but in the event of the death of either of them, then he directed the trustees "to pay, assign, or transfer the said legacy of him so dying, unto and equally amongst such of his children as should be then living, when and so soon as the youngest of such children should attain the age of fourteen years;" and to pay, assign, and transfer the residue of his estate unto such person as Catherine Paine should appoint, and in default of her appointment (which happened), to the children of Thomas Hyde by Hannah his wife. He then expressed his will to be, "that the legacies given to them, the said John, Edward, Thomas, and George Fowle, were given to them *subject to and upon this condition*, that they, respectively, and their respective heirs, executors, and administrators, should, within three years next after his the testator's decease, well and lawfully pay or cause to be paid unto the testator's trustees and executors, all debts or moneys as should or might be due or owing by or from them or any of them at the time of his decease." And he declared that nothing in his will contained should invalidate or make void the securities which he held for [469] the repayment of a loan due to him from Edward, Thomas, and George Fowle.

The testator died in January 1800.

Thomas and George Fowle were indebted to the testator in the sum of £1900, which was not paid until January 1804. Edward and Thomas were also indebted to the testator in the sum of £1900, and were bound to secure the reinvestment of £6400 consols, which sums were not repaid and reinvested until May 1806. George Fowle was also indebted to the testator in the sum of £345, which was not repaid until May 1806; so that, in effect, the monies were not repaid within the three years from the testator's death, as required by the will.

Edward, Thomas, and George Fowle afterwards died in the lifetime of Catherine Paine and she died unmarried in January 1840.

The legacies were now claimed by the children of Edward, Thomas, and George Fowle, who presented a petition in the cause for payment.

Their claim was opposed by the persons entitled to the residuary estate, on the ground that the condition (viz., payment of the debts within three years next after the testator's death), had not been performed, and that upon the context of the will, taken in connection with the words in which the condition was expressed, it appeared that the testator intended a strict performance.

Mr. Kindersley and Mr. Purvis, in support of the petition. This is a simple condition, not of a conditional limitation, and there is no gift over; in such case the [470] Court will not declare a forfeiture where the condition has been substantially performed. Thus, in *Simpson v. Vickers* (14 Ves. 341, 348), cited in *On Legacies*, pp. 664, 667. Mr. Simpson bequeathed to his brother Michael a sum of money to be paid within six calendar months after his (the testator's) decease, upon his executing to the executrix a release of all claims and demands; and if he refused to do so, the testator revoked the bequest, appointing his sister Elizabeth sole executrix. It seemed that Michael did not give the release within the time prescribed; nevertheless Sir W. Grant declared him to be entitled to the legacy, releasing all demands.

It is a general principle of the Court, that it will relieve against a forfeiture.

occasioned by the mere non-payment of money within a particular time; *Cage v. Ruel* (2 Vent. 352); as in the case of mortgages, or of a forfeiture of a lease for non-payment of the rent, though forfeited at law, the Court will give relief, on payment of the arrears of rent; *Lowat v. Lord Ranelagh* (3 Ves. & B. 24): so where there is a gift to a person, provided he shall marry with consent, the Court construes the condition as *in terrorem* only.

The condition does not apply to the Petitioners, who are the children, for the testator says, "the legacies given by me to them, the said Edward, Thomas, and George Fowle, are given to *them* upon this condition," &c. This condition, therefore, does not apply to the children.

Mr. Pemberton and Mr. Beavan, *contra*. [471] Where a condition is precedent, he bequest will not take effect, unless the condition is literally performed. Here there is no question as to forfeiture, but a bounty was intended by the testator upon a particular condition, and unless the condition were performed, the legatee was to receive no legacy. In *Davis v. Thomas* (1 Russ. & Myl. 506) a party had a right to purchase an estate within five years, in case he regularly paid his rent. He did not comply with these terms, yet applied within the five years to repurchase, on tendering the rent due. What the Master of the Rolls said in that case is very applicable to the present; he says, "In all cases of the payment of money where penalty or forfeiture is introduced for the purpose of security, there a Court of equity will relieve against the penalty or forfeiture, upon the ground of full compensation by giving interest. But where there is no stipulation for penalty or forfeiture, but a privilege is conferred, provided money be paid within a stated time, were the party claiming that privilege must shew that the money was paid accordingly; as in a case of interest reserved on a loan at 5 per cent., with a proviso that 4 per cent. will be accepted, if paid within a limited time after it becomes due; in the case of a covenant for the renewal of a lease, on the payment of a certain sum at a stated period. Here it is admitted that the rent was not duly paid at the stipulated times, and no fraud, surprise, or accident is alleged; and the Plaintiff is therefore not entitled to the repurchase which he claims by this bill, and the bill must be dismissed with costs." This decision was affirmed on appeal. The same principle was acted on in *Perry v. Meddowcroft* (*ante*, 197). In *Burgess v. Robinson* (Mer. 7) a legacy was given, to be paid as soon as the legatee arrived in [472] England, or claimed the same, provided the claim was made within three years. It appeared that one of them came to England at the end of four years subsequently to the testator's death, after which, being informed for the first time of the will, he claimed the benefit intended for him by the testator; but Sir W. Grant, Master of the Rolls, determined against the title, observing, that the testator having imposed on a legatee a condition, with which he had not complied, although the non-compliance was the effect of the latter's ignorance of the provision, yet the consequence must be that he was not entitled to the legacy.

The case of *Simpson v. Vickers* (see *Tulk v. Houlditch*, 1 Ves. & B. 248, 259) is accurately stated in Roper: there was no such decision as that stated; the point decided was on the will of Mrs. and not of Mr. Simpson, and the condition in the will was if the legatee "*refused or declined*" to execute a release, and which it did not appear he had done; but it was there decided under the will of Mrs. Simpson, that the devise failed upon his non-performance of the condition stated in her will within the time specified.

The condition is applicable to the children, who take in substitution, for every provision attaching to an original legatee is applicable to the substituted legatee. If legacies were given free of legacy duty, the substituted legatee would take, discharged of legacy duty. The words, "the legacies given by me to them," viz., to the testator, are merely descriptive of the particular legacy, for the testator, in the preceding passage of his will, describes the subject of his gift to the children as "the said legacy of him dying," viz., of the parent. If the legatees had neglected to pay until the present day, [473] could they claim the legacies? The Petitioners ought to pay the costs of this petition, the neglect of the party having occasioned the question.

Mr. Willcock, in the same interest.

Mr. Kindersley, in reply. The gift to the children is a substantive gift, and the

performance of the condition does not attach to them, but to the parents, the respective heirs, &c.

Nov. 25. THE MASTER OF THE ROLLS [Lord Langdale], after stating the bequest and condition, said: The testator, by his will, has given a great number of legacies, some of which he directed to be paid at particular times; and as to many of his legacies, he directed that they should not be paid until after the expiration of three years from the time of his death. He directed the executors to get in the monies due to him, as soon as convenient after his death; and he declared, that the securities given by Edward, Thomas, and George Fowle were not to be invalidated by anything in his will. But on considering the whole will, it does not appear to me to throw any further light upon the testator's intention, as to the time limited for the performance of the condition, than is expressed in the statement of the condition itself.

The legacies were contingent upon the death of Catherine Paine, unmarried; and it was wholly uncertain whether she would marry or not, and at what time she would die; she might have died unmarried within three years after the testator's death. It was equally uncertain, whether the Fowles would survive her or not; and if she had died unmarried within the three years, the legacy might have become vested in the Fowles, or in [474] the children, before the expiration of the time appointed for the performance of the condition; and, looking at these circumstances, and considering the words in which the condition is expressed, I think that it is to be regarded as a condition merely for payment of money, in which the time limited has not, by the Court, been deemed to be of strict obligation; and that it was substantially performed by payment of the debts, although the money was not paid until after the expiration of the time limited in the condition.

I am therefore of opinion, that the Petitioners are entitled to the legacies which they claim, and also to the costs of the application.

When the testator in his gift to the children of Fowles, in the event of the original legatee's dying, describes each legacy as the *legacy of him* so dying, he does not mean to speak of the legacy as vested in him, but merely as a legacy which he had given to his children, if he had not died; and the legacies described as given to the children in the clause expressing the condition, were only contingent legacies, which, upon the deaths of the legatees in the lifetime of Catherine Paine, became incapable of being performed by the legatees, and in fact became contingent legacies to the children. If the will be construed strictly, they do not apply to the legacies given to the children, but to the legacies given to the legatees, consisting of the sums which in another event would have been given to the legatees. The testator may have meant otherwise, but it is not necessary to decide the point.

NOTE.—See also *Taylor v. Popham*, 1 B. C. C. 168; and *Hollinrake v. Russell*, 500.

[475] HOLFORD v. PHIPPS. Feb. 9, 1840.

[S. C. 5 Jur. 36.]

Trustees who unsuccessfully resisted the claim of the assignee from the cestui que trust, to have a term merged, held entitled to trustees' costs.

This case, which is reported 3 Beavan, 434, now came on to be spoken of in the minutes of the decree. It was contended on behalf of the Defendants' trustees, that they were entitled to *trustees' costs*.

Mr. Pemberton and Mr. Piggott, for the Plaintiff.

Mr. Lloyd, *contra*. The Defendants throughout have insisted that they were trustees for the Plaintiff; there is, therefore, no ground whatever for giving them any other than ordinary costs as between party and party. They are not entitled to assume the character of trustees, merely for the purpose of obtaining extra costs.

THE MASTER OF THE ROLLS [Lord Langdale]. A term was vested in the Defendants in trust for securing a jointure to Mrs. Crespigny. By dealings between Mrs. Crespigny and the Plaintiff, the term became the property of the Plaintiff.

by that course of dealing, to which the Defendants were not parties, the trustees held the term in trust for the Plaintiff. The fact, however, was not made out up to the time of the hearing of the cause. The consequence was, that the Defendants were right in denying that they were trustees for the Plaintiff, until it was shewn by other evidence that they were no longer trustees for Mrs. Crespigny. Acting, therefore, from that time, as trustees for the Plaintiff, they ought to be allowed trustees' costs.

See *Sherratt v. Bentley*, 1 R. & M. 655; *Norway v. Norway*, 2 Myl. & K. 278.

[476] PROUDFOOT v. HUME. Nov. 26, 1841.

Right of a Plaintiff to have money in the Defendant's hands paid into Court, not proceed on admissions in the answer, made in reference to an equity raised by the bill, and not in reference to an independent equity stated only in the answer.

Under a will and a deed executed subsequent thereto, both being dated in 1815, Plaintiff was entitled to one-fifth part of the residuary estate of the testator.

This bill was filed against the executors, who were also trustees of the deed, for a general account of the testator's estate, and for payment to the Plaintiff of his proportion thereof.

The Defendants, by their answer, set up a settled account and release executed by the Plaintiff, whereby it was ascertained that the share of the Plaintiff amounted to the sum of £865, 19s. 3d., and he released them from all claims and demands, however, except from the amount so found due. The answer of the Defendant, one of the executors and trustees, further stated, that the said sum was treated and considered by the Plaintiff as an ascertained and liquidated sum, and that the Plaintiff expressly desired that the executors and trustees would retain the balance in their hands at 5 per cent., which he Hare agreed to do; and he further said, "that after the date and execution of the said indenture of release, the said sum of £865, 19s. 3d. was treated and considered by the said Plaintiff and Defendant as ascertained and liquidated sum in the hands of the Defendant, belonging to the Plaintiff, due and owing to him;" and that the Defendant Hare had, "from time to time made payments to the Plaintiff on account thereof, which payments amounted to a large sum in the whole."

[7] It was now moved, on behalf of the Plaintiff, that this sum might be paid into Court.

J. S. Bell, in support of the motion. There is sufficient admission to entitle the Plaintiff to an order for payment into Court; *Mortlock v. Leathes* (2 Mer. 491); and the Defendant may shew by affidavit what payments are to be deducted; *Anonymous* (1359).

J. James Parker, *contrâ*. The equity of the bill is for a general account against the Defendants as executors. The answers deny that equity, and state a case of a settled account, in respect of which the admission is made. The Plaintiff cannot rely on equity not alleged by his bill.

THE MASTER OF THE ROLLS [Lord Langdale]. The bill, as now framed, asks for relief in a case of an open and unsettled account. If the bill had sought relief on the footing of a settled account, I would, after calling on the Defendant to specify by affidavit the payments alleged to have been made, have made an order. That is the case here; the Defendant, instead of admitting an open unsettled account, has avowed by which it appears that there was a settled account. I think on this I cannot make the order. If I were to make the order at present, it would be in the Plaintiff's admission of the release, and which his bill does not admit.

The Plaintiff may amend his bill by setting out the release, and asking relief accordingly; he may then apply again to the Court.

[478] MORRALL v. SUTTON. Nov. 20, 26, 1841.

[S. C. 5 Beav. 100; 14 L. J. Ch. 266; 9 Jur. 697; 1 Ph. 533; 41 E. R. 735.]

Bequest of leaseholds, after prior life-estates, to A. B., her executors, administrators, and assigns, during the term of her natural life. Held, on the context, to give life-estate only.

The question in this case was, whether Sarah Calcott the younger, in the events which had happened, took an absolute interest or a life-estate only, under the terms of the testator's will, in certain leasehold premises.

The testator Edward Lloyd, by his will dated in 1789, amongst other things, expressed himself as follows. "I give and bequeath unto Ann Elizabeth Waring, Sarah Calcott the elder, and Mary Spencer, all my leasehold estate in Gloucestershire, held under the Dean and Chapter of Bristol; to hold to them for and during their joint natural lives, and the life of the longer liver of them, but subject nevertheless to, and charged and chargeable with, the following annuities (that is to say), one annuity of £20 a year to Esther Jerginson during her life, and with one other annuity of £20 a year to Sarah Jerginson, daughter of the said Esther Jerginson, during her life, and with one other annuity of £10 a year to Mrs. Addenbrooke; which several annuities I do hereby direct to be charged on my said estate in Gloucestershire, and to be paid half-yearly, as the rents of the said estate can be received, without any deduction for taxes or otherwise.

"And from and after the decease of the said Ann Elizabeth Waring, Sarah Calcott, and Mary Spencer, I give, devise, and bequeath my said leasehold estate in Gloucestershire (subject to the said several annuities as aforesaid) to the said Sarah Calcott the younger, if she shall be then living, her executors, administrators, and assigns, subject to the said annuities charged thereon, [479] during the term of her natural life. And if the said Sarah Calcott the younger shall die in the lifetime of the said Ann Elizabeth Waring, Sarah Calcott the elder, and Mary Spencer, leaving any lawful issue of her body, that shall be living at the decease of the survivor of them the said Ann Elizabeth Waring, Sarah Calcott the elder, and Mary Spencer; then I give, devise, and bequeath the said leasehold premises, from and after the several deceases of the said Ann Elizabeth Waring, Sarah Calcott the elder, and Mary Spencer, to such child or children of the said Sarah Calcott the younger as shall be then living, to be equally divided between them, if more than one, share and share alike; provided that if any child of the said Sarah Calcott the younger shall be then dead, leaving issue then living, such issue shall be entitled to the same share, as his, her, or their parent would have been if then living, equally between them if more than one. But if the said Sarah Calcott the younger shall die in the lifetime of the said Ann Elizabeth Waring, Sarah Calcott the elder, and Mary Spencer, or either of them, without leaving any lawful issue of her body that shall be living at the decease of the survivor of them the said Ann Elizabeth Waring, Sarah Calcott the elder, and Mary Spencer, then I give, devise, and bequeath all my said leasehold estate in Gloucestershire after their several deceases (but subject to the said annuities to Esther Jerginson widow, and her daughter Sarah Jerginson), to the said Thomas Jerginson the son and the said Charles Morrall, their executors, administrators, and assigns, for all the then residue of my said leasehold interest therein, in equal shares and proportions.

"And it is my will, and I do hereby require, that the person or persons who shall be possessed of the said leasehold estate by virtue of this my will, shall renew the said lease as often as occasion shall require, and not permit or suffer the same to be forfeited or become void, and that the expense of renewing the same shall be paid by and out of the rents and profits of the said premises, at the time of renewing thereof, without prejudice to the said annuitants; and that the several persons entitled to the rents of the said estate, except the said annuitants, shall pay a proportion of such expense, according to the amount of their respective estates and interests in the said premises; and if any or either of such persons interested (except as aforesaid) shall refuse to pay a proportionable share thereof as aforesaid, that the

persons in possession of the said premises may detain and deduct the same out of the estate."

Sarah Calcott the younger married Sutton; she survived Ann Elizabeth Waring, Sarah Calcott the elder, and Mary Spencer, and she died in January 1838, and she made such a disposition of the property as, it was admitted, would entitle the Defendant thereto, provided she had been entitled to an absolute interest.

The question therefore was, whether under the above-mentioned bequest, Sarah Calcott the younger, who survived Ann Elizabeth Waring, Sarah Calcott the elder, and Mary Spencer, and died without having had any issue, took an estate for life, or an absolute interest.

Mr. Pemberton, Mr. Kindersley, and Mr. G. Russell. In the event which has happened there is a gift to Sarah Calcott, her executors, administrators, and assigns, during the term of her natural life; and the argument on the other side will be, that the words "during her life" are inconsistent with the previous absolute gift to S. C., her executors, &c., and must therefore be struck out; but the rule is, that words in a will are not to be rejected, [481] unless you are unable, by possibility, to give them a rational construction, *Chambers v. Brailsford* (19 Ves. 653). Here we contend, that there is no necessity for rejecting any of the words, for as there were no trustees interposed, it was convenient to give her the absolute legal interest for the purpose of surrendering the old lease, in order to obtain a renewal, though her beneficial interest was limited to her for her life only; it was necessary also to enable her executors to retain any proportion of the fines advanced by her for the benefit of those in remainder.

Again, it is a rule of construction, that where gifts are inconsistent, the latter prevails. If any words are to be rejected, they must be the words "executors, administrators, and assigns." S. C. therefore took for life only.

Mr. Tinney and Mr. Dixon, *contra*, contended that S. C. took an absolute interest. The general intention must prevail, and no words must be rejected if it can be avoided. There was a general intention in favour of S. C. the younger and her issue, but her issue would be excluded in case of her surviving the tenant for life, unless she took an absolute interest. If any words are to be rejected, they must be the words "during the term of her natural life."

In *Doe dem. Cotton v. Stenlake* (12 East, 515), there was a devise to one and her heirs during their lives, and the latter words were rejected. So in *Reese v. Steel* 2 Simons, 233, where the devise was to A. for life, and to her heirs the issue of her body for their lives; and in *Spry v. Bromfield* (7 Mees. & W. 545; and see 9 Sim. 324, and 10 Sim. 94, 224), [482] where the devise was "to J. B.'s wife and children, and which children at the death of their mother shall inherit the same jointly during their lives."

If she took the whole legal interest in trust for the purposes of renewal, then why was not the same extent of interest given to the previous tenants for life? But it is plain that she did not take an absolute interest for that purpose, for the annuities were charged upon the leasehold.

THE MASTER OF THE ROLLS. If the legatee took an absolute interest, then the bill must be dismissed; but if she took for life only, the question as to the fines paid for the renewals must then be disposed of.

I think I had better give the case some further consideration.

Nov. 26. THE MASTER OF THE ROLLS [Lord Langdale], after stating the will, said: Sarah Calcott the younger survived Ann Elizabeth Waring, Sarah Calcott, and Mary Spencer, and afterwards died without having had any issue. Under these circumstances, the question upon this very confused and inaccurate will is, whether she took an estate for life only, or an absolute interest in the leaseholds devised.

The events contemplated by the testator were:—

1. Sarah Calcott the younger dying in the lifetime of the preceding tenants for life, with or without children.

2. Her surviving the three tenants for life.

[483] If she died in the lifetime of the three, leaving children who should be living at the death of the survivor of the three, these children were to take.

If she died in the lifetime of the three, or either of them, without leaving any child, there was a gift over.

If she survived the three tenants for life, then, after the death of the three first tenants for life, the testator bequeathed the leasehold estate (subject to the annuities to Sarah Calcott the younger, her executors, administrators, and assigns, subject to the annuities charged thereon during her natural life. And it is upon the construction of this clause that the question depends.

Prima facie the words in which the clause is expressed are inconsistent; the executors and administrators of Sarah Calcott could have no interest in an estate limited to her for life only.

And the argument, on the one hand, has turned upon the possibility of attributing a meaning to the words "executors and administrators," which may be consistent with the limitation for life, and, on the other hand, upon the possibility of attributing to the words "during her natural life" a meaning consistent with the gift of an absolute interest; and each party has contended, that if the words be irretrievably inconsistent, such of them as are repugnant to the interest which is claimed should be rejected.

In a case like this, it is impossible to come to a conclusion entirely satisfactory. We cannot reason upon what the testator might have done, if the case had occurred to him. A will so inaccurately expressed does not afford the means of clearly ascertaining the general [484] intention; and the mode in which the residuary clause is expressed, affords no evidence of the intention of the testator in the particular clause; and what is still more unfortunate is, that neither of the only two constructions which can be put upon the words, will have the effect of making every part of the clause clear and consistent.

The Plaintiff contends that the words "executors and administrators" have a special operation in securing the legatee as tenant for life a proportion of the fines which might have to pay on renewal, and moreover that the words "during her natural life" occurring at the end of the sentence, are entitled to great weight.

The Defendants contend that the words "during the term of her natural life" should be annexed exclusively to the immediately preceding words, "subject to the annuities charged thereon," so as to intimate no more than that the legatee's taking an absolute interest was, during her life, to keep down the charges.

There are objections to both these views of the case; but, on the best consideration I have been able to give to it, and as I own, without being able entirely to satisfy myself, it appears to me that the interpretation in favour of the Plaintiff is the most probable, and most consistent with the rules of construction, and with the rest of the bequest; and I think that the declaration must be that Sarah Calcott the younger took only an estate for life.

NOTE.—The cause was afterwards reheard before the Master of the Rolls, and his Lordship remained of the same opinion as to the construction. (See 5 Benv. 41.) The parties have however since appealed to the Lord Chancellor.

[485] EVANS v. WILLIAMS. Dec. 2, 1841.

The production of a writ of attachment for want of answer with the sheriff's return is sufficient evidence to ground the traversing order.

Mr. W. M. James moved for the traversing order under the 21st and 22d G. O. Orders of August 1841. (Ord. Can. 170.)

The Defendant was in the custody of the sheriff for want of answer.

The only evidence which was produced was the writ of attachment, and the indorsement on which (being the sheriff's return) it appeared that the sheriff had seized the Defendant under an attachment for want of answer.

THE MASTER OF THE ROLLS [Lord Langdale]. You may take the order.

[485] FRY v. MANTELL. Dec. 2, 1841.

An answer directed to be taken off the file, on the ground of the misnomer of the next friend of the infant Plaintiff.

Taking an office copy of an answer, not knowing of an irregularity in its title, is not a waiver.

The bill in this case was filed by Alfred Fry, an infant, by Jonathan Simmons, next friend.

In the heading of the answer, the next friend was named Jonathan Symmonds. Mr. Headlam, on behalf of the Plaintiff, moved to take the answer off the file, on ground of the irregularity in the title. He cited *Griffiths v. Wood* (11 Ves. 62), *Cope v. Parry* (1 Mad. 83).

[486] Mr. Rolt opposed the motion on two grounds:—

Firstly. That the mistake was only in the name of the next friend, which was material; and that there is no error in the name of the Plaintiff, as in *Griffiths v.*

Secondly. That the Plaintiff, by taking an office copy of the answer, had waived the objection. He cited *Sidgier v. Tyte* (11 Ves. 202), and *Pieters v. Thompson* (G. Rep. 249).

Mr. Headlam, in reply.

Dec. 2. THE MASTER OF THE ROLLS [Lord Langdale]. I am of opinion that the answer must be taken off the file, and that the irregularity is fatal. I think it is necessary to name the next friend correctly; and the Plaintiff having discovered the error by means of the office copy, and not having taken the copy knowing the error, I think he cannot be held to have waived the irregularity. (See *Yates v. Jacob*, 223.)

[487] TANNER v. ELWORTHY. ELWORTHY v. TANNER. Dec. 3, 1841.

[S. C. 5 Jur. 1099.]

Where the tenant for life of leaseholds in settlement, being under no obligation to renew, obtains an extension of the term, he is a trustee, for those claiming under the settlement; and the fact of the settlement containing a special provision that a particular renewal shall enure to the benefit of the trust, does not prevent the application of this general rule.

Leaseholds were settled on A. B. for life, with remainder to his wife for life, with remainder to such child or children as he should appoint, and in default amongst them equally. A. B. renewed the leases in his own name, and by his will confirmed the settlement, and gave all "his freeholds and leaseholds" to his son, and a legacy to his daughter; he died, having other leaseholds besides those settled. Held, that the will was not an execution of the power; and, secondly, that the daughter was not to be put to her election.

This cause came on upon original and cross-bill. The former was filed to have it declared that certain leasehold estates for terms determinable on lives were subject to the terms of a settlement made in 1783, and the cross-bill to obtain from the Court a positive declaration.

In 1783 the leasehold property in question, which was called "The Hole" and "The Hole" was held on lease for a long term of years, determinable on several lives, of which Andrew Elworthy was one. This property had been for a series of years granted under similar leases, but contained no covenant for renewal.

The settlement dated in 1783, and made on the marriage of Richard Elworthy (the father of Andrew Elworthy) with Jane Luxton, the leasehold property was conveyed to them in trust for the husband for life, with remainder for the wife for life, with remainder to the children as the husband should appoint, and in default between them

equally. A provision was made by the settlement, that if Richard Elworthy should be minded to procure a new lease in the name of a child of the marriage, in lieu of that of Andrew Elworthy, then the trustees were to surrender the old lease for the purpose, and it was agreed that such new lease should be held upon the trusts of the settlement.

There were two children of the marriage, viz., the Defendant Richard Elworthy the younger, and the Plaintiff Elizabeth, the wife of Jonathan Tanner.

After the death of Andrew, Richard obtained new leases of The Hole property, a term determinable upon the death of Richard Elworthy the younger; and he also, on the surrender of one of the old lives on the Yeo property, obtained a renewal for a term of years determinable on the decease of the Plaintiff Elizabeth Tanner.

These leases were taken in his own name, without reference to the settlement, and were not assigned to the trustees.

Richard Elworthy the elder died in 1805. By his will he confirmed his settlement "in favour of his wife," and he gave a legacy of £1000 to the Plaintiff his daughter. He also gave, devised, and bequeathed all his freehold and leasehold messuages, tenements, and hereditaments, with their and every of their rights, members, appurtenances, and all his estate and interest therein respectively, unto trustees, in trust, and for the benefit of his son Richard Elworthy, his heirs, executors, administrators, and assigns; and he gave the residue of his personal estate on certain trusts to his son Richard.

The testator had at his death other leaseholds besides those in settlement.

[489] After the testator's death the legacy was paid to the Plaintiff, and the leases were subsequently renewed upon a surrender of the old term.

Until 1831, when she died, the widow retained possession of the property.

The original bill insisted that these leases were now held on the trust of the settlement of 1783, and that no appointment of the property having been made, the same belonged to the Plaintiff and Defendant in equal moieties, as the only children of the marriage.

Dr. Pemberton, Mr. Girdlestone, and Mr. Teed, junior, for the Plaintiff. The settlement, where a trustee, or any person having a partial interest in leasehold property, renews the extended term is subject to the trust of the settlement. (See *Giddings v. Giddings*, 3 Russ. 241, and the cases in the note to *Taster v. Mander*, Ambler (2d ed.) 668.) The will is no execution of the power, and there is no election, for the testator had a leasehold property which satisfies the bequest of "leasehold messuages," and he expressly confirms the settlement; *Rancliffe v. Parnell* (6 Dow 149); and to give effect to the trusts of the settlement cannot be considered as a claim against the estate of the testator, *Coleman v. Jones* (3 Russ. 317).

Mr. George Turner and Mr. W. H. Clark, for the Defendant Elworthy.

Provision was made for the case of a renewal by inserting the life of a child of the marriage in lieu of that [490] of Andrew Elworthy. The parties having thus provided that the benefit of a particular renewal should enure to the benefit of the trust, it excluded all other renewals, which the tenant for life might make at his own cost and risk.

Secondly, the will of the testator, being executed according to all proper forms required by the power, is a due execution in favour of the Defendant; it expressly refers to the settlement containing the power, which is sufficient, for although the will does not state that it is made in execution of a power, yet, if it plainly refers to and comprises the subject of the power, it will be deemed a good execution, *Hughes v. Gall* (1 Russ. & Myl. 515, but see *Hughes v. Turner*, 3 Myl. & K. 666).

Thirdly, the Plaintiff must be put to her election between the benefit taken under the will and her interest in this property; for the property was vested in the Plaintiff, and he always treated it as his own, and to deprive the Defendant would be to defeat the will of the testator. The Plaintiff, having received her legacy, must be considered to have made her election.

Mr. Hallett, for a trustee.

Mr. Pemberton, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. A temporary and partial interest in this property seems to have been given by the settlement to Richard Elworthy

elder, and being in possession of a partial interest in a leasehold property, he procured for himself the grant of reversionary leases therein. The first question is, whether [491] according to law, as administered in this Court, he could do that for his own benefit. According to the general rule, it is admitted, as it could not fail to be, that he could not take an enlarged interest for his own benefit, but must hold it for the benefit of the persons entitled under the settlement, and to the extent of the legal interest so acquired, he must be considered a trustee for all parties interested under the settlement. However, it is said, that this general rule ought not to apply in this case, because there was a special contract, providing for the surrender during the life of Andrew Elworthy. If there had been a special contract, from which the Court could not fail to infer, that that which was the subject of the settlement and which was wearing itself out should not be renewed, I should agree in that argument. But there is nothing in this settlement which tends to that conclusion; and I am clearly of opinion that the interest acquired by Richard Elworthy the elder must be considered as acquired by him in trust for the purposes of the settlement.

The next question raised here is, whether his power of appointing to the children has been executed by his will. He made a will dated the 17th of July 1801. At that time, it appears from the evidence now before me, that he had freehold property, that he was possessed of a life interest in the leaseholds in question under the settlement, in addition to the whole legal interest therein which he had procured to be granted to him; and he had besides an absolute interest in other leasehold property, which he held for the residue of a long term of 200 years.

Under these circumstances, he made his will, and gave £1000 in trust for his daughter; he then gave his freehold and leasehold estates for the benefit of his [492] son Richard, and in the commencement of his will he notices the settlement, in order to say that he confirms it. In that state of things I think it is impossible for anyone to suppose that there was an execution of the power. He might have referred to the power, or he might have been in such a situation, as not to be able to use the word "leasehold," without raising the necessary inference that he intended to execute the power; but from the mode in which he has referred to the settlement, and as he had other property upon which the will could operate, I am of opinion that this is not an execution of the power.

Then it is said there is a case of election. I am of opinion there is no case of election, nor any plausible foundation for the argument that there is.

I must make a declaration that the leaseholds are subject to the trusts of the settlement, and that the Plaintiff Mrs. Tanner and Richard Elworthy are entitled to the property in equal moieties. If the Defendant has expended money in paying fines, or heriots, no doubt one half of that expense must be paid by the Plaintiff, who has obtained half the benefit. I am of opinion that the Defendant must pay the costs of the original bill; and as to the cross-bill, which was quite unnecessary, it must be dismissed with costs.

[493] ALLEN v. BONE. Dec. 10, 11, 1841.

[See *Crossley v. Crowther*, 1851, 9 Hare, 384.]

A suit instituted by a solicitor without authority, dismissed on motion, with costs of the suit and of the motion, as between solicitor and client.

This was a motion, made on behalf of the Plaintiff, that the bill might be dismissed, with costs to be paid by the solicitor; on the ground that it had been instituted by him without any authority having been given for that purpose by the Plaintiff.

It was admitted that no authority in writing had been given.

Mr. Pemberton and Mr. Cankrien, in support of the motion, cited *Wiggins v. Peppin* (2 Beav. 403), and *Wright v. Castle* (3 Mer. 12), and asked for the costs of suit and of the motion, as between solicitor and client.

Mr. Kindersley and Mr. Glasse, *contra*, argued, that if there had not been any authority, at least, that there had been an acquiescence in the proceedings, which bound

the Plaintiff; and secondly, that the Plaintiff was not entitled to costs as between solicitor and client, as he repudiated that relation between him and the solicitor.

THE MASTER OF THE ROLLS [Lord Langdale] (without hearing a reply) said: It is the duty of a solicitor to obtain a written authority from his client before he commences a suit. If circumstances are urgent, and he is obliged to commence proceedings without such authority, he should obtain it as soon afterwards as he can. An authority [494] may however be implied, where the client acquiesces in and adopts the proceedings; but if the solicitor's authority is disputed, it is for him to prove it, and if he has no written authority, and there is nothing but assertion against assertion, the Court will treat him as unauthorised, and he must abide by the consequences of his neglect.

Here the solicitor has failed in proving his authority, and the bill must be dismissed with costs, as between solicitor and client (*Wade v. Stanley*, 1 Jac. & W. 675), to be paid by the solicitor. He must also pay the costs of the motion as between solicitor and client. (Reg. Lib. 1841, A. fol. 203.)

[494] BROOKS v. PURTON. Dec. 17, 1841.

A second order to amend, obtained as of course after an answer has been put in, is irregular, though the first has not been acted on.

Where an application is made at the Rolls to discharge an order of course, obtained in a Vice-Chancellor's cause, the Court can only consider the regularity of the order as an order of course, and will not enter into the merits.

The rule is general, that the Court will not, on an application to discharge an order of course, for irregularity, sustain it as an order obtained adversely on merits.

This was a motion to discharge a second order to amend the bill, obtained at the Rolls as of course.

On the 4th of August one of the Defendants put in his answer and another Defendant put in a plea; and on the same day the Plaintiff obtained at the Rolls an order of course to amend, he undertaking to amend within three weeks.

This order was not acted on, and the Plaintiff on the 24th of November obtained at the Rolls a second order [495] of course to amend his bill, without prejudice to an injunction, and undertaking as before, to amend within three weeks.

The cause was attached to the Court of the Vice-Chancellor Knight Bruce.

Mr. Chandless now moved to discharge the second order, on the ground that by the Thirteenth Amended Order of November 1831 (Ord. Can. 8), a Plaintiff after "an answer has been filed," can only obtain one order of course to amend; and that any further order to amend must be obtained upon special application, supported by the requisites stated in the Thirteenth Order. He argued also, that a Plaintiff might amend without prejudice to an injunction, but that under the second order of 9th May 1839 (Ord. Can. 135), he must undertake to amend within a week, and not within three weeks, as has been done here.

Mr. Romilly, *contrâ*. The first order to amend was not acted on, and till acted on was a mere nullity, and therefore the Thirteenth Order does not apply. A Plaintiff may obtain a further order to amend at any time before the Defendant has answered the amended bill; *Wharton v. Swann* (2 Myl. & K. 362), and the Plaintiff may obtain a second order notwithstanding his first undertaking; *Nicholson v. Peile* (2 Beav. 497). The order to amend without prejudice to the injunction is quite regular; *Ferrand v. Hamer* (4 Myl. & Cr. 143); and the second order of the 9th May 1839 gives to the Plaintiff the right to an additional order to amend.

[496] Mr. Chandless, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. In this case it appears, that after the answer had been put in, the Plaintiff obtained an order of course to amend the bill, undertaking to amend within three weeks. He afterwards, on the 24th of November, obtained a second order of course to amend his bill, undertaking as before to amend within three weeks. The Thirteenth Order seems express upon the point. The Plaintiff is at liberty, after an answer has been filed, to obtain without

notice one order to amend, "but no further leave to amend shall be granted after answer, unless" in the way there pointed out, and which therefore must be obtained on a special application, and not as of course. According to the letter of this General Order, what was done was in contravention of it. It is said that the order is not to be construed literally, and that it does not mean one order to amend, but one order taken advantage of and acted on, and on which the bill has been amended. I have looked in vain for such construction of the order, and I think there is no authority for it.

It is said that the second order of 9th May 1839 gave a right to do what has been done in this case; and that the leave to amend, thereby given, was in addition or something superadded to the 13th Order. I cannot acquiesce in that argument, and I do not think that such is the proper construction, or the true intention of this order. It was intended to prevent the effect which an order to amend was supposed to have on the common injunction. The only question is, how many orders to amend may be obtained of course after answer; and plainly according to the 13th Order, there can be only one.

[497] There was another argument, that if I were to discharge this order, it would be more inconvenient to the Defendant, as the Plaintiff would afterwards obtain the same order upon a special application: but I have no discretion. This being a cause attached to another branch of the Court, I cannot go into the merits, but can only judge of whether the order was regularly obtained as of course. I must observe also, that the rule which was acted on in this Court by Lord Cottenham, to the satisfaction of everybody, was this, that where an order had been obtained as of course, and an application being made to discharge it, it appeared, on discussion, that though irregularly obtained as an *ex parte* order, it could be sustained on the merits, the Court, whatever might be the merits, must discharge the *ex parte* order, leaving the party to make an application on the merits.

This application must be granted with costs.

[497] CLARKE v. CLARKE. Dec. 21, 22, 1841.

The fifth order of 1 W. 4, c. 36, s. 15, requiring a party in custody, &c., to be brought to the Bar of the Court, is satisfied by bringing him before the Judge at his private residence.

The Defendant was arrested under a commission of rebellion on the 13th of October 1841, and on the 14th of October (it being in the Long Vacation), he was taken before the Master of the Rolls at his Lordship's private residence, and was then turned over to the Fleet.

The Defendant not having put in his answer, Mr. George Turner now moved, under the 1 W. 4, c. 36, s. 15, rule 2, to take the bill *pro confesso* against the Defendant.

[498] Mr. Dixon, *contra*. By the fifth rule, the Plaintiff ought to have brought the Defendant to the Bar of the Court within thirty days from the time of his being arrested. The thirty days expired on the 12th of November, and as the Defendant was never brought to the Bar before that time, he is now entitled to his discharge out of custody, and the bill cannot therefore be taken *pro confesso* against him. Taking a party to the private residence of a Judge, is not a bringing to the Bar of the Court.

Mr. G. Turner, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. The order in this case was made by me in the Long Vacation for the convenience of the prisoner and all other parties. My impression certainly is, that wherever a Judge of this Court is, there is his Court; I think that, for a century and more, it has been considered that the Court of a Judge of this Court is the place where he administers justice. If the order had been made here in my private room, could any such objection prevail?

I have no doubt on the subject; but as two other cases occurred during the Long Vacation, I will make some inquiry.

Dec. 22. THE MASTER OF THE ROLLS said, he thought he had authority to make

the order at his house, and therefore, that the order for taking the bill *pro confesso* must be made. (Affirmed, 1 Phillips, 116.)

NOTE.—The Defendant was afterwards brought before the Court of Queen's Bench by *habeas corpus*. The Court, on the 24th of January 1842, remanded him, deciding that he could not controvert, by affidavit, the fact stated on the warrant "that he had been brought to the Bar of the Court."

[499] COCKELL v. BRIDGEMAN. Dec. 8, 23, 1841.

Bill by indorsee against the acceptor of a bill alleged to have been mislaid, lost, accidentally destroyed, for payment or an indemnity, dismissed with costs, the loss &c., not being sufficiently proved.

Held, also, that the proof of payment by the indorsee to the holder, and the delivery up to him of the bill, coupled with the admission of the acceptor, that he had paid, and the usual affidavit of the Plaintiff upon filing his bill of the loss, was not sufficient to entitle the Plaintiff to an enquiry.

This bill was filed by the alleged holder and indorsee of a lost bill of exchange against the acceptor, for payment of the amount due upon the bill, upon giving proper indemnity to the acceptor.

It appeared that the Defendant was the acceptor of a bill of exchange for the sum of £62, 10s., drawn by and made payable to Mr. Ryan.

Mr. Ryan indorsed the bill, and before it became due, it came into the possession of the Plaintiff, who paid it over to Messrs. Hodgson & Burton. On the bill becoming due, it was presented by Messrs. Hodgson & Burton for payment, and was dishonoured. The amount was subsequently paid by the Plaintiff to Messrs. Hodgson & Burton. These facts were proved in this cause.

The Plaintiff by his bill alleged, that frequently since the bill became due, he had required payment thereof from the Defendant, but that since the 23d May 1838 (the bill having become due on the 18th), he had been unable to find the bill, although he had made diligent search for it, and that the same was now either mislaid, or lost, or had been accidentally destroyed.

The Defendant admitted that the Plaintiff had frequently required payment of the bill without producing it, and had alleged that the bill was mislaid or lost, save as aforesaid (i.e., as the Plaintiff alleged it); the Defendant did not know, and could not [500] set forth, as to his belief or otherwise, whether the Plaintiff had been unable to find the bill, or whether he had made diligent search for it, or whether the bill had been mislaid or lost, or had been accidentally destroyed. The Defendant by his answer also admitted that he had never paid it, or any part of it.

The Plaintiff's bill was accompanied by the affidavit of the loss of the bill of exchange.

In this state of the pleadings both parties went into evidence, and the Plaintiff did not produce any witness, nor offer any evidence to prove his allegation, that he had made diligent search for the bill, that he had been unable to find it, or that the bill was mislaid or lost, or accidentally destroyed.

Mr. Pemberton and Mr. Elderton, who appeared for the Plaintiff, asked for an inquiry before the Master as to the loss of the bill, and contended that the affidavit of the Plaintiff, the admissions of the Defendant and the evidence in the cause furnished a sufficient foundation for the inquiry.

Mr. J. Russell, for the Defendant, contended that the bill ought to be dismissed with costs, the Plaintiff having failed to prove the most material allegation.

The authorities will be found referred to in the judgment.

Dec. 23. THE MASTER OF THE ROLLS [Lord Langdale]. The affidavit was filed with such a bill as this, is no evidence in the cause that the instrument [501] It is required (*East India Company v. Boddam*, 9 Ves. 466) not as evidence of the loss, but as a security for the propriety of jurisdiction. The Defendant by his answer, admitted the loss; and the Plaintiff, being put upon proof, al-

the hearing, that no proof can be given of such a loss as he has sustained. A loss may be more or less susceptible of proof, according to circumstances. In some cases it may be clearly and distinctly proved; in other cases, it may be reasonably inferred from circumstances, and every case must, to some extent, depend upon its own circumstances. In the case of *Walmsley v. Child* (1 Ves. sen. 344), Lord Hardwicke said, that in this Court, "there is no other rule of evidence upon the payment of money upon a loss, than there is at law, but that in all cases at law, except in one, the party may be remedied on proof at law, just as he may here, provided reasonable evidence is given of the loss; Courts of law not requiring any more than Courts of Equity, strict and positive evidence of the loss; which, as it is generally occasioned by negligence, is seldom capable of being given; but both admit evidence arising upon circumstances, and upon that the party is entitled to recover."

In this cause there is no evidence, either direct or circumstantial, of the loss; and I am therefore of opinion, that the Plaintiff is not entitled to a decree.

In the case of *Stoke v. Robson* (3 Ves. & B. 51), which was a case of lost deeds, alleged to have been stolen from a mortgagee, the Defendant did not object to an inquiry at the expense of the Plaintiff, and an inquiry what had become of the deeds was directed; and the Master having reported that the deed was not to be found, the Plaintiff obtained a decree. (19 Ves. 385.) This was a bill of foreclosure, [502] the deeds having been stolen from the mortgagee, represented by the Plaintiff.

Smith v. Bicknell (3 Ves. & B. 51, note) was a case of redemption, and the deeds were alleged to have been stolen from an executor of the mortgagee, and an inquiry was directed, what deeds were delivered to the mortgagee, and what was become of the same title-deeds.

Neither of these were cases in which the jurisdiction was changed by the loss of the deed.

Here, the loss not having been proved, would have led to a non-suit at law.

The Plaintiff failing, not upon any question of law, but from the imperfection of his evidence, which may be supplied on another occasion, I think that the proper course is to dismiss the bill with costs, without prejudice to any other bill which the Plaintiff may be advised to file. (This case was affirmed on appeal by Lord Lyndhurst, C.)

NOTE.—See *Macartney v. Graham*, 2 Sim. 285.

[503] SMITH v. JEYES. Dec. 9, 10, 23, 1841.

To entitle one partner to an order for an injunction and receiver, against his co-partner, he must either shew a dissolution, or facts which, if proved at the hearing, would entitle him to a decree for a dissolution.

Where a partner does acts inconsistent with the duty of a partner, and of a nature to destroy the mutual confidence which ought to subsist between partners, and makes it impossible that the business can be conducted in partnership with benefit to either party, the Court will decree a dissolution before the expiration of the term for which the partnership was entered into.

The transactions of partners with each other cannot be considered merely with reference to the express contract between them. The duties and obligations arising from the relation between the parties are regulated by the express contract between them, so far as the express contract extends and continues in force; but if the express contract, or so much of it as continues in force, does not reach to all those duties and obligations, they are implied and enforced by the law; and it is often matter to be collected and inferred from the conduct and practice of the parties, whether they have held themselves, or ought or ought not to be held, bound by the particular provisions contained in their express agreement. When it is insisted that the conduct of one partner entitles the other to a dissolution, the Court must consider, not merely the specific terms of the express contract, but also the duties and obligations which are implied in every partnership contract.

This was a motion for an injunction and receiver, by one partner against his co-partner.

Mr. Pemberton and Mr. J. Parker, in support of the application.

Mr. Kindersley and Mr. Wright, *contra*.

THE MASTER OF THE ROLLS. The Plaintiff and Defendant in this cause are attorneys and solicitors. In the year 1835 they formed a partnership with each other, under the provisions of an indenture dated the 29th day of May 1835. It was stipulated that the partnership should continue for ten years, but for certain causes enumerated in the deed, either party was to be at liberty to determine the partnership, by notice, at an earlier period. The Plaintiff alleging that the Defendant by his conduct, on the 21st day of August last, given cause for dissolution of the partnership, gave a notice of dissolution on the 21st day of August last, and has filed this bill, for the [504] purpose of having it declared that the partnership was dissolved by the effect of the notice, or if need be, to have the partnership dissolved by the decree of this Court; and he now moves to have a receiver appointed to collect the partnership effects, and an injunction to restrain both parties from resigning them.

The Plaintiff is not entitled to the order for which he asks, unless he has shown that he had a right to dissolve the partnership, by notice under the deed, or has shewn facts, which, if proved at the hearing, would entitle him to a decree for dissolution.

One cause of dispute between the parties has been the amount of debts or monies which have been left outstanding. The Plaintiff complains that the Defendant did not brought in capital as he ought to have done, and has diverted some sum of money from the partnership account, or retained them for his own use; and in answer to these charges, the Defendant alleges, that if the Plaintiff had exacted himself to get in the outstanding debts, as he might and ought to have done, there would have been no occasion for additional capital; and further, that if the Defendant, has at any time retained in his hands partnership monies, and applied them to his own use, such monies have been less in amount than the sum of money to which he would have been entitled under the deed, if the outstanding debts had been collected by the Plaintiff, as they ought to have been.

Upon the affidavits given in evidence on this occasion, it does not appear that the Plaintiff has been guilty of any such neglect or supineness as the Defendant charges him with, in the collection of outstanding debts. There does not appear to me to be any-[505]-thing in the conduct of the Plaintiff, in that respect which would justify any deviation, on the part of the Defendant, from the course of duty which he ought to have pursued towards his partner.

The transactions of partners with each other cannot be considered merely in reference to the express contract between them. The duties and obligations arising from the relation between the parties are regulated by the express contract between them, so far as the express contract extends, and continues in force; but if the express contract, or so much of it as continues in force, does not reach to all those duties and obligations, they are implied and enforced by the law (*Crawshaw v. Collins*, 12 M. & W. 226); and it is often matter to be collected and inferred from the conduct and dealings of the parties, whether they have held themselves, or ought or ought not to be bound by the particular provisions contained in their express agreement. When I have insisted, that the conduct of one partner entitles the other to a dissolution, we must consider, not merely the specific terms of the express contract, but also the duties and obligations which are implied in every partnership contract; and upon the facts produced on the occasion of this motion, it appears to me that the conduct of the Defendant, Mr. Jeves, has been such as to make it impossible that the business can be conducted in partnership with benefit to either party. The neglect to account for the £54 received from Liverpool in August 1840; the application of the £54 received from Eliason to the payment of his private debts; the refusal to sign office checks; the refusal to sign a check for the proctor's bill, and the transmission of the proctor's letter to the creditors, however [506] few, of the creditors of the partnership, with a letter of his own, expressed as to be manifestly injurious to the partnership, and his conduct as

\$556 remitted to the partnership for the purpose of making a specific payment, appear to me to be all of them inconsistent with the duty of a partner, and of a nature to destroy the mutual confidence which ought to subsist between them. These acts, and others referred to in the affidavits, are not disproved or satisfactorily explained by the Defendant; and being such as, if proved at the hearing, would, in my opinion, entitle the Plaintiff to a dissolution, appear to me to be sufficient to entitle him to the order for which he now asks.

Order for injunction and receiver granted.

NOTE.—See *Goodman v. Whitcomb*, 1 Jac. & W. 589; *Chapman v. Beach*, *Id.* 594; *Marshall v. Colman*, 2 Jac. & W. 266; *Richards v. Davies*, 2 Russ. & M. 347.

[506] ARTHUR v. HUGHES. Dec. 23, 1841.

A fund ascertained was remitted from abroad by an executor to a person in England, to distribute between the legatees. The Court determined the rights of the legatees, without having a legal personal representative before the Court, the assignee being a party to the suit.

The testator resident abroad, gave a legacy to A., "or in case of his decease, or at his decease, to be equally divided amongst his children." He gave other legacies in similar terms to B., C., &c., and he directed these sums to be paid to the above persons, then residing in Wales, and he appointed executors in trust to send them to the respective individuals within six months. Held, that the parents took absolute interests.

The testator who was resident in New South Wales, bequeathed as follows:—"I do hereby give and bequeath to my brother Rees Arthur, or in case of his decease, or at his decease, to be equally divided amongst his children, the sum of £1280. I do also give and bequeath to my sister [507] Mary Arthur, the sum of £1100. I do also give and bequeath to my sister Jane Arthur, the sum of £1100. I do also give and bequeath to my sister Ann Arthur, the sum of £1100; in case or at the death of any of my said sisters their respective sums to be equally divided amongst their children. These legacies all to be paid in good and lawful money of Great Britain, out of my goods and chattels to the above-named persons now residing in Wales in Great Britain, and born in the parish of Sanderson, county of Carmarthen; and lastly, as to all the rest, residue, and remainder of my goods and chattels of what kind or nature whatever, I give and bequeath to the Rev. Thomas Hassell and Stephen Williams, whom I do hereby appoint my sole executors, in trust to send the above-named sums out of the colony to the respective individuals within six months after my death, of this my last will and testament."

Thomas Hassell alone proved the will in the Supreme Court of New South Wales, and he set apart the sum of £4500, being the total amount of the four legacies, and he paid it to the Defendant Thomas Hughes, with directions to apply it to or for the benefit of the parties entitled to the said legacies under the said will.

The four legatees survived the testator, and the question was, whether they took the legacies with remainder to their children, or absolutely.

The stock had been transferred into Court.

The bill was filed by Rees Arthur and Mary Arthur and her husband against Thomas Hughes and the other parties interested; but no personal representative of the testator was made a party to the suit.

[508] Mr. Pemberton and Mr. Rolt, for the Plaintiffs, and Mr. Sidebottom in the interest, contended that the parents took an absolute interest. The legacies were to be paid "to the above-named persons then residing in Wales," and the above sums were to be sent "to the respective individuals within six months after my death," and therefore the testator intended payment to be forthwith made to the legatees. They submitted that it was not necessary to have the legal personal representative of the testator before the Court, as the fund was ascertained and paid.

Mr. Faber having appeared for the consignee of the money in Court, THE MASTER OF THE ROLLS said he thought that sufficient.

Mr. Kindersley and Mr. Heathfield, *contra*, then contended that the parents took for life only, with remainder to their children, the words "or at his decease," &c., ought not to be rejected.

Mr. Pemberton, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. The case is far from clear from doubt, but on the whole I think the parents take an absolute interest.

[509] *In re LAW*. Jan. 11, 12, 13, 1842.

A petition under the 1 W. 4, c. 60, to obtain a transfer of trust stock from the names of the surviving trustees into the joint names of such trustees and of a new trustee duly appointed, is properly presented by such new trustee.

Mode in which a petition presented under an Act of Parliament, by which the Court derives its jurisdiction, ought to be intituled.

This was a petition under the 1 W. 4, c. 60. It appeared, that in the year 1839, certain sums were standing in the names of Joseph and Thomas Price, and a Mr. Bowman, as trustees of a settlement; and that the only person beneficially interested therein was an infant, whose father Francis Law had, under the terms of the settlement, a power of appointing new trustees.

In 1839 Mr. Bowman, the active trustee, having died, Francis Law duly appointed George Law a new trustee in his stead. George Law, having been appointed trustee, applied to Joseph Price and Thomas T. Price to concur in the transfer of the stock in his name. A great deal of discussion took place upon this, and ultimately Joseph Price and Thomas Price refused to make the transfer without an order of the Court.

In consequence of the refusal, this petition was presented by Mr. George Law under the authority of the above Act, after the expiration of the thirty-one days mentioned in the sixteenth section, and prayed that a person might be appointed to transfer the stock into the joint names of the surviving trustees and Mr. George Law.

The petition was intituled simply "In the matter of Law."

Mr. Tinney and Mr. G. S. Law, in support of the petition.

[510] Mr. Pemberton, *contra*, contended, first, that the petition ought to have been intituled "In the matter of the 1 W. 4, c. 60, and in the matter of the particular trust," and not "in the matter of Law."

THE MASTER OF THE ROLLS said, the petition had better stand over to inquire as to the practice.

Jan. 13. THE MASTER OF THE ROLLS [Lord Langdale]. I thought that it was quite the usual practice, in cases of this description, to insert the title of the Act of Parliament. (NOTE.—This was always required by Sir John Leach when M. R.) I am told that there have been instances in which it has not been done, and the question having been brought forward before the Vice-Chancellor of England, he has overruled the objection. However, I believe that in almost all cases it is done. That seems to be considerable reason for doing it, but having been told that the Vice-Chancellor of England has overruled the objection when taken, I must hear the petition, reserving the consideration of that question.

The petition then proceeded.

Mr. Pemberton then objected, secondly, that the request ought to have been made, and the petition presented, by the person beneficially entitled to the stock, and not by a new trustee.

THE MASTER OF THE ROLLS. Several objections have been unfortunately raised to this petition. The title of the petition is merely "In the matter of Law," not noticing in any way the statute which gives the Court the jurisdiction, and not noticing [511] in any way the sort of business or matter in which the Petitioner Mr. Law is at all concerned. I have looked at the Act of Parliament, and I cannot say that the Court has not jurisdiction because the petition is thus headed, though it is manifestly quite contrary to what is the usual course of proceeding, and it is beside

very inconvenient. The convenience of stating upon the title of the petition the matter to which the petition relates, and the foundation of the jurisdiction which the Court is to exercise in such cases, is very manifest. There is no suit or other matter pending in which the Court has obtained jurisdiction: and it would, therefore, be very convenient to state it, though, as I said before, I do not think the Court has not jurisdiction because of the omission in the title.

Mr. Tinney. It is a mere slip.

THE MASTER OF THE ROLLS. I take it to be so, but I think it is a slip which ought to be corrected; and that it would be convenient to state it as being both in the matter of the settlement, and in the matter of the Act of Parliament.

The next objection which is taken to this petition is this, that there is no jurisdiction to make a transfer, except at the instance of a person beneficially interested. I think that there has been a sufficient refusal here, and that a refusal to the application of a newly appointed trustee does bring the case within the Act of Parliament.

The next objection made is, that the refusal was a reasonable refusal, and such a refusal as the Court would sanction. [His Lordship then referred to the circumstances of the case, and said], I cannot say there is reasonable cause for refusal in this case.

[512] On the whole, I think I must make the order which is here required. Though I think that the Petitioner is entitled to the order without amending the title of the petition, yet it is necessary to keep up a regular and distinct mode of stating these matters; and the title of the petition ought therefore to be amended, and when amended, let the order be made for the officer of the Bank of England to make the transfer.

[512] WRIGHT v. MAUNDER. Jan. 19, 1842.

The forty-seventh section of the Insolvent Debtors Act (1 & 2 Vict. c. 110) is directory only. So that although the assignee does not strictly comply with the manner, &c., of selling real estate, as directed by the creditors, the contract is not void.

This suit was instituted by the assignees of an insolvent debtor, against the purchaser of a portion of the insolvent's real estate, for the specific performance of his contract.

By the forty-seventh section of the above-mentioned Act it is enacted, "that the assignee or assignees of the estate and effects of any such prisoner, shall, with all convenient speed after his or their appointment, use his or their best endeavours to receive and get in the estate and effects of such prisoner, and shall, with all convenient speed, make sale of all such estate and effects; and if such prisoner shall be interested in or entitled to any real estate, either in possession, reversion, or expectancy, such real estate, within the space of six months after the appointment of such assignee or assignees, or within such other time as the said Court shall direct, shall be sold by public auction, in such manner and at such place or places, as shall, thirty days before any such sale, be approved, in writing under their hands, by the major part in value of the [513] creditors of such prisoner entitled to the benefit thereof, who shall meet together, on notice of such meeting published fourteen days previous thereto in the *London Gazette*," &c.

It appeared, that at a meeting of the creditors held in September 1839, in pursuance of the requisition of the above clause, it was resolved, that his real estate should be sold by auction in two lots, by the person and at the time and place therein mentioned; and it was further resolved, that there should be one reserved bidding for each of the said lots, and that the sum of £325 should be the sum fixed at the said reserved bidding for the first of the said two lots.

The assignees accordingly caused the insolvent's real estate to be put up to sale, and without such reserved bidding; and the Defendant became the purchaser of the first lot for the sum of £310, being £15 less than the amount of the reserved bidding agreed upon by the creditors. The purchaser, having subsequently discovered the resolution of the creditors as to the reserved bidding, refused to complete his purchase, unless the creditors sanctioned the sale, at a meeting to be called for that

purpose. In consequence of his refusal this bill was filed by the assignees for a specific performance.

Mr. Pemberton and Mr. Shebbeare, for the Plaintiffs. The assignee is the full legal owner of the insolvent's estate; it is absolutely vested in him by the Act, and he is directed to receive and get it in with all convenient speed, and sell it; the remaining part of the forty-seventh section of the Act is merely directory and applies only as between the assignee and creditors, in the same way as [514] in *Piercy v. Baker* (1 M. & K. 4), where it was held, that in a suit by the assignees of the estate of a bankrupt or insolvent, it is not competent to the Defendant to object that the suit has been instituted without the consent of the major part of the creditors as required by the Bankrupt and Insolvent Acts.

The sale is not invalidated, though the assignees, if they have acted improperly, will be responsible to the creditors; the fact, however, is, that the creditors do not object to the conduct of the assignees.

Mr. Kindersley and Mr. Parry, for the Defendant. The Defendant is a willing purchaser, and will complete his purchase, if another meeting of the creditors be called to confirm the sale; he has been advised that without such confirmation he will not obtain a good title. An assignee is simply a trustee; and so he is considered in the forty-fifth section, which vests the property of the insolvent in his assignees or assignees in trust for the benefit of his creditors. If a debtor vested property in a trustee upon trust to sell as he should direct, the sale would be void, unless the trustee strictly followed the directions given. The assignee cannot sell without a previous meeting of the creditors to approve of the manner and place of sale. It is true, that in a suit instituted by the assignees, a Defendant cannot object that it is brought without direction of the creditors; but here a meeting of the creditors has actually been called, and the assignees have acted in direct contravention of the directions given: the case is quite different.

The object of the forty-seventh section of the Act is to give the creditors a controul over the sale; and the [515] words "in such manner" include the price at which the estate is to be sold: the mode of sale, viz., by auction, is expressly provided for.

If the construction contended for by the Plaintiffs be correct, the assignees might take on themselves to sell an estate worth £1000 for £500, and the creditors would lose the security of the land, and retain merely the personal security of the assignee for the deficiency.

Mr. Pemberton, in reply. The words of the Act are merely directory. The creditors are to fix the manner and place of sale; suppose they directed that the sale shall be by A. B., at a particular place at one o'clock on a given day, could it be contended that if A. B. died in the *interim*, or sent his clerk, or if the sale were postponed till two o'clock, or took place in a neighbouring room, that the sale would therefore be void, and that no subsequent confirmation could make it valid? There is a great difference between the case of an insolvent's assignee and a trustee for sale. The price is not included in the "manner" of the sale. If the words were negative it might be difficult to hold that they were only directory; yet where the question was as to the authority of the assignees to bring a suit without consent similar words have been held so.

THE MASTER OF THE ROLLS [Lord Langdale]. It is not alleged that the assignee has in any way deviated from the resolutions of the creditors, except in one respect which was this; the creditors directed that there should be a reserved bidding of £325, but the assignee sold the property to the Defendant for £310. In this state of circumstances, it is alleged by the Plaintiffs, that the sale was valid, and that the contract which was then entered [516] into was a good contract, and ought to be performed; on the other hand, it is alleged by the Defendant, that the deviation from the directions of the creditors is fatal to the contract; and that the contract was invalid, in consequence of there being a deviation from the directions contained in the creditors' resolution, the assignee having sold for £310, when the resolution had directed a reserved bidding at £325; this is the only question in dispute between the parties in this cause. The question undoubtedly depends on the nature and effect of the enactments contained in the Act of Parliament. Is the effect of the

such, that any deviation whatever from the resolutions of the creditors, directing the manner and the place or places of sale, is to invalidate the contract, or is the effect merely this, that the assignee is to be responsible to the creditors for such deviation, and that the creditors are to have relief against the assignee, personally, in case the deviation has been productive of any injurious consequences to the estate? Now considering what has been decided upon the other question in the case which has been cited, and the form and nature of the enactments which have been referred to in this case, it does appear to me, that the section in question of the Act is merely directory, and if the words had been much stronger than they are, I do not know whether they would have enabled the purchaser to avoid the contract which he has entered into; but taking them as they are, merely a direction that the assignees (whose principal duty is to realize the property) should sell in the manner and at the time directed by the creditors, I cannot think that the proper construction of these words is this: that if they deviate in any way, even in the slightest particular, such deviation is to invalidate any contract they may enter into. That the deviation here complained of should invalidate the contract, one can hardly conceive; if it were to do so, the purchaser would, on every occasion, be entitled to call upon the assignees to shew that they had strictly complied with the minutest particulars. It does not appear to me to be the intention of the Act of Parliament, or the meaning of the words in which the Act is expressed.

No doubt there may be cases in which a deviation may be attended with such circumstances, as would induce a Court to say, that a purchaser shall not avail himself of his contract; because there may be circumstances from which you must necessarily infer collusion between the assignee and the purchaser; but in a case like the present, where nothing of the sort is imputed, or even suspected, and where the deviation is such as here took place, I think there is nothing from which I can infer that the contract is invalid. If the assignee has misconducted himself, or has not exercised a due discretion, he remains answerable. I may observe, that I am inclined to think that the reserved bidding must come within the expression, the "manner" of selling, and that therefore there has been a deviation from the manner directed; but still the deviation is of such a sort and nature, that I cannot come to the conclusion that it invalidates the contract. The contract, therefore, must be decreed; and there being no other objection to the title, declare that the contract is to be performed, and refer it to the Master to approve of a conveyance if the parties differ.

I do not think I ought to charge the Defendant with the costs of the suit. This is to me to have been a new question; and as there was really a deviation, I ought to make the decree without costs.

NOTE.—See *Mather v. Priestman*, 9 Sim. 352; and *Sidebotham v. Barrington*, 4 E. 110.

[518] SALMON v. TURNER. Jan. 22, 1842.

case, where a *subpoena* is served on a Defendant before the bill is filed (the cause being an injunction cause).

In this cause the *subpoena* was served on the 11th, and the bill was not filed till 17th afterwards, viz., on the 13th. The cause was not an injunction cause.

Kindersley and Mr. Hallett moved to discharge the *subpoena* for irregularity, on the ground that the *subpoena* ought not to have issued, until the bill was filed; for by the 4 Ann. c. 16 it is enacted, that no *subpoena* on the process of a Court of Chancery shall issue till after the bill is filed with the proper officer, and a certificate thereof brought to the *subpoena* office, except in cases of bills for injunctions, waste, or stay suits at law commenced.

Pemberton, contra.

THE MASTER OF THE ROLLS. Where a party is served with a *subpoena* before the bill is filed, I thought the practice was, that he goes to the Six Clerks' Office, and

finding no bill on the file, he is entitled as of course to a *subpoena* for the costs. (Hinde, 77.) I never knew of such an application as the present.

The case stood over until the next seal; and the Plaintiff (as I have been informed) conceiving his proceeding to be irregular, abandoned the motion.

[519] SHEFFIELD v. SHEFFIELD. Jan. 28, 1842.

In an Exchequer suit, the Plaintiff after an order *nisi* to dismiss, filed his replication and took no further steps. Held, that it was reasonable that the Exchequer practice should now be applied to this case, in regard to dismissing the bill for want of prosecution.

This bill was filed in the Exchequer, and the Defendant having answered obtained an order *nisi* to dismiss the bill for want of prosecution, whereupon the Plaintiff, on the 17th of April 1841, filed a replication, since which, no proceeding had been taken on the part of the Plaintiff.

By the 5 Vict. c. 5, s. 2, the suits in the Exchequer were transferred to the Court of Chancery, there to be carried on and prosecuted, and dealt with, and decided, according to the practice of that Court, in the same manner in every respect as if such suits and matters had been originally commenced in the said Court of Chancery; and it was provided, that in case it should appear to the Court of Chancery to be just and expedient, that any suit or suits, matter or matters, so transferred to the said Court of Chancery, should be wholly or partially carried on, according to, or regulated by the then present practice of the Court of Exchequer, or that any question or questions arising in the same suit or suits, matter or matters, should be decided with reference to the then present practice of the said Court of Exchequer, it should be lawful for the said Court of Chancery to make such order or orders in relation thereto as to the said Court of Chancery shall seem meet.

It was now moved, on behalf of the Defendant, that the Plaintiff's bill might stand dismissed out of this Court for want of prosecution, with costs, unless the Plaintiff should appear upon such motion, and should undertake, according to the late practice of the Court [520] of Exchequer in equity, to examine his witnesses in the Vacation, and bring his cause to a hearing in next Easter term, not being hindered by the Defendant, and that publication should pass on the first day of next Easter term; and in default of the Plaintiff examining his witnesses, and bringing his cause to a hearing as aforesaid, then that the Plaintiff's bill should stand dismissed with costs without further motion. (2 Fowler, 29.)

Mr. Heathfield, for the motion, argued that this case, being after replication, did not come within the General Orders of the Court of Chancery of 1828. And that if the Chancery practice was to prevail in this case, it would be necessary for the Defendant to dismiss the bill under the old Chancery practice, whereby more than a year would elapse before the Defendant could be relieved from this suit. He urged that this was, therefore, a proper case for acting according to the Exchequer practice, as was asked by this motion.

The Plaintiff did not appear.

THE MASTER OF THE ROLLS [Lord Langdale] thought the application reasonable, and made the order.

[521] PARSONS v. GROOME. Jan. 29, 1842.

The assignor, though party to the cause, must, under the General Order of April 1841, be served with the petition for a stop order.

Mr. Rogers, on an application for a stop order, suggested that it was now unnecessary to serve the assignor, who was a party to the cause, as the General Order of April 1841 (Ord. Can. 161) directs, that persons applying for stop orders should not be required to serve the petition upon the parties to the cause; but,

THE MASTER OF THE ROLLS [Lord Langdale] said, he considered it necessary to shew the assignment, and that the assignor had an interest; and that the assignor ought to be served with a petition presented by the assignee alone.

[521] READ v. SMITH. Feb. 1, 8, 1842.

The Forty-seventh Order of August 1841 is applicable to all cases in which the debts being under the consideration of the Master, and established before him, the costs may be added to the debts, and included in the report. It is not, however, applicable to cases, in which either the Master has reported upon the debts, or the proceedings are in such a state that he cannot open them for the purpose of adding the costs to the debt.

Where a creditor had established his debt, and the Master had issued his warrant on preparing his report previous to the orders of August 1841 coming into operation, but made his report after that period, held that the creditor was not entitled to his costs under the Forty-seventh Order.

The question was whether, under the circumstances, a creditor was entitled, under the 47th Order of August 1841 (Ord. Can. 177, n.(a)), to have the costs of establishing his debt. By that order, "A creditor who has come in and established his debt before the Master, under a decree or order in a suit, shall be entitled to the costs of establishing his debt."

[522] It appeared that the creditor had proved his debt, and that the Master had issued his shew-cause warrant, and the warrant on preparing his report, previous to the Orders of August 1841 coming into operation (26th November 1841); but the creditor made his report subsequent to that time.

Mr. Bacon contended, that the creditor was entitled to have his costs of establishing his debt added to his debt; for, by the 51st Order of August 1841, it was ordered, that the foregoing orders shall take effect as to all suits, whether now depending or after commenced on the last day of Michaelmas term 1841," so that the orders were retrospective. The 47th Order in terms applies to all cases in which a creditor comes in and established his debt.

Mr. Pemberton and Mr. Little, *contra*. The effect of the construction contended would be, to give to all creditors, however long ago they may have proved their debts, the costs of proving, even to those who have received payment; and the Master would, in all cases, be compelled to review his report as to every debt. This cannot have been the intention of the framers of the orders. Again, it would be impossible to ascertain the amount of the costs: for, by the 67th Order of April 1828 (Ord. Can. 117), it was ordered that the Master shall not receive further evidence as to any debt depending before him, after issuing the warrant on preparing his report. It would be necessary to have further evidence to enable the Master to tax the costs, which the Master is by this General Order prevented receiving. The word "has" in the 47th Order must be read "shall," otherwise it will not apply to future cases. The cases were evidently those in-[523]-tended. They referred to a case of *Spencer v. Wigram*, before V.-C. Wigram, December 8th, 1841, in which His Honor held, that a creditor who had proved his debt previous to the Orders of August 1841 coming into operation, is not entitled to interest thereon under the 46th Order.

Mr. Bacon, in reply. The Master requires no further evidence, in order to tax the costs. It is unnecessary to argue whether the order is retrospective in a case where the matter has been finally settled, and when the Master must open his report; but the matter was open until the Master had made his report, which was not done until the orders had come into operation.

THE MASTER OF THE ROLLS said, he would make inquiry as to what had been done in the other case.

[524] 8. THE MASTER OF THE ROLLS [Lord Langdale]. The question reserved is, whether the creditors who have established their debts in this cause, are, under the terms of the orders of August last, entitled to the costs of establishing them; and it is to be shewn that they are not, because, at the time when the orders came into

operation, the state of the proceedings in the Master's office was such, that the Master was precluded from receiving any new charge or evidence. I think that the order is applicable to all cases, in which, the debts being under the consideration of the Master and established before him, the costs may be added to the debts and included in the report; and that it is not applicable to cases in which, either the Master has reported upon the debts, or the proceedings are in such a state, that he cannot open them for the purpose of adding the costs to the debt.

[524] GREEN v. MAITLAND. Jan. 22, 24, 26, Feb. 10, 1842.

A consignor who has purchased goods on account and at the risk of his correspondent and delivered them to the carrier, has no right, by reason of a variation of the accounts between him and his correspondent, or of a disagreement between them, to depart from his duty and deliver them to another person; and a party taking from the consignor with notice of the circumstances is subject to the rights of the correspondent.

Mr. Kindersley and Mr. Rolt, for the Defendants Messrs. Maitland, moved to dissolve the injunction obtained in this case; first, on the ground that the Plaintiff had suppressed material facts on obtaining it; and, secondly, on the merits.

There was a cross-motion for a receiver.

Mr. George Turner and Mr. Lewin, for Gibbes, Bright & Co.

Mr. Pemberton and Mr. Prior, for the Plaintiffs.

The circumstances of the case are fully stated in the judgment of the Court.

THE MASTER OF THE ROLLS [Lord Langdale]. In this case I have read the affidavits and the answer of Robert Forsyth Maitland. There are two motions, one to dissolve an injunction which was obtained *ex parte*, the other is a motion, made upon notice, by the Plaintiffs, for the appointment of a receiver; and having regard to the allegations and evidence upon which the motion to dissolve the injunction, the opposition to the appointment of a receiver are founded; considering also the situation of Messrs. Gibbes, Bright & Co., and the knowledge which they appear to have possessed, at the time when they became interested in the cargo of the "Jamaica," I am of opinion, that the order to be made on this occasion depends upon the merits, as [525] they appear in the evidence now before me, between the Plaintiffs and Messrs. Maitland. I do not think that Messrs. Gibbes, Bright & Co. can be considered as purchasers for valuable consideration without notice of the transaction between the Plaintiffs and Messrs. Maitland; or that the injunction was so obtained as under the circumstances of this case to deprive the Plaintiffs of their right to maintain it, if there are sufficient merits proved.

The case is as follows:—In and before August 1841 the Plaintiffs carried on business in London, under the firm of Green, Meares, & Richards. The Defendants Robert Forsyth Maitland and Edward Maitland, carried on business as merchants in London, and at Montreal and Quebec in Canada, under the firm of R. F. Maitland & Co., the Defendant R. F. Maitland being the partner resident in London.

Various dealings had taken place between the two firms. Amongst other transactions, the Defendants the Maitlands had, on account of the Plaintiffs, purchased and paid for the cargo of a ship called the "William Salthouse," in respect of which there was some arrangement that the Plaintiffs should accept bills for the Maitlands to the amount of £2000, and the Maitlands had placed in the hands of the Plaintiffs an amounting to about £3500, which the Plaintiffs were to get discounted, on the account and for the use of the Maitlands.

In the month of September 1841 the Plaintiffs alleged that the Maitlands were greatly indebted to them; and on the 8th of September, the first letter relating to the transaction in respect of which the present dispute arose, was written by the Plaintiff to [526] Edward Maitland in Canada. The Plaintiffs were the owners of a ship called the "Cheverell," which they were about to send to Canada for a cargo of flour. The letter was expressed as follows:—"Per 'Cheverell.' The above vessel belongs to ourselves, leaves us this day for Quebec, where it has been arranged with

senior, that she shall load a cargo of flour (of Canada fine flour), perfectly sweet and sound, which we request may be put on board with all possible dispatch. In giving you this order, we do not limit you at all as to the price you are to pay, but we trust that it will be purchased on the most favourable terms, ruling, at the time you receive this order." And after desiring the vessel to be loaded with timber, if flour could not be procured, the letter proceeded:—"We refer you for all other particulars relating to this transaction to your Robert Forsyth Maitland, with whom we have concluded the arrangements, and you will please advise us in due time as to insurance," &c.

The communication, made to Edward Maitland by Robert Forsyth Maitland on the subject, is dated the 18th of September, and is as follows:—"Green & Co. have ordered a full cargo of Canada fine sweet flour by the 'Cheverell,' and I hope you will be able to purchase it at credit. What Green suggests is this, that you shall value on him for the account of the cargo, *per* 'William Salthouse,' in drafts not less than sixty days' sight; and with the proceeds you can purchase the cargo ordered. The great difficulty, I apprehend, is your being able to negotiate the bills, unless you do so through Dunscomb or some other friend. Green and I wish particularly that you should not make any draft on Green, Meares, & Richards on account of the cargo *per* 'Cheverell,' we having promised Meares, to keep him in humour, that this shipment should come [527] as a remittance by Green, who will see your drafts in order for the cargo *per* 'William Salthouse,' &c. From this letter it is apparent that the intention of the parties to the arrangement was, that the shipment by the "Cheverell" was to come as a remittance, and that the Plaintiff, Mr. Green, in connection with the shipment, agreed, that he would see the drafts in order for the cargo by the "William Salthouse."

It does not appear what were the circumstances which gave rise to this particular arrangement; what were the difficulties which had arisen respecting the drafts for the cargo by the "William Salthouse," or why seeing those drafts in order, was connected with the intended shipment by the "Cheverell." But the arrangement between the Plaintiffs and Robert Forsyth Maitland seems to have been, that the shipment by the "Cheverell" should come as a remittance, and that the drafts for the cargo, *per* "William Salthouse," should be duly attended to.

The order appears to have been accepted upon the terms agreed upon by Edward Maitland, who, on the 28th of October 1841, wrote to the Plaintiffs as follows:—"We addressed you on the 27th of September; and by last steamer, we had the pleasure of writing a few lines to your Mr. Green, whom we requested to inform you, that we had received your much-esteemed favour of the 8th of September, advising us to be despatched to our address at Quebec your ship the "Cheverell," to load a cargo of flour for your account and risk; and we have to assure you, that it has received most particular attention." He then states his regret that the "Cheverell" had not arrived, and further, that he had made certain purchases in execution of the order, and he then proceeds:—"When we last ad-[528]-dressed you, we stated, that we did not propose drawing on you for the 'W. S.'s' cargo: we however had cause for this determination, and have now to beg your honour to following drafts at sixty days' favour. Alexander Simpson." And he then states the particulars of the cargo to the amount of £2000.

This letter shews, what is confirmed by other circumstances, that some doubt or question had been made whether Maitland should draw for the £2000 for the "William Salthouse's" cargo, and that the drafts were drawn pursuant to the arrangement between the Plaintiffs and R. F. Maitland. By a letter of the same date, Edward Maitland desired his partner in England to take care that the bills were cashed on presentation, and in a few days afterwards (2d of November), after cashing the bill, he expressed himself thus: "which you will of course see protected by presentation against cargo of 'W. S.'"

It is, I think, apparent, that the acceptance of the £2000 bills, though to be set off against the cargo of the "William Salthouse," and however arising upon former arrangements between the parties, was agreed to or understood by Mr. Green, in consideration of the intended execution of the order of the 18th of September, for the shipment of a cargo of flour by the "Cheverell."

There is some obscurity about the transaction: some reason, perhaps, to think that something which passed between Mr. Green and Mr. Robert F. Maitland was not fully communicated at the time to Mr. Meares, who, for some reason, was to be kept in humour; but upon the face of the letters themselves the agreement seems to be such as I have stated.

[529] The "Cheverell" not having arrived in Canada, Edward Maitland to some extent, executed the Plaintiffs' order for a cargo of flour, by shipping it on board the "Jamaica;" and by a letter dated the 17th day of November 1841, addressed by him to the Plaintiffs, he expressed himself thus: "After having given your vessel three days longer, ere making any decided move, we secured freight on board the 'Jamaica,' for your port, and the flour, 1265 barrels, leaves the place for Quebec to-night, and we hope she will get away from Quebec on the 22d or 23d. The cost of this flour will be about £2300 currency, on board at Quebec, or about £180 sterling: you will therefore effect such insurance on the shipment as you may think necessary for your own safety," &c. On the 23d of November Edward Maitland wrote another letter to the Plaintiffs, confirming his letter of the 17th of the same month (received the 18th December), and further stating as follows:—"Our Quebec house write us that they do not think the 'Jamaica' can get away before the 24th or 25th, so be governed accordingly; we shall inclose invoice and bill of lading our next."

At the time when these letters were written, Edward Maitland having purchased the flour, pursuant to the order and his own letter of the 28th of October, for the account and risk of the Plaintiffs, had placed it on board the "Jamaica," at the risk of the Plaintiffs; the voyage was to be performed at their risk, and they were advised to effect insurance, and informed that the invoice and bills should be enclosed in the next letter. Under these circumstances, the Plaintiffs had the strongest reason to think that the flour was shipped and delivered to the master of the "Jamaica" for their use, and that the property was theirs.

[530] In the meantime, disputes had arisen between the Plaintiffs and Robert Forsyth Maitland, respecting the account between the two firms; and the Defendant R. F. Maitland says, that the Plaintiffs had intimated an intention to refuse accept the expected drafts on them for £2000, on account of the cargo per "William Salthouse," and also threatened proceedings in bankruptcy; and to avert such proceedings, the Defendant R. F. Maitland assigned to the Plaintiffs certain property by way of security, and entered into certain covenants, and in consideration of which the Plaintiffs agreed to take up certain bills with their own money, and that receiving certain remittances, they would, when presented, accept a draft in favour of the Maitlands for the sum of £2000.

The instruments by which this arrangement was carried into effect, were dated the 11th of November; after which day the Plaintiffs accepted the bills drawn by Edward Maitland for £2000, on account of the cargo per "William Salthouse."

The Plaintiffs allege that they accepted these bills on the credit of the flour intended to be shipped by the "Cheverell," and which was in fact shipped by the "Jamaica." The Defendant R. F. Maitland says, that they were accepted on the credit of the security given by the deeds of the 11th of November. I do not present and upon the evidence now before me, see any reason to think, that the arrangement made in November was intended to supersede the order for the flour, to alter the arrangement, under which the order was given; although the Plaintiffs might, in the month of November and with reference to the state of the account, think it proper to demand and obtain some further security.

[531] Notwithstanding this arrangement made in November, the state of account between the two firms has continued to be a subject of dispute; and several complaints are made by the Defendant R. F. Maitland, as to the conduct of the Plaintiffs, in respect to the bills to the amount of £3500, which the Plaintiffs would get discounted for the Maitlands, and in respect of other matters. Mr. E. Maitland appears to have been dissatisfied with the conduct of the Plaintiffs, and to disapproved of the transaction relating to the intended shipment of flour, by the "Cheverell." He thought it necessary to use great caution, which might have been perfectly proper, if openly and fairly done.

As I have stated, he, on the 17th of November 1841, wrote to the Plaintiffs, and told them to effect such insurance as they might consider necessary for their own safety, and in a letter, dated the 23d of November, he said they should enclose invoice and bill of lading in their next; leaving, therefore, the Plaintiffs to expect, that the bill of lading would be made out and delivered to them; but on the same 17th of November, in a letter to his partner, and without giving the Plaintiffs any warning or notice, he expressed himself as follows:—"I shall, for your government, make out the bills of lading to order, and they will be sent to you to hand over: I take this precaution, in case any unpleasantness has occurred, in which you can command the destination of the parcel, and in this case, see to the insurance, as they might omit to cover it." And although, in his letter to the Plaintiffs of the 23d of November, he had given reason to expect that his next letter to them would enclose the invoice and bill of lading, yet, in fact, his next letter to the Plaintiffs was itself enclosed in a letter addressed to his partner, dated the 26th of November, in which he expresses himself as follows:—"I [532] now enclose a letter for G. M. and R., open for your perusal, enclosing invoice of the flour *per* 'Jamaica,' which you will seal and deliver, if all is going on comfortably with them; and if not, you can retain it as well as the bill of lading sent from Quebec by ship, and by this ship blank indorsed to you, which you can also hand over if you see proper. The amount due, in cash, here on the 22d of November, is £2298, 17s. 11d. currency, or £1889, 10s. 1d. sterling."

The bills of lading arrived in the month of December 1841. The ship "Jamaica" arrived with its cargo on the 1st of January 1842. R. F. Maitland & Co. indorsed the bill of lading to the Defendants Gibbes, Bright & Co., under circumstances, which appear to me to make it necessary to impute to them a knowledge of the transactions between the Plaintiffs and Maitland & Co. They were informed of circumstances, which, in my opinion, were sufficient to shew the interest, and the full extent of the interest, which the Plaintiffs had in the flour. The Plaintiffs filed their bill on the 5th of January, and obtained the injunction which it is now sought to dissolve.

The question is, whether, under the circumstances, it is clear that Messrs. Maitland, by sending the bill of lading to order and indorsing it to them, were enabled to give to Messrs. Gibbes, Bright & Co. a title to the cargo; and I am of opinion that I cannot come to that conclusion.

The cargo was purchased for the Plaintiffs by Maitland & Co., who accepted and executed the order, and instructed the Plaintiffs to insure for their own protection. It is admitted that no circumstances, entitling the Messrs. Maitland to stop the goods *in transitu*, have [533] occurred; there is no bankruptcy or insolvency of the Plaintiffs, but disputes have occurred between the firms as to the state of the accounts between them.

If the state of the accounts is material in the consideration of the question between the parties, they must be taken before the question can be determined.

No instance has been cited, in which the consignor of goods, having purchased them on account and risk of his correspondent, and having undertaken the duty of consigning them to the person on whose account and risk the purchase was made, and having given notice of their delivery to the carrier, has been held entitled, by reason only of the variations of a general account between the partners, or of circumstances unpleasant or uncomfortable taking place between them, in the absence of insolvency, to depart from the duty which he had undertaken, and deliver the goods to another person.

I apprehend that there may be circumstances, in which the purchaser may not acquire an absolute property in the goods which have been shipped on his account and risk; there may still be some condition to be performed, some act to be done, without which, according to the dealing between the parties, the purchaser may not be entitled to have the goods actually delivered to him. But, in such a case, the nature of the condition and the right to require its performance ought to be shewn by contract, or to appear from the circumstances.

As this case appears upon the evidence now before me, I do not find any sufficient reason to conclude, that the Maitlands were entitled to impose any condition on [534] the delivery of the flour to the Plaintiffs, and it appears to me that the injunction must be continued till the right can be determined.

[534] GARDNER v. M'CUTCHEON. Jan. 31, Feb. 1, 8, 16, 1842.

[See *Dean v. MacDowell*, 1878, 8 Ch. D. 355. Cf. *Aas v. Benham* [1891], 2 Ch. 244.]

The master of a ship is bound to employ his whole time and attention in the service of his employer, and *semble*, that a custom allowing such master to trade on his private account during the voyage, cannot be maintained.

The master and part-owner of a ship purchased goods during the voyage, which in answer stated were purchased out of private property and the profits of private trade during the voyage, but the Court considering there were strong grounds for thinking that the goods were purchased with partnership property, or with money for which the Defendant was accountable to the partnership, and that they belonged to the partnership, restrained him from receiving the goods.

Affidavits were filed in support of an application for an injunction, to restrain the master and part-owner of a ship from taking possession of goods claimed by him as his private property, and by the other partners as partnership property; and which the Defendant put in his answer, and several affidavits were subsequently filed on both sides. Held, under such circumstances, and on such an application that the answer could only be treated as an affidavit.

This case came on upon several motions, the particulars of which are fully detailed in the judgment of the Court.

Mr. Pemberton, Mr. George Turner, and Mr. J. Anderson, for the Plaintiff.

Mr. Spence and Mr. J. H. Palmer, *contra*.

THE MASTER OF THE ROLLS [Lord Langdale]. This case came on upon a motion to restrain the Defendant John M'Cutcheon from receiving certain wools, which were consigned by him to the Defendants Magniac, Smith & Co., and upon other motions the object of which, on the part of the Plaintiffs, is to have the wools or the proceeds thereof secured, until the question between them and M'Cutcheon, which is to be decided in this cause, can be determined, and the objects of which, on the part of M'Cut[535]-cheon, is to obtain for him the disposition of the wools, or the proceeds thereof at this time.

Mr. M'Cutcheon was part-owner and master of the ship, "Jean," with which he sailed from England in 1838, on a voyage to the Eastern seas; and after carrying on an extensive trade in several ports, and employing the ship on freights on several occasions, he sold her at Sydney, in August 1840. About or soon after the time of the sale of the ship, he made large purchases of wools, in part of which Messrs. Hunter & Co. had an interest. Those wools were sent to England; some of them were on board the "Caledonia," others on board the "Minerva," and the rest on board the "Spartan," and were consigned to the Defendants, Magniac, Smith & Co.

The Plaintiffs and the Defendant M'Cutcheon, being the co-owners of the ship "Jean," and all the owners being interested in the common adventure, the Plaintiffs insist, that the wools in question were purchased with partnership property, and on a partnership account, and they therefore claim the wool as property belonging to the partnership.

The Defendant, on the other hand, insists, that besides acting as master of the ship, and trading on the joint account, he had a right to trade, and did trade, on a separate and private account; that such private trading was profitable, and that he purchased the wool with his own effects.

The Defendant M'Cutcheon was master of the ship and partner in a trading adventure, and as a general rule, there can, I apprehend, be no doubt, that the master of a ship is bound to employ his whole time and attention in the service of his employers; and that a [536] partner in trade has no right to employ the partnership property in a private speculation for his own benefit.

The Defendant, however, alleges, that there is a custom, which makes it lawful for him to carry on such private trade, as he did in this case; and moreover, that the Plaintiffs well knew that he did carry on his private trade; and acquiesced in doing so.

Before the ship departed, the Plaintiffs, as managing owners, agreed to charter her to Thompson, Roberts & Co. of Batavia, merchants, under an agreement, which provided that the ship was to proceed, with all convenient speed, to Batavia, with leave to proceed therefrom to a port in China, and thence to Batavia; the whole earnings up to the time of her arrival there, to be for the benefit of the owners; and on her arrival there, on being reported ready, she was to be at the disposal of Thompson, Roberts & Co., for a limited time, on certain terms; and the ship was to be for the benefit of all cabin passengers, and the owners were to have no interest in her, except rice when purchased for joint account.

Mr. M'Cutcheon had authority to employ the ship, either in freighting her on charter-party, or trading on adventure; and on the 20th of April 1838 the Plaintiffs gave him the charter-party they had entered into with the agents of Thompson, Roberts & Co., and they expressed themselves as follows:—"We have to request that you give us, as often as you can, particular accounts of your receipts and payments, and all the information you can give us; and on the expiration of your charter-party, you can find that you can do better, by employing her solely on 'owners' account, give you liberty to do so, and to retain in hand sufficient funds for that [537] purpose; but we would caution you against speculations, and at all times prefer a safe charter;" and after referring to the length of the intended voyage, the letter ended: "In case a favourable opportunity should offer for disposing of the ship, we have given you a power of attorney to enable you to do so."

The Defendant says, that when the ship sailed, he took with him on the voyage descriptions of property, consisting of preserved viands, wine, beer, spirits, hams, trinkets, clothing, and divers other goods, wares, merchandizes, and articles belonging to himself, together with his own nautical instruments, amounting in value altogether to £900 or £1000. An insurance to the amount of £400 was effected on his nautical instruments and other personal effects. On the 31st of October 1838, and again in January 1840, he desired this insurance to be renewed.

It is not necessary, for the purpose of disposing of these motions, to trace minutely the progress of the ship, or to consider each separate transaction. The ship was employed by M'Cutcheon, sometimes in freighting or charter, sometimes in trading. He says, that he carried on some trade on his own private account, and that his transactions were carried on whilst the ship was chartered, with leave of the Plaintiffs; but he does not allege, that he alluded to his private trade in his correspondence with the Plaintiffs, otherwise than as I shall hereafter notice.

On the 4th of October 1838 he was at Manilla; he had some flints on board, and on the 11th of that date he says, "The flints have turned out an expensive and unsuccessful speculation; and my cheese and hams were not much better." He desires to be understood from [538] this, that his partners knew that he carried out the cheese and hams on a trading speculation, for his private benefit, and that as they had no objection they must be taken to have consented.

On the important adventure, which he says was a private dealing, of which he is desirous to take the sole benefit, took place in the winter of the years 1839-40.

On the 17th of October 1839 he was at Hong Kong, in China, and wrote to the Plaintiffs, as follows:—"Dear sirs, I had this pleasure on the 24th ult. from Mr. [539] [redacted], enclosing shipping document *per* 'Jean' and 'Mouritean,' wherein I declare every penny in my possession (save and except a solitary sovereign); I arrived at Macao Roads on the 13th inst.;" and after speaking of his voyage, and that he had anchored at Hong Kong the day before at noon, he says, "I lost no time in writing to our mutual friends, Messrs. M'Vicar & Co., but I am sorry to say that it can be done here peremptorily at present. The present cargo will realise a very small profit indeed, unless a certain spec. answers from this to Manilla, which I shall gladly jump at, and sell my rice there, take on board coarse sugars (ballast), about 150 tons, more or less, return here, fill up with tea, 'by hook or by crook' for Sydney, and when there, you may depend I shall turn the 'Jean,' into a money-making machine, as possibly can," &c.

The letter, written by M'Cutcheon to the Plaintiffs, can only be construed as being to an adventure to be engaged in on the joint account; it could not have

been understood to mean that the speculation which he announced was to be on his private account, that he was to employ his time as master which was due to the [539] joint interest, and the ship, which was the common property of all, for his own peculiar profit.

Being in China, he wanted the means of making a profitable speculation in China by the purchase of teas to be afterwards sold at Sidney. The means by which he was to obtain or purchase the teas are but obscurely hinted at, but from the tea "hook or crook," which he uses, it may be inferred, that there was something in the intended transaction, which was not in all respects, consistent with the regular course of trade in the countries where he was trafficking. If he meant to import opium into China, contrary to the laws of that country, and by means of the opium to obtain an investment of tea, it can hardly be supposed that he at the same time meant to inform his partners, that a speculation in itself illegal and hazardous was meant for his own benefit at their risk.

Not long after the date of this letter, he took the ship to Manilla, he there purchased a quantity of opium, he took it to Tong Koo Bay, in China, there sold it, and purchased a large quantity of tea.

Whilst taking in the tea, and on the 15th January 1840, he wrote to the Plaintiffs, stating that the "Jean" was chartered by Jardine, Matheson & Co. of Hobart Town and Launceston; and, further, expressing himself as follows: "I have this day taken on board the first of our tea cargo (namely 100 chests), I insure the sugar and the entire freight here with friend Burn, and as I fully intend selling the ship, either at Hobart Town or Sidney, I leave the management of the insurance entirely to you, together with my £400 on private effects, conditional on the vessel is not sold."

[540] The Defendant left Tong Koo on the 25th February, and on the following day, he wrote from Macao Roads to his partners as follows:—"I sailed yesterday from Tong Koo, and anchored here this morning with a full ship, and upwards of 200 tons in the cabin (of the cargo). Indeed, had I not stowed the latter, the ship would not have stowed the tonnage agreed on as per charter-party, which would have been a serious loss to us, as the entire chests or boxes shut out would have been thrown on my hands. Although the 'Jean' has now in her bottom 90 tons of stone, and 100 tons sugar in bags, she is still quite crank. Inclosed you have of lading for sugars, &c., which are covered by our mutual friends, M'Vicar & Co. who will forward you the policies with copy of the 'Jean's' account, &c.; in case of accident, I have authorised them to insure on my private investment, and draw on you for the amount of premium which you will please duly honour."

The Plaintiffs have produced the bills of lading mentioned in this letter, and the policies of insurance therein referred to, and which were afterwards forwarded by M'Vicar & Co.

There is nothing in the bills of lading, or in the policies, from which it can be inferred that the Defendant had any separate property or interest in any goods. The expression, "my private investment," seems to refer to the private effects mentioned in the former letter of the 15th of January, and in the policies which he had effected and desired to be continued. And it does not appear to me, that the letter of February can be considered as conveying any information to the Plaintiffs that the Defendant was carrying on a private and separate trade for his own benefit.

[541] The letter alludes to the tonnage agreed to be taken by the charterers, leaving it to be understood that the goods mentioned in the bills of lading were stowed in places to which the charterers were not entitled. From the letter it might be collected that the charterers were entitled to the whole vessel, and that the Defendant leave to carry his own merchandize, which he stowed in the cabin, and that was at his own disposal.

This letter is erroneously set forth in the Defendant's answer, and, as stated, was furnished to the Defendant's counsel the means of supporting a very able and ingenious argument on the behalf of the Defendant; the letter itself, when properly considered, does not warrant the argument; and having now considered all the letters, it is alleged that the Defendant communicated his private dealings to the Plaintiffs, and have come to the conclusion, that upon the evidence now before me, it does not

that the Plaintiffs ever were informed by the Defendant that he was carrying on a separate trade for himself.

It appears to have been with the produce of the teas purchased at Tong Koo Bay, that the wools in question were purchased at Sidney.

It has indeed been argued, that the Defendant might have had credit of his own, and might have purchased the goods with which he traded on that credit; but as there is no evidence of that, I can attach no weight to the argument, and if I ought, at this time, to consider the teas as partnership property, I think that I ought also to consider the wools to be partnership property. The Defendant's case rests entirely on his answer. He says distinctly, in substance, that he took out private [542] property for the purpose of private trade; that his doing so was known to and disavowed by the Plaintiffs: that he carried on private trade accordingly; that private dealings were profitable; and that he employed the money derived from profits, as he had a right to do, in the purchase of the wools, which are therefore his own. He has produced two witnesses, who have stated that the custom of trade justifies such dealing.

On the other hand, the nature of the case, the facts proved, the particular effects set out by the Defendant on his preparation for a long voyage, and his correspondence appear to me to tend to an opposite conclusion.

As to the alleged custom of trade, I could not, even if it were uncontradicted, but if it is not, pay much attention to it on the present occasion. The master of a ship is an agent bound to give all his time and attention to his principal; in this case the duty of the Defendant, as master, was, when the ship was employed on a trading voyage, to act for the common benefit of the owners, and when the ship was chartered, to obtain freight on the best terms he could for the owners, free from all bias of separate interest in himself, or of leave given to himself by the owners to trade for himself; and I think that it will be very difficult to support a custom, which, if legal, as alleged, would entitle him to trade for himself separately, when it was his duty to trade to the best of his ability for the joint interest of himself and the other owners, and would give him a discretionary power to place his own interests in competition with the joint interest, an option to give the advantage to himself, whenever he pleased, without the knowledge of his co-owners, and without giving them notice of his proceedings in this respect; a custom also which would make it valid for a person in the relation of co-owner or partner, having full control over the ship which was partnership property, to employ it at the risk for his private benefit. I cannot, on the present occasion, assume that there is such a custom; I can well conceive that the master of a ship, undertaking a long voyage, and necessarily taking out provisions or private effects of some value, which require change, may not be precluded from parting with those effects for others, in that respect carrying on some trade, and if this were the sort of custom alleged, it would deserve more attention on this occasion; but the Defendant claims something beyond this, and taking all the evidence into account, I cannot rely on the alleged custom: and it appears to me that there are strong grounds for thinking that the wools were purchased with partnership property, or with money for which the Defendant was accountable to the partnership, and that they belong to the partner-

The evidence in this stage of the cause, and taken in the form in which it is now before me, cannot be conclusive; but such is the impression which I have received from a consideration of the answer and of the affidavits.

I am of opinion that I must attend to the affidavits. The application is in effect to prevent the Defendant from getting possession of partnership property in order to apply it to his own use. Affidavits being filed in support of the application, the Defendant put in his answer, and several affidavits have been subsequently filed on both sides. Under such circumstances, and on such an application, I am of opinion that the answer can only be treated as an affidavit.

The Defendant complains that, in the events which have happened, money has been paid to him on account, and that he is deprived of the means of setting himself free by being prevented from taking possession of the wool. I have no means of knowing how this may be; nothing which may be done will prevent him from

claiming any credit in account, to which he may be entitled, and, on the whole, I am of opinion, that the injunction against M'Cutcheon must be granted, and that the injunction against his consignees Messrs. Magniac, Smith & Co. ought not to be dissolved.

It will be well, if the parties, without any prejudice to their respective rights and claims, can agree upon a satisfactory mode of converting the property, and bringing the net proceeds into Court to await the final decision.

See *Thompson v. Havelock*, 1 Campb. 527; *East India Company v. Henchman*, 1 V. jun. 289; *Massey v. Davies*, 2 Ves. jun. 317.

[545] STUBBS v. MOLINEUX. Feb. 11, 21, 1842.

A reference was made to the Master as to a partnership and several other matters, and the parties were to produce all papers, &c., relating thereto; the Defendant was called on by the Master to produce the papers relating to the partnership, having made default, the Master certified that he had been summoned to produce all the papers relating to the matters in question, and had not produced any. A certificate was ordered to be taken off the file for irregularity, and a four-day order founded thereon was discharged.

By the decree, it was referred to the Master to take an account of the personal estate of the testator, and of his debts and legacies, in the usual form, and to take account of the share of the business (known as the firm of "Stubbs & Hancock") stock-in-trade, book debts, leases, and premises thereunto belonging, bequeathed to the Defendant Edward Stubbs by the will of the said testator, bearing date the day of August 1832; and to enquire and state to the Court of what particulars the same consisted, and to what amount or value at the death of the testator, and of what particulars the same now consisted, and what was the present amount or value thereof, and to certify whether the legacies given by the testator were charged thereon. It was ordered, that the Master should enquire and state to the Court, what had been made, since the death of the said testator, by the Defendants; and parties were to produce before the Master upon oath, all deeds, books, papers, writings in their custody or power, relating thereto.

On the 27th of November 1841 a warrant was taken out for the Defendants to produce and deposit in the Master's office, all books, papers, writings, and documents belonging to, or connected with the co-partnership of Stubbs & Hancock.

This was attended before the Master on the 30th of November, when the Defendant alleged that the decree had been improperly drawn up in his absence, and the Master extended the time for depositing the books, [546] papers, writings, and documents in his office until the 3d day of December 1841.

The Defendant did not however produce them within that time, and the Master on the 9th of December certified, that the Defendants Richard Molineux and Edward Stubbs had been duly summoned to bring into his office all deeds, books, papers, writings in their custody or power relating to the matters in question in this suit, that they had not, nor had either of them brought into his office any of such books, papers, and writings, although duly summoned for that purpose. On the 9th day (the 9th of December), and upon this certificate, the Court ordered, that the Defendant Edward Stubbs should, within four days after personal notice, produce upon oath, all books, &c., "relating to the matters in question in this suit," or in default thereof, the serjeant-at-arms should apprehend him for contempt.

It was now moved, that the order of 9th of December 1841 should be discharged, and that the Master's certificate, on which the order was grounded, might be taken off the file.

Mr. Craig, in support of the motion.

Mr. Pemberton and Mr. Rolt, *contra*.

Kemp v. Wade (2 Keen, 686), was cited.

THE MASTER OF THE ROLLS [Lord Langdale] said, that the certificate was taken off the file, and the four-day order discharged. The Master had certified

De-[547]fendant had been summoned to produce all the documents relating to the matters in question, and had not produced any. This was not the case, as he was only called on to produce those relating to the partnership, his disobedience therefore related to those alone.

[547] *BARTON v. CHAMBERS. Feb. 21, 1842.*

party obtained an order on motion, the other side not appearing, but the service of the notice of motion, though regular, was supported by an imperfect affidavit. Held, that he could not subsequently verify the service, and that a new notice of motion must be given.

On a former seal day a motion had been made for opening biddings, and the order had been made upon an affidavit of service of the notice of motion.

The order could not however be drawn up, in consequence of the affidavit of the service of notice of motion not being regular in form; it shewed that the notice of motion had been served on the parties, and not on the clerk in Court. (NOTE.—This affidavit has since been altered; see Ord. Can. 214, 215.)

Mr. Bolt now produced a second affidavit made since the last seal, shewing that the notice of motion had really been properly served on the clerk in Court, and he asked that the order might now be drawn up, but

THE MASTER OF THE ROLLS [Lord Langdale] refused the application, saying that the order having been irregularly obtained on a former day, on an informal affidavit, it could not now be set right in the absence of the other parties, and that a new notice of motion must therefore be given.

[548] *INMAN v. WHITLEY. Feb. 21, 1842.*

Defendant by his answer admitted that he had in his possession "divers books of account." Held, that the particulars were not sufficiently specified to enable the Court to make an order for their production.

It was a motion for the production of documents stated in the Defendant's answer. It is not necessary to state the object of the suit.

The Defendant by his answer admitted that he had in his possession "*divers books of account*, containing sundry private accounts of the said John Inman, respecting his monies and his receipts and expenditure in respect thereof," and after stating circumstances relating to their materiality, he stated, that they did not relate to any of the matters in question in this suit: that they were wholly immaterial to the subject of this suit, and he submitted he was not bound to set forth the titles of such books, or any description thereof further than as aforesaid, or to make the same.

B. Chapman now moved for the production of these books amongst other documents.

Freeing, *contra*.

No objections were raised to the production; first, that the books in question were sufficiently specified; and secondly, that they did not relate to the matters in question.

THE MASTER OF THE ROLLS [Lord Langdale]. I do not think that I can order the production of these books, for the terms in which they are specified in the answer, are too uncertain to found an order for [549] their production, describing them in a manner as to enable the Court to enforce its order.

It is not necessary to decide another point argued, whether the Plaintiff has a right to have the books more accurately described, it must be brought before the Court in another shape, viz., by exceptions for insufficiency.

NOTE.—See Wigram on Discovery (2d ed.), 209; *Atkins v. Wright*, 14 Ves. 213;

and *Christian v. Taylor*, 11 Simons, 401. In *Phelps v. Olive*, 25th of March 1835, Sir C. C. Pepys refused to order the production of documents described as "a bundle of papers marked G."

[549] MICHELL v. MICHELL. Feb. 26, 1842.

Portions for children, held raisable during the life of a tenant for life, out of reversionary term.

The costs of raising portions is payable out of the estate, and not out of the portion. A life-estate in realty was created by a deed in 1787. The estate was sold and invested in 1821 in consols. The tenant for life died on the 9th of December 1841. Held, that her executors were not entitled to an apportionment of the dividends under the 4 & 5 W. 4, c. 22.

By the settlement made on the marriage of Mr. and Mrs. Michell in 1787, estates were conveyed to the use of Mr. Michell during the joint lives of himself and his wife, with remainder to Mrs. Michell for life; but in case Mr. Michell should survive his wife, then to him during the joint lives of himself and the children of the marriage, and from and after the decease of the survivor of Mr. and Mrs. Michell, to trustees for 1000 years, to be computed from the death of the survivor of them, upon the trusts declared; and after the expiration or sooner determination of that term, and until thereafter and the trusts thereof, to the use of the first and other sons of the marriage in tail, &c., &c.

The trusts of the term were declared to be, that in case there should be no more child, other than [550] an eldest, the trustees should, "at any time or after the decease of the said Charles Michell, by mortgage, sale," &c., of the hereditaments comprised in the term, or with and out of the rents, issues, and profits thereof, raise for the portions of the younger children, the sums aftermentioned; that is to say, if there should be one, the sum of £10,000, to be paid at such age and time as Mr. Michell by deed or will should appoint, and in default of appointment, to the younger son at twenty-one, and to a daughter at twenty-one or marriage, "if it should first happen after the decease of the said Charles Michell." If there should be two, three, or more children respectively, £12,000, £15,000, or £20,000 were to be respectively raised, to be paid at such ages and times as Mr. Michell should appoint, and in default of appointment, to be paid to, and be considered vested in, the younger sons at twenty-one, and daughters at twenty-one or marriage.

The settlement contained a proviso for accruer, and a power for maintenance after the decease of Mr. Michell, "out of the rents, issues, and profits" of the hereditaments "not exceeding the yearly interest of the portion of such children, at the rate of 3 per cent., "in the meantime and until his portion should be payable." The trustees were to permit the person or persons entitled, except upon the determination of the term, to receive the residue of the rents.

There was also a power for the trustees "after the decease of Charles Michell, to advance any part of the portion to any such son as aforesaid, not exceeding one-fifth of the portion.

The settlement contained a power for the trustees to sell the estates, and to invest the produce in other [551] estates, to be settled to the same uses; and, in the meantime, to invest the produce in Government or real securities.

Pursuant to that power, the estates had been sold for £23,080, and the proceeds were subsequently, in 1821, invested in £29,400 consols.

There was issue of the marriage several children, all of whom attained the age of twenty-one years in the lifetime of their parents.

Mr. Michell died, Margaret, his widow, survived him, and died on the 9th of December 1841 having received the dividends down to July 1841.

One of the younger children who was of age now presented a petition in the Court for having £20,000 raised for the portions, with interest from the father's death.

The questions were, first, whether the portions were raisable from the death of the father, or from the commencement of the term of 1000 years, which commenced

upon the death of the survivor of the husband and wife. In the former case, interest would be payable from the death of the father.

Secondly, whether the executors of the widow were entitled to have an apportioned share of the dividends on the consols; and thirdly, whether the fund was to bear the costs of raising the portions.

Mr. Pemberton and Mr. Hull, for one of the younger children, and Mr. Tinney, Mr. Willcock, Mr. Turner, and Mr. Faber, for parties in the same interest, contended, that though the term was reversionary, yet the trust [552] was distinct, that the portions were to be raised on the death of the father alone; *Smyth v. Foley* (3 Y. & C. 142), *Codrington v. Lord Foley* (6 Ves. 364).

That the settlement having been made prior to the Act of 4 & 5 W. 4, c. 22, there could be no claim, by the widow's representatives, for an apportioned share of dividends. That the fund must bear the costs, otherwise less than £20,000 would be raised for portions.

Mr. Shapter, for the executors of the widow. It is said that there can be no apportionment, because the 2d section of the statute 4 & 5 W. 4, c. 22, applies only where the payment becomes due "under any instrument that shall be executed after the passing of the Act," but in *Re Markby* (4 Myl. & Cr. 484), the Lord Chancellor seems to have considered "the instrument executed after the passing of the Act," to refer, not to the instrument settling the estate, but to the lease or other instrument, creating or evidencing the rent or other yearly payment. He even entertained the question of right to apportioned rents claimed by the executors of a tenant in fee against the heir at law; and disallowed the claim, not because there was no settlement made after the passing of the Act, but because the letting of the estate was not by instrument executed after the passing of the Act.

Mr. Kindersley and Mr. Pirie, for the heir, said they could not maintain the third point.

[THE MASTER OF THE ROLLS. I think that very clearly against you.]

[553] A discretion is given to the trustees to raise the portions "at any time or times after the decease of the father," which they did not exercise in the widow's lifetime.

The term does not take effect until the death of the surviving parent, and the Court leans against raising portions on a reversionary term, for if the particular tenant were to live long, the estate might be swallowed up to answer the portions and years of interest. *Clinton v. Seymour* (4 Ves. 440), *Stevens v. Dethick* (3 Atk. 39).

The words of the Act, "instrument that shall be executed after the passing of the Act," must clearly apply to the instrument of settlement. In *Re Markby* there was only a letting from year to year.

[THE MASTER OF THE ROLLS. Yes, it was quite sufficient in that case to say that there was no lease in writing.]

Mr. Kimpton, for trustees.

Mr. Pemberton, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. There is certainly some obscurity in the settlement. The portions are to be paid to sons at twenty-one, and to daughters at twenty-one or marriage, whichever event should first happen after the death of the father; but the term out of which they were to be raised was to commence only upon the death of the surviving parent. [554] The only possible way of answering the clear intention would be by raising the portions out of the reversionary term. The Court is always reluctant to raise portions in that way: but when it is necessary, in order to satisfy the intention of the settlement, it must be done. The portion must be raised with interest from the father's death. There can be no apportionment in favour of the widow.

[554] KIRKMAN v. ANDREWS. Feb. 10, 23, 1842.

Plea on information and belief of Plaintiff's bankruptcy. Held regular.

This was a plea for want of parties, on the ground that the Plaintiff, having become a second time bankrupt without having obtained his certificate, or paid a

dividend of 15s. in the pound, was not, for that reason, entitled to sue without making his assignee a party to the suit.

The plea stated that the Defendant "*was informed and believed*" that the Plaintiff had become bankrupt in 1821 (stating in succession the facts upon which the bankruptcy rested), and that he had obtained his certificate; and that he had again become bankrupt in 1827 (stating the facts as before). That the second commission had not been superseded, and that the Plaintiff had not obtained his certificate thereunder, and that no dividend, or a dividend or dividends less than 15s. in the pound had been paid; and the Defendant submitted that the assignee under the second bankruptcy was a necessary party to the suit.

[555] Mr. G. Turner and Mr. W. J. Taylor, in support of the plea, cited *Fenke v. Pratt* (1 P. Wms. 592), *Govel v. Armitage* (2 Anstr. 412), *Ex parte Lees* (16 Ves. 474), *Meux v. Smith* (11 Simons, 410), and before the Lord Chancellor on appeal in March 1841.

Mr. Chandless, *contrà*. The plea is informal; it ought to state the bankruptcy positively; being stated on information and belief only, the fact of information and belief, and not of the bankruptcy, is in issue; secondly, the bankruptcy is not well pleaded, the facts to support its validity not being distinctly stated in succession; thirdly, the plea is double, it raises the issue of no certificate, and no dividend, or a dividend of less than 15s. in the pound. He referred to *Redesdale*, 236, *Drew v. Drew* (2 Ves. & B. 160), *Small v. Atwood* (Younge, 449), *Tarleton v. Hornby* (1 Y. & Col. 172, 333).

Mr. Turner, in reply. An allegation on information and belief is sufficient in an answer, and consequently in a plea, to put the fact stated in issue, and that is all that is required. When a fact is not necessarily within the personal knowledge of a party a statement on his information and belief is sufficient.

[THE MASTER OF THE ROLLS. Would it not have been more correct pleading for the Defendant to say he had been informed and believed, and averred the fact to be]

The fact being put in issue, the present allegation amounts to the same thing. The plea is not double; all the facts lead but to one point, viz., that the assignee is a necessary party.

[556] THE MASTER OF THE ROLLS said he would reserve the consideration of the objection of the plea being on information and belief, but he was of opinion that the averments as to the bankruptcy were sufficient, and that the plea was not open to the objection for duplicity, as the facts stated led to the single point, viz., the necessity of the assignee being present. This was important, because the account asked by the bill ought to be rendered in the presence of all persons interested.

Feb. 23. THE MASTER OF THE ROLLS [Lord Langdale]. Several objections were taken to the form of the plea; they were all disposed of except one, by which the Plaintiff insisted that the plea was bad, because the Defendant, instead of alleging the facts directly and positively, only stated his information and belief that the facts were as alleged.

It was argued that the Defendant, by his plea so framed, did not put in issue a fact, but only his information and belief that such facts were as he alleged; and, in support of the argument, the case of *Small v. Atwood* in the Exchequer (1 Younge & Col. 39) was cited; and the intimation of Lord Redesdale's opinion in his book of Pleading, and the case of *Drew v. Drew* (2 Ves. & B. 162), were referred to.

As the facts stated in an answer upon the information and belief of the Defendant are held to be sufficiently put in issue, and as the allegations in a plea, however positively stated in the plea itself, are, if the statements relate to the acts of others sworn to only upon the belief of the Defendant; and as the facts alleged in this [556] plea are the acts of others, and do not appear to be facts necessarily or probably within the knowledge of the Defendant, I wished to enquire, whether any distinct authority upon the subject, in this Court, could be found, but I have not succeeded in finding any.

Lord Redesdale, stating that the averments in a plea ought in general to be positive (Pleading, 297), refers to a case in 3 Atk. 590, in which the question whether an averment upon belief would be good did not arise; and he observes, that the averments of facts not within the immediate knowledge of the Defendant, it might

man improper to require a positive assertion. He adds, "unless however the averment is positive, the matter in issue appears to be not the fact itself, but the Defendant's belief of it;" and he then says, that the Defendant's conscience is saved by the nature of the oath administered. In *Drew v. Drew* (2 V. & B. 162), which was a case of negative plea, Sir Thomas Plumer says, "Where a person is speaking upon oath to acts not his own, but done by others, it is sufficient if he states them upon belief."

These being all the authorities cited, and I am unable to add any others, it can freely be said, that the rules of the Court of Chancery require a Defendant to plead affirmatively facts which are not within his knowledge; and it is difficult to comprehend, why a statement of fact upon belief in an answer should put the fact itself in issue in answer, and not in a plea.

The fact itself must undoubtedly be clearly and distinctly stated; there must be something distinctly averred, by which the Defendant may be bound, and [558] upon which the Plaintiff may join issue; and in order that the plea may be good, the facts must be clearly and distinctly stated, to which the Defendant binds himself and upon which the Plaintiff may join issue, must be such, that if they are true, there will be a defence to the bill, or constitute a reason why the Plaintiff should not be permitted to proceed with the suit, in the Court or in the manner and form in which it is commenced; I apprehend, that in all cases where affirmative facts are pleaded, the burthen of proving the facts is upon the Defendant who alleges them in his defence, or for his defence. A Defendant who swears that he believes a fact which he knows to be true, may be indicted for perjury; and I think that a Defendant, who, by answer swears that he believes a fact proper for his defence to be true, sufficiently puts that fact in issue, and takes upon himself the burthen of proving it. And on the whole I think the plea must be allowed.

See *Pool v. Pool*, Younge, 331, and 2 Van Heythuysen, 96, where the plea of perjury is on information and belief.

[558] BAMPTON v. BIRCHALL. March 10, 14, 1842.

For subsequent proceedings, see 5 Beav. 67, 330; 1 Ph. 568; 41 E. R. 749.]

It was given to file a double plea to an ejectment bill, viz., not heir; and, secondly, by the Statute of Limitations.

The Plaintiff in this cause was the assignee under the insolvency of Thomas Standish, or Stanley, deceased, who took the benefit of the Insolvent Debtors Act in 1792, and was alleged to have been the heir at law of Sir Frank Standish, who died in 1712. The Plaintiff, claiming in right of the heir, by his bill, prayed [559] a decree that he was entitled to the estates of which Sir Frank Standish died seised, and for such relief, discovery, and accounts, as he might be entitled to in right of the heir, and by virtue of the title which he claimed in that character.

The Defendants alleged, *first*, that Thomas Standish, or Stanley, was not the heir of Sir Frank Standish; and, *secondly*, that even if he were such heir, the Plaintiff's claim for relief was barred by the Statute of Limitations.

A motion was now made, that the Defendants might be at liberty to plead those matters as several pleas to the bill.

G. Turner and Mr. Elmsley, in support of the motion.

Pemberton and Mr. Johnson, *contra*, for the Plaintiff.

THE MASTER OF THE ROLLS said, that permitting such a plea would certainly be to the defence; but the difficulty was, that the defences seemed inconsistent: *first*, that the Plaintiff was not heir; and, *secondly*, that he was heir, but was barred by the Statute of Limitations. His Lordship added, that he would give the matter further consideration.

On the 14. THE MASTER OF THE ROLLS [Lord Langdale]. If the Defendants can plead singly, that Thomas Standish, or Stanley, was not heir of Sir Frank

Standish, and the Plaintiff should take issue on the plea, and succeed, the Defendants would be precluded from pleading [560] the Statute of Limitations; and the Plaintiff having, in the case supposed, established his claim in right of the heir, would succeed in the suit, notwithstanding a good defence to which the Defendants might be legally entitled.

And although I apprehend that the Defendants might plead the Statute of Limitations singly, and fail in maintaining it, without precluding themselves from the defence of "no heir;" yet, in the case thus supposed, it would be necessary for them, either to apply to the Court for leave to plead "no heir" after failure of the first plea, or to make the defence by answer, at the risk of being obliged to give the discovery, and set out the accounts to which the Plaintiff has no claim, otherwise than in right of the heir, which is in question.

I think that the question, whether the Defendants should be allowed to plead double pleas, depends upon the nature of the case, and the convenience which may attend one or other course of proceeding.

I have not succeeded in finding any instance in which two several pleas of the kind now proposed have been permitted; but, on consideration, I find no reasonable objection to them.

Each of them may be a good defence to the bill. If Thomas Standish, or Stanley, was not heir, the Plaintiff has no title. If the right in which the Plaintiff was accrued at such a time, and was so neglected that the Statute of Limitations bars the remedy, the Plaintiff cannot recover; and in pleading the Statute of Limitations it is not necessary to admit that the Plaintiff has, or ever had, any title.

[561] And it appearing to me that it would be no disadvantage to the Plaintiff and a great convenience to the Defendants that the defences should be put in the form of pleas, in order that their validity may be considered before a discovery is enforced, I think that leave must be given to plead as desired.

The Defendant must, however, pay the costs of the application.

See *Gibson v. Whitehead*, 4 Mad. 241; *Hardman v. Ellames*, 5 Sim. 645; *Key Marshall*, 1 Keen, 190; *Story Eq. Pl.* 413.

[561] DAY v. CROFT. Nov. 4, 1841.

An additional legacy (though not so expressed) held subject to the same incidents as the original legacy.

A testator gave a legacy to a *feme covert* for her separate use, and by a codicil gave to her a further annuity in addition. Held, that the latter was subject to the restriction for her separate use.

The testator, by his will, gave and bequeathed to each of the persons to whom annuities were by that his will given, a legacy equal to one half-year's annuity, and he desired the legacies to such several annuitants to be paid as soon as convenient after his decease. And he gave and bequeathed among other annuities, one annuity or yearly sum of £300 to his sister Mary Day, the wife of William Claughton Deane, for and during the term of her natural life. And with respect to such annuities and legacies as were thereinbefore by him given to females, it was his positive and expressed will and meaning, that they should not be subject or liable to the power, control, or disposal of any husband, but should, at all times, be and remain as a provision for them, for their respective sole and separate use and benefit, without power of anticipation.

[562] The testator made several codicils to his will, and by the second codicil thereto, bearing date the 2d day of September 1836, he bequeathed, "in addition to the legacies given by his will," to each of his sisters £100 a year "for their several lives."

This was a petition presented by Mrs. Mary Day for payment to her of the annuities and the legacy. It appeared that she had been for some time living apart from her husband.

The husband insisted that the second annuity given by the codicil, was not given for the separate use of his wife.

Mr. George Turner and Mr. L. Wigram, in support of the petition, contended that the additional annuity had the same quality as the original annuity, and belonged to the Petitioner for her separate use, independent of her husband. *Mayne v. Maynard* (1 Ves. jun. 279), *Crowder v. Clowes* (2 Ves. jun. 449), *Long v. Day* (3 Ves. 286, n.), *Cooper v. Day* (3 Mer. 154), *Chatteris v. Young*, (1) cited in *Cooper*, 760.

Mr. Willcock, *contra*, for the husband. There is a marked distinction made by the testator between the annuity given by the will and that given by the codicil; the former is expressed to be given for her separate use, the latter is not subject to restriction. The marital right of her husband is not therefore excluded as to gifts by the codicil.

[63] THE MASTER OF THE ROLLS [Lord Langdale]. I am of opinion that the annuity given by the codicil is subject to the same restriction as that given by the will. The will having given an annuity of £300 a year for the Petitioner's separate use, the codicil gives an additional £100; the result is, that he has given to her £400 a year subject to the restriction for her separate use; the husband is therefore excluded.

[5] *In re NICKELS' PATENT.* Feb. 1, 15, 29, March 27, 30, May 31, June 5, 1841.

[S. C. on appeal, 1 Ph. 36; 41 E. R. 544.]

petition and practice in correcting clerical errors in letters patent, the proceedings in obtaining them, and in the enrolment.

The object of this petition was to correct a clerical error which had occurred in the proceedings in obtaining letters patent, and consisted in substituting the word "recovering" for the word "covering."

In March 1838 Mr. Nickels petitioned the Queen for a patent for "improvements in machinery for covering fibres applicable in the manufacture of braid and other fabrics." In the petition, declaration, notice, and in the Solicitor-General's report, the word "recovering" was properly stated; but a clerk in the Secretary of State's Office introduced, by mistake, in the Queen's warrant the word "recovering" instead of "covering," this error was adopted in the subsequent proceedings, namely, in the Queen's Signet Bill, the Privy Seal Bill, and in the enrolment, and also (as stated in the petition) in the letters patent themselves; the evidence, however, was ambiguous in the letters patent. In the specification the word "covering" was used.

[64] The Queen's warrant had, by command of Her Majesty, been recently issued, and the following memorandum had been written thereon:—

The word 'recovering' in the seventh line of this page was erased, and the word 'covering' in the same line was inserted in the presence of Her Majesty and by Her Majesty's command.

Whitehall, 23d January 1841.

NORMANBY."

The Queen's Bill, into which also the same error had extended, had also been issued, and the following memorandum made thereon:—

The word 'recovering' in the third line of this bill was erased, and the word 'covering' was inserted in the presence of Her Majesty and by Her Majesty's command.

Whitehall, 23d January 1841.

NORMANBY."

[6 Mad. 31. And see *Burrows v. Cottrell*, 3 Sim. 375; *Overend v. Gurney*, 7 Sim. 237; *The Earl of Shaftesbury v. The Duke of Marlborough*, 7 Sim. 237; *The Commissioners of Charitable Donations v. Cotten*, 2 Dr. & War. 615; *Martin v. Drinkwater*, 11 Sim. 215.

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The Queen's Bill was deposited with the proper officer at Her Majesty's Signet Office; and the signet transcript (the Signet Bill) thereof was deposited with Her Majesty's officer the Lord Privy Seal; but the Privy Seal Bill was, as usual, in the custody of the Master of the Rolls.

The petition prayed "that the proper officer from the Privy Seal Office might be allowed to make the alteration, in accordance with the Queen's Bill, and that the exemplification or enrolment of the letters patent might be corrected according to the transcript of the Queen's Bill.

The petition (which was signed by the Solicitor-General, as signifying his consent to it on behalf of the [565] Crown) came on, in the first instance, *ex parte*; but the Master of the Rolls, having been informed that the Petitioner had commenced an action at law against the London Caoutchouc Company, for the infringement of the patent, and that the London Caoutchouc Company were prosecuting a writ of *scire facias* for the repeal of the patent, directed that notice of the petition should be given to the London Caoutchouc Company, who were to have leave, if they thought fit, to shew cause why the prayer of the petition should not be granted.

Feb. 15, 29. The petition again came on for hearing, when it appeared that the Petitioner had, in June 1840, filed a bill against the company, complaining of an infringement of his patent "for covering;" and that a motion made in August 1840 for an injunction had been ordered to stand over, the Plaintiff being allowed in the meantime to bring his action at law. The Petitioner commenced such action in November 1840, which was still pending, and in January following he was served with a writ of *scire facias* at the suit of the company to repeal the letters patent.

Mr. Tinney, Mr. Dixon, and Mr. Corrie, in support of the petition.

THE MASTER OF THE ROLLS said he must hear the other party first, in the way of shewing cause against granting the prayer of the petition.

Mr. Pemberton, Mr. Kindersley, and Mr. Hindmarch, for the company. When a party applies to the discretion of the Court for an indulgence, he must shew that he makes the application at the earliest moment, and he must state fairly and without reserve all the material facts connected with his case. If anything is withheld, the Court will refuse to interfere.

In this case the Petitioner has suppressed several material facts; first, he has not in any way, explained when the error in the letters patent, if any exists, was discovered; the explanation, such as it is, applies only to the enrolment. Again, he does not appear whether the error has been corrected in the *Signet Bill*, or how the Queen's Bill was altered, and the Court is bound to satisfy itself that all the proceedings anterior to the enrolment have been properly corrected. Nothing is said by the affidavits as to the letters patent themselves, or whether they contain the error. There is something behind unexplained. We call upon the Petitioner to produce the letters patent, in order that it may be seen whether the error is contained in them, or whether they are the original, the enrolment is a mere copy, and it is proposed to alter the copy without correcting the original.

The Master of the Rolls has no authority to make any alteration in the enrolment. The Lord Chancellor himself derives his authority under the Privy Seal Bill, which is in the nature of a writ and cannot be altered after it has been acted on. Writs cannot be altered after they have been served, and if they are resealed they would be considered as new writs. The Lord Chancellor has strictly followed his authority, and if a new authority be given to issue letters patent in a different form, they must be resealed before the enrolment can be altered.

Where a patent is in controversy, it cannot be altered so as to prejudice either the litigant parties. The object of the alteration is to defeat the proceedings. [567] defence of the Respondents; and the parties ought to have proceeded under the 5 & 6 W. 4, c. 83, s. 1, and not in the present mode.

They referred to the 18 Hen. 6, c. 1, to shew that the patent must be dated the day of the delivery of the warrant to the Lord Chancellor; to the 27 H. 8, c. 1, and 57 G. 3, c. 63, as regulating the course of proceedings for passing letters patent; to the 3 & 4 Ed. 6, c. 4, explained by the 13 Eliz. c. 4, to shew that an exemplification of the letters patent might be given in evidence, without producing the letters patent themselves under the Great Seal. They also referred to *Ex parte Hoops* (6 Ves. 68).

The Weavers' Company v. Hayward (3 Atk. 362), *Leigh v. Leigh* (2 Bing. N. S. 464, and Dowl. P. C. 650), *Glen v. Wilks* (4 Dowl. P. C. 322), *Galloway v. Bleadon* (1 Man. & S. 247), *Wynne v. Thomas* (Willes, 563), *Lord Pembroke v. Lord Jeffereys* (1 Salk. 52), *Id.'s Pr.*, *Webster on Patents*, *Beames's Orders*, 76.

Mr. Tinney, Mr. Dixon, and Mr. Corrie, *contra*. The objections are two, 1st, to the jurisdiction of the Court, and 2dly, that the Court will not, in its discretion, exercise its jurisdiction. The cases of *In re Redmund* (5 Russ. 44), and *In re Sharp's Patent* (3 Beavan, 245), and other authorities (1) prove the jurisdiction of the Master of the Rolls to correct clerical errors like the present.

(1) Cases in which, upon search directed by the Master of the Rolls, it was found that amendments had been made.

RECORDS AMENDED.

1 Pat. 2 Hen. 7, p. 1, m. 5. Grant to William Knight. Warrant under the King's hand for amending the name of a forest; warrant annexed to the roll, but the amendment not made.

2 Pat. 8 Hen. 8, p. 2, m. 4. Grant to John Philip amended, by warrant under the King's hand annexed to the roll.

3 Pat. 35 Hen. 8, p. 1. Grant to George Throckmorton. Date of grant amended in the enrolment, by order of Sir Julius Caesar, Master of the Rolls, in the presence of himself, Sir Robert Heath, Attorney-General and others. The roll signed by the Master of the Rolls and the Attorney-General.

4 Pat. 36 Hen. 8, p. 4. Grant to Roger Tavernor and Robert Tavernor amended, by order of Sir Thomas Egerton, Lord Keeper, and the Master of the Rolls, in the presence of himself and Sir Edward Colne, Attorney-General. Roll signed by both.

5 Pat. 36 Hen. 8, p. 12. Grant to Leonard Chamberlaine. Extensive errors amended by order of Lord Bruce, in the presence of himself and a Master in Chancery; signed by both.

6 Pat. 37 Hen. 8, p. 3, m. 24. *Pro Ricardo Lawley and Thomas Lawley*. Name of county amended by order of Lord Bruce.

7 Pat. 2 Edw. 6, p. 4. Grant to Robert Curson amended in presence of Lord Bruce and the Six Clerks. Roll signed by Lord Bruce.

8 Pat. 2 Edw. 6, p. 5. Grant to Sir Thomas Bell and Richard Duke amended by order of Lord Bruce, in the presence of himself and two of the Six Clerks, and "George Curson." Roll signed by all.

9 Pat. 1 & 2 Ph. & Mary, p. 3. Grant to the Merchant Adventurers of England. Roll amended upon petition to Lord Keeper Guildford, with an affidavit of the error, signed by the Master of the Rolls. Petition and affidavit endorsed upon the roll. In the margin of the enrolment, a memorandum signed by Sir Harbottle Grimston, Master of the Rolls, stated that the amendment was made by his order and in his presence.

10 Pat. 1 Eliz. p. 9. Grant to Sir Henry Cary Baron de Hunsdon. The original enrolment found to be full of gross errors was cancelled, and the new enrolment put in front of it by order of Sir Edward Phelips, Master of the Rolls, and the memorandum signed by him.

11 Pat. 5 Eliz. p. 7. Grant to Stephen Holford and John Jenkyns. A single word amended by warrant from King James, after the Attorney-General's report in a petition to the King.

12 Pat. 7 Eliz. p. 3. Grant to Thomas Tyndall. One word amended by order of Lord Bruce. Roll signed by him.

13 Pat. 7 Jac. p. 18, n. 10. Lease to Robert Lewis. Petition to the Chancellor referred to the Master of the Rolls. Petition and reference indorsed upon the roll; in the margin of the enrolment, a memorandum that the amendment was made in the presence of Sir Julius Caesar; but the error remains.

14 Pat. 8 Jac. p. 44. Grant to George Whitmore and Thomas Whitmore. A word "Priorat" altered to "Monaster" by order of Sir Dudley Digges, Master of the Rolls, in the presence of himself and Sir John Bankes, Attorney-General. Roll signed by both.

[568] This is not a case of indulgence, but of strict right. The officers of Majesty have committed an error to the prejudice of the Petitioner, he is therefore [569]-titled to have the matter set right. The cases cited do not apply, they are cases of adversary writs. As to the Signet Bill, though not so stated in the petition it [570] has been actually corrected, and if required by the Court, an affidavit be produced.

[THE MASTER OF THE ROLLS. I cannot advise you upon it. If I do anything upon this petition, it must be upon a complete statement of everything, and I shall seek the assistance of the Respondents, in order to insert such recitals as they consider material to enable them to call in question the validity of what may be said by me. It is pressing on my mind, that if this be a fatal error, and I refuse application, I fix the Petitioner with all the consequences of the error that has been committed; whereas, on the other hand, if I make an order, which, notwithstanding my endeavour to avoid error, may turn out to be illegal, the Respondents apprehend, have the means of being relieved from it; so that there seems to be no chance of doing any real and permanent injury by making an order, than by refusing to make one; but nevertheless, it is necessary to be extremely cautious.

There is no authority for calling for the production of the letters patent themselves. The letters patent are copied from the Privy Seal Bill, but it is the Privy Seal Bill and not the letters patent which is enrolled. The Privy Seal Bill, when enrolled, is the record in the Court of Chancery. The enrolment therefore must be made to correspond with the Privy Seal Bill and not with the letters patent. The purposes of correcting the record, the Privy Seal Bill alone is to be regarded.

[571] The stat. of 5 & 6 W. 4, c. 83, if looked at, will be found quite inadequate to remedy the mistake complained of.

They referred to *Kershaw v. Cox* (3 Esp. 246), *Byrom v. Thompson* (3 Per. 471), *Hudson v. Revett* (5 Bing. 368), *Rowlett v. Orlebar* (6 Taunt. 73), *Cooke v. Cross* (4 Taunt. 644), *Blackmore's case* (8 Rep. 156 a.), *Cross v. Kaye* (6 T. R. 543), 5 Dig. 138, 4th ed.

Mr. Pemberton, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. I shall take time to consider what order ought to be made in this case.

The Petitioner, having petitioned Her Majesty for a grant of letters patent to secure to himself the exclusive use and enjoyment of a certain invention, Her Majesty having been pleased to grant that petition, adopted the usual process for the purpose of obtaining the grant. In the course of the proceedings, an error was made by a clerk in one of the offices in which the proceedings took place, and that error, not being discovered in reasonable time, found its way into the

15 Claus. 9 Jac. p. 8, n. 13. Indenture dated 10th of August, between (1) Morice and Francis Phelips, and (2) Edw. Eden. The enrolment of deed and the request of the grantors, who had acknowledged it in the presence and by command of Sir Edward Phelips, Master of the Rolls. The roll signed by the Master. The words struck out were "feod firm," in the recital of the grant, the land held by fealty.

16 Pat. 9 Car. 2, p. 5. Grant to Sir Kenelm Digby. (Beames's Ord. 66.) Having passed through several stages with the error of a single letter, which occurred at the Signet Office, was, upon petition to the King, ordered by the Lord Chancellor with the advice of the Attorney-General, to be amended and newly sealed.

17 Claus. 7 Geo. 2, p. 9, n. 3. Bargain and sale, Duke of Kingston to the Duke of Devonshire. Date of enrolment of a deed inserted by order of Sir Thomas Clarke, Master of the Rolls.

18 Claus. 46 Geo. 3, p. 117, n. 13. Memorial of annuity deed. Enrolment by Sir John Leach, to be examined with the original, remaining with the Signet Office. Petition, &c., indorsed on the roll.

1824, April 14th, *Re Whitehouse's Patent*, referred to in 3 Beavan, 253.

1830, Jan. 13th, *Re Green's Patent*.

1836, April 15th, *Ex parte Faulkner*.

1836, August 17th, *Ex parte Fisher*, two orders.

ment, which are in the possession of the party, and into that which is called the enrolment of the letters patent, which is in my custody as Master of the Rolls. The alteration consists of the substitution of the word "*recovering*" for the word "*covering*."

After litigation had commenced between the Petitioner and the persons who have appeared to oppose [572] the prayer of the petition, the Petitioner applied to me to have the word corrected in the Privy Seal Bill and in the enrolment of the letters patent. Considering it to be perfectly clear that the error was a mere slip, of which the Petitioner was entirely innocent, I consider it my duty to assist, in every way I can, in its amendment, but in such a way as may be in the least possible degree prejudicial to the party who is likely to suffer by it. It is a matter for the most serious consideration, not only whether I can legally do it, but if I can, in what manner and way it ought to be done.

I have nothing to do with the moral principle on which this application is made. The object, no doubt, is to take the advantage of a slip for the purpose of obtaining the right of the party. I make no observation upon that. The party has a right to take such an objection, if the law allows him to do so, but the question is, whether it ought to be allowed to prevail. Great learning and ingenuity have been shown in the argument, and if it were to prevail, I think it would be an extraordinary triumph of subtlety and technicality over commonsense and justice. At this moment it seems to me that it ought not, and I cannot think that it will ultimately prevail. The objections are of this sort, first, it is said that in the various proceedings which have unfortunately been rendered necessary prior to the letters patent and enrolment, the enrolment has not been rightly done, so as to enable me to have something in a correct form, duly made, whereby I may be enabled to correct the enrolment.

The other objection appears to me to be of a far more serious nature; whatever be the form of making out the letters patent, and the record of the enrolment [573], of the letters patent, there can be no doubt but that it was intended that they should correspond. I am, upon this occasion, asked to make such an alteration in the record, by obliterating the two letters "*re*," so that, when the alteration has been made, the record will not correspond with the letters patent, because it is stated in evidence that the letters patent contain the letters "*re*"—covering instead of *ing*."

It is a matter of most serious consideration whether I have any right or authority whatever, even if I had the letters patent here, to introduce any alteration in the record; I think that I have not, and I am at present strongly impressed with the conviction that what is required to be done cannot be legally and effectually done without the concurrence of the Lord Chancellor. I think that the authority both of the Lord Chancellor and the Master of the Rolls is required in order to do that which is now asked to be done. That is my present impression; and I feel it so strongly, that I cannot think of acting in any way against it, without having a communication with the Lord Chancellor on the subject, in order that I may know what his opinion may be.

As to the Privy Seal Bill, it is the authority upon which the enrolment is made; but it is that Privy Seal Bill coming from the Great Seal Office which is the authority for the enrolment. The Privy Seal Bill coming from the Great Seal Office is acted upon there; and it may be, that, for the purpose of this application, it may be sent back there, in order that the proposed alteration may be taken proper notice of there. I say this, although I cannot quite concur in the proposition advanced in the argument, that it is necessary for me to see that every anterior step has been strictly and duly followed. What I have got here, may, for [574] anything to the present venture to say to the contrary, be quite sufficient. I have got the sign-manual, the Queen's Bill, and the consent of the Solicitor-General to the alteration. If, indeed, every step prescribed to be taken in this case, were to be taken for the security of the Crown to prevent improvident grants of patents, it might be necessary, for the purpose of an amendment, to have the sanction of every officer through whose office the patent has passed; but I have once or twice called to the attention of the learned counsel upon the principle so many steps have been required—the principle, I am afraid, is not the purpose of giving greater security, but for the purpose of creating revenue,

which revenue has been entirely satisfied by what has been already done. However (although I throw that out now), I shall reserve the consideration how this matter to be dealt with. If I make any order, I shall endeavour to do that which is right and I shall communicate it to the parties; but I shall make no order until I have had a communication with the Lord Chancellor, which I cannot at present have, account of the state of his Lordship's health; but as soon as I can, I will communicate with him, in order that I may know what his view is upon that part of the question which seems to me at least to be subject to very considerable doubt.

After making the above observations, the Master of the Rolls had an interview with the Lord Chancellor on the subject of this case, and then stated, that upon evidence as it stood before him, his opinion was that the patentee was entitled to relief; but that the enrolment could not properly be amended, without making corresponding amendment in the letters patent: and that [575] as he had no jurisdiction over the letters patent, the case appeared to him, as it had appeared to Lord Alvanley, in a like case, to require either a joint order or two concurrent orders from the Lord Chancellor and the Master of the Rolls. At that time it appeared to the Lord Chancellor, that if the Master of the Rolls were to make an order for amendment of the enrolment, any party having reason to complain of it would apply to the Lord Chancellor to discharge the order, and that upon the hearing of the application he could exercise the jurisdiction which he had over the letters patent, and by that means cause complete justice to be done, without any joint or concurrent orders of himself and the Master of the Rolls: and in consequence of this view of the case being taken by the Lord Chancellor, the Master of the Rolls made the following orders.

The first was dated the 27th of March 1841. It ordered that the proper officer of the office of the Privy Seal should be at liberty to attend the officer in whose custody the Privy Seal Bill then was, and to amend the said Privy Seal Bill, if he should think fit, by striking out the word "recovering" and inserting the word "covering" in lieu thereof; and it was ordered that the rest of the prayer of the petition should stand over.

The Privy Seal Bill having been amended in pursuance of the liberty given by the above order,

March 30. The second order, dated the 30th of March 1841, was made, when after reciting that the Privy Seal Bill had been produced to the Master of the Rolls by the officer in whose custody it then was, and that it appeared to have been amended, in pursuance of the liberty given by the order of the 27th of March, it was ordered, that the enrolment made from the Privy Seal Bill should be amended, by striking out the word "recovering" and inserting the word "covering" in lieu thereof, so as to make the enrolment conformable to the Privy Seal Bill as amended; and that the proper officer should attend his Lordship with the enrolment for the purpose of such amendment being made in his presence. And it was ordered that a copy of that order should be endorsed on the roll on which the enrolment was made.

The enrolment made from the Privy Seal Bill was amended in pursuance of the last order, and a copy of the order was endorsed on the roll.

May 31. A petition to discharge both the above orders with costs was presented to the Lord Chancellor by the London Caoutchouc Company. After reconsideration and hearing the arguments, his Lordship thought that the object of altering the Privy Seal Bill was merely to authorise the holder of the Great Letters Patent to make corresponding alterations in the letters patent; and that an order should have been procured from the Lord Chancellor for the amendment of the letters patent before the Master of the Rolls made the order for alteration of the enrolment.

June 5. Subsequently the Lord Chancellor (referring to the above case of Lord Alvanley), expressed his opinion that the enrolment and the letters patent should have been concurrently amended; but having regard to the pendency of the case in which the letters patent were to be tried, his Lordship offered to the petitioner certain terms, on which he would attend to an application for the amendment of the letters patent. The patentee declined to accede to those terms, and took no steps to procure the letters patent to be altered. The Lord [577] Chancellor, on the

forwards stated to him, expressed his opinion that the enrolment should be restored to its original state.

August 10. A further communication then took place between the Lord Chancellor and the Master of the Rolls; and finally an order was made on the 10th of August 1811, in the following terms: "Upon the petition" of the London Cautehouse Company, coming on to be heard before the Lord Chancellor in the presence of counsel for the Petitioners and for the Respondent, the said Christopher Nickels, and upon reading the said petition, and the several affidavits filed in support thereof and in opposition thereto, and what was alleged by the said counsel; his Lordship took time to consider his judgment, and having called to his assistance the Right Honourable the Master of the Rolls, upon the subject of the said orders bearing date 19th and 30th days of March 1841, and it appearing that Christopher Nickels, petitioner had not procured the letters patent to be altered according to the Privy Seal Bill as altered: It is hereby ordered and directed, that the order made by his Lordship the Master of the Rolls, dated the 30th day of March last, and indorsed on the roll on which the enrolment of the said Privy Seal Bill is made, be discharged, that the enrolment be restored to the state in which it was before such order was made; and that a copy of this order be indorsed on the said roll.

"COTTENHAM, C.

"LANGDALE, M. R."

[578] JAMES v. JAMES. Dec. 18, 21, 1841.

stood over with liberty to amend by adding parties. The Plaintiffs took out amendment to those parties, and stated so by amendment. The Defendants, by their answer, then objected, that the amendments had been improperly made. The Plaintiffs afterwards filed a second replication. Held, that the Defendants are not entitled to have the second replication taken off the file, unless they showed their objection to the amendments.

The testator devised some estates to trustees on certain trusts for his eleven children.

His bill was filed by two of such children, praying that the will might be proved, and that the interests of all parties thereunder might be ascertained and settled, and that a purchase of part of the property by one of the trustees might be set aside.

The answers of the Defendants objected that the representatives of several of the said children were necessary parties to the suit. A replication having been made, and witnesses examined, the cause came on for hearing in June 1840, and the objection for want of parties then prevailed. The cause was accordingly ordered to stand over, with liberty for the Plaintiffs to amend, by adding parties with apt words to describe them.

The Plaintiffs amended their bill, by stating that they had taken out representation of the deceased children, and by adding, as a new Defendant, an annuitant under the testator's will. The Defendants answered the amended bill, and submitted that the amendments were improper, and claimed the same benefit of the objection as the Plaintiffs had pleaded it.

The Plaintiffs, on the 2d of December 1841, filed a further replication to the Defendants' answer.

It was now moved, on behalf of two of the Defendants who claimed under the will, that the second replication might be taken off the file for irregularity; and that it might be taken off, so far as regarded the Defendants on whose behalf the amendment was made.

Mr. Pemberton and Mr. Freeling, in support of the motion. The proceedings of the Plaintiffs are altogether irregular. They had no right, under the liberty to amend, to introduce new statements by amendment, and sue in a new character as representatives of persons who were not before the Court at the former hearing,

and thus raise a different issue against the Defendants; *Milligan v. Mitchell* (1 Myl. & Cr. 433), *Goodwin v. Goodwin* (3 Atk. 371).

Where parties are added after publication, the cause as to such parties must be heard on bill and answer only. (Hinde, 25, 1 Dan. Pr. 544.) This is the consequence of the rule, that, after publication of the evidence, the Court does not permit a new examination; *Willan v. Willan* (19 Ves. 590), *Taylor v. Obee* (3 Price, 83), *Ward v. Eyles* (Moseley, 377). If it be necessary to use evidence against the new Defendants, it must be taken in a supplemental suit; *Pratt v. Barker* (1 Sim. 1), *Quantock v. Buller* (5 Mad. 81); and a supplemental bill might have been filed under the leave to amend; *Greenwood v. Atkinson* (5 Sim. 419), *Wood v. Wood* (4 Y. & Col. 135).

If this replication were to remain, the witnesses already examined would have to be re-examined, and new questions would be raised between the parties.

Mr. G. Turner and Mr. W. M. James, *contra*, contended that the rule stated in Hinde (page 25) did not apply, [580] that the Defendants had waived all objections to the amended bill by answering it, and that having raised new defences by the answer, it was necessary for the Plaintiffs to file a replication to the answer. That the motion ought to have been to take the amended bill off the file.

Mr. Pemberton, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. This motion has, no doubt, been in a great measure caused by reference to the rule which is stated in the books of practice, that if parties be added after publication, the cause, as to such parties, must be heard upon bill and answer only. It is not in this case necessary to determine upon the correctness of that rule, because it is not strictly applicable to this case, for these parties were not added after publication, but were original Defendants, against whom a new case is now made; they, in their turn, have brought a new case for their defence against the Plaintiffs in their new character, and while seeking to get rid of the second replication, they at the same time reserve their objections to the amendment. The case is involved in difficulties which perhaps require further consideration by the parties. At present, it seems to me that the Defendants are not entitled to take the replication off the file, and also to reserve their objections to the amendment; but if they are willing to waive the latter objection, I should be disposed to relieve them from the replication, unless the Plaintiffs, with the difficulties before them, would prefer making an application to be at liberty to set the cause right, and bring the representatives of the four children before the Court in the regular way.

[581] The parties, by consent, arranged an order on the terms suggested by the Court.

[581] THE PHILANTHROPIC SOCIETY v. KEMP. March 6, 11, 1842.

[S. C. 11 L. J. Ch. 360.]

The Court will not marshal assets for the purpose of giving effect to charity legacies. A testatrix bequeathed legacies to charities and to individuals, and she directed her charity legacies to be paid "out of her ready money, and the proceeds of the sale of her funded property, personal chattels and effects, and not from the proceeds of by sale of her leasehold or real estates;" and she charged her leasehold estates, in addition, with the payment of her debts, funeral and testamentary expences, and legacies not given to charities. The pure personality was insufficient to pay the debts, &c., and all the legacies. Held, that the charity legacies failed in the proportion of the mixed personality to the pure personality.

Ann Sammon, by her will, gave legacies to certain individuals, amounting in the whole to about £4000; and she also gave legacies to charities, amounting together to about £1300 (amongst which was a legacy of £100 to the Plaintiffs), "which said charitable donations and bequests the testatrix directed should be paid and satisfied out of her ready money and the proceeds of the sale of her funded property, personal chattels and effects, and not from the proceeds or by sale of her leasehold or real

estates; and the testatrix charged her leasehold estates, by her said will bequeathed to Sarah Bedcock and Mary Simmonds, in addition to her other personal estate, with and to the payment of her debts, funeral, and testamentary expenses, and of such of the said several pecuniary legacies and bequests thereinbefore particularly mentioned, and not given to charitable uses." The testatrix bequeathed her residuary estate to Sarah Bedcock and Mary Simmonds, to be equally divided between them.

The assets of the testatrix consisted of about £1200 in pure personalty, and £400 in personalty connected with real estate, of which £2985 was the produce of leaseholds, and the remainder a charge on real estate. Her assets were liable to about £500 debts, besides her funeral and testamentary expenses.

[582] On behalf of the charities, it was contended that under the terms of the will, the assets of the testatrix ought to be so marshalled, that the charity legacies should be in the first place wholly paid out of the pure personalty.

On the other hand, it was contended, that the charitable legacies were payable *pro rata* only, or in the proportion which the pure personal estate of the testatrix not specifically bequeathed, bore to the whole of her personal estate not specifically bequeathed.

Mr. Pemberton and Mr. Ellison, for the Plaintiffs.

Mr. Kindersley and Mr. Colville, for the Defendants.

Magg v. Hodges (2 Ves. sen. 52; and 1 Cox, 9), *House v. Chapman* (4 Ves. 542), *Peris v. Walker* (1 Russ. & My. 759), *Attorney-General v. The Earl of Winchelsea* (3 B. C. 374), *Boote v. Blundell* (1 Mer. 193), were amongst others cited.

THE MASTER OF THE ROLLS [Lord Langdale]. The question is, if the Court can marshal the assets in order to give effect to charity legacies. In cases in which there has been a gift of the residue to a charity, there has been no doubt that so much of the residue as is connected with realty fails. There has, however, been a question, whether, where a particular legacy was given to a charity, there could be a marshalling of assets, in order to give effect to the charitable legacies. Lord Hardwicke thought there could be, and there are several [583] cases decided by him in which that has been done. (1) But it has now been decided beyond all doubt, that if a simple pecuniary legacy is given out of two sorts of personalty, there must be an abatement in the proportion of the mixed to the pure personalty. (2) I am not aware of any case in which the present question has been argued. The point was alluded to by Lord Hardwicke in *Arnold v. Chapman* (1 Ves. sen. 110), but he gave no decision on it, as the case before him did not require it. Moreover, there have been one or two cases in which the Court has sanctioned the payment of charity legacies out of the pure personalty, in the first instance: but there is no case in which it has been done after argument; therefore it is a new question. It does not come on in a very favourable form, when the direction is to pay the charitable bequests "out of the ready money, and proceeds of the sale of her funded property, personal chattels, and effects, and from the proceeds, or by sale of her leasehold or real estates;" but we have other directions charging the debts, funeral and testamentary expenses, on the leaseholds, in addition to her other personal estate," and this precludes the assumption that the testatrix exonerated the pure personalty from the payments of the debts and leaseholds. The leaseholds being given "in addition to," and not "in exoneration of" her personal estate, we have the whole personal estate subject to the debts, &c., and the other legacies. The [584] necessary consequence is, that when you come to pay the assets in payment, you must have *pro rata* payments out of different parts of the personal estate; you pay the debts, funeral expenses, and legacies out of the fund, and yet it is desired that the charity legacies should be first paid out of the pure personalty. Here, as in every case, the testatrix intended all the legacies

Attorney-General v. Lord Weymouth, Ambler, 25; *Attorney-General v. Graves*, Ambler, 155; and *Attorney-General v. Tomkins*, Ambler, 216, decided by Lord Hardwicke; and see *Attorney-General v. Caldwell*, Ambler, 635.

Ridges v. Morrison, 1 Cox, 180; *Waller v. Childs*, Ambler, 524; *Attorney-General v. Wall*, Ambler, 614, and 2 Eden, 207; *Foster v. Blagden*, Ambler, 704; *Hillyard v. Wall*, Ambler, 713; *Makeham v. Hooper*, 4 B. C. C. 153; *Hobson v. Blackburn*, Ambler, 273.

to be paid, but it must be done according to the principle of law; and if this were a matter altogether independent of authority, I own I should have thought that good reasons might have been found for marshalling assets. I cannot help very strongly thinking so; but considering the authorities which have prevailed, the language which has been laid down on this subject, and the necessity of having *pro rata* payments, in cases where charity legacies are concerned, I think that something more than is to be found in this will is wanting, to entitle the charity legacy to be paid in full out of the pure personalty. The words in this will seem to me insufficient to enable her intention to be carried into effect in the state of her assets.

The intention was perfectly lawful, and might have been effected in a different way; if there had been words introduced into this will, expressly throwing the other burthens upon the other portions of the estate. In that case, I think, the lawful intention would have been carried into effect, and there would have been no such difficulty as at present appears.

See *Attorney-General v. Lord Mountmorris*, 1 Dickens, 379; *Boyle on Charities*, 356; and *Sturge v. Dimsdale* (M. R. June 1843), 5 Beav. 462.

[585] BROWN v. PERROTT. August 2, Nov. 8, 9, 1841.

After verdict, and before judgment had been entered up, the Defendant sold his leaseholds by auction. Held, that under the 1 & 2 Vict. c. 110, the Plaintiff could not levy execution on the purchase-money.

This case came before the Court on general demurrer. According to the allegations of the bill, the Plaintiff commenced an action at law against Perrott in June 1840, which was tried on the 17th of July when she obtained a verdict for £600. Final judgment was entered up in Michaelmas term 1840, and entered with the Master of the Common Pleas.

The bill alleged, that to defeat the Plaintiff's remedies, the Defendant, who was entitled to certain goods and a moiety of valuable leasehold property, had, on the 26th of July 1840, sold the goods; and that on the 23d of October the leaseholds had been sold by auction to three several purchasers; the Defendant fraudulently representing that the sale had taken place by Sophia Bryan, the administratrix of John Perrott, deceased, she being entitled to the other moiety of the leaseholds.

The bill also alleged that the Defendant made a fraudulent voluntary settlement of the property "pending the matters aforesaid;" and it contained allegations, that but for the fraudulent settlement, the Plaintiff would have been entitled to levy execution on the goods and leaseholds, and on the purchase-money.

The purchases had not been completed, and this bill was filed against the debtor, the several purchasers, the auctioneer who had the deposit, and the trustees under the settlement, not questioning the validity of the sales as regarded the purchasers, but praying, in effect, that the settlement might be declared fraudulent and void [586] as against the Plaintiff, and might be cancelled; that the Plaintiff might be let in to levy execution on Perrott's half of the purchase-money of the leaseholds and goods, or otherwise that the proceeds might be applied in payment of the Plaintiff's demand, and for accounts and an injunction.

One of the purchasers filed a general demurrer.

Mr. G. Turner and Mr. Younge, in support of the demurrer. The Plaintiff has no right to make purchases for valuable consideration without notice, parties to this bill, in which the purchases cannot be completed; he ought merely to have prayed for a receiver, who would have carried the contracts into execution. The bill is multifarious in making the several purchasers, whose contracts are distinct, parties to one bill.

The property was so circumstanced that if the settlement were out of the way, the Plaintiff would not be able to take it in execution.

Mr. Pemberton and Mr. Rogers, *contra*. Under the 1 & 2 Vict. c. 110, s. 13, a judgment operates as a charge on all lands, &c., to which the debtor at the time of

entering up the judgment is entitled "for any estate or interest whatever at law or in equity." The Plaintiff is, therefore, entitled to set aside the fraudulent settlement which intercepts her charge, and to take Perrott's interest in execution.

By the twelfth section the sheriff may seize any money, or bank notes, and "any cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money, belonging to the person against whose effects [587] such writ of *fiery facias* shall be sued out; and may and shall pay or deliver to the party suing out such execution any money or bank notes which shall be so seized or a sufficient part thereof, and may and shall hold any such cheques, bills of exchange, &c., or other securities for money as a security" for the amount directed to be levied, "and may sue in the name of such sheriff or other officer for the recovery of the sum or sums secured thereby if and when the time of payment thereof shall have arrived." The sheriff might have seized and delivered the contract to the creditor, and might have enabled him to sue on it, if it were not for the fraudulent settlement, which ought therefore to be set aside.

Giving notice to the purchaser makes him a trustee for the Plaintiff. They cited *Sagden's Vendors*, 395, 399.

Nov. 8. Mr. Turner, in reply. By the thirteenth section no judgment creditor is to proceed in equity to obtain the benefit of his charge until after the expiration of one year from the time of entering up judgment.

The words "other securities" mean securities for money like those previously mentioned, viz., on bond. No suit for specific performance could be sustained in the name of the sheriff under this Act, for the sheriff could not complete the purchases.

Nov. 9. THE MASTER OF THE ROLLS [Lord Langdale]. In this case I have referred to the notes which I took of the argument when the case was heard on the former occasion, and I am of opinion that the demurrer must be allowed.

[588] The object of this bill is to set aside a settlement alleged to be fraudulent, in order that the Plaintiff may have the benefit of levying execution on a judgment which she has obtained. There are a great many general allegations in the bill, that for the settlement alleged to be fraudulent, the Plaintiff would be entitled to do so, if it rested there, credit might probably be given to those general allegations; upon the bill she has stated a certain number of facts, from which it appears to me she would not be entitled to levy execution, if there had been no such settlement which she alleges, and on that ground it is that I think the demurrer must be allowed.

An appeal was lodged, but the case was afterwards compromised.

[589] CLARKE v. TIPPING. Jan. 18, 1842.

[For subsequent proceedings, see 9 Beav. 284.]

It is not necessary for a Plaintiff in a bill for an account to submit to account himself; a demurrer on the ground of the omission of such a submission was therefore overruled.

This case came before the Court upon a demurrer for want of equity and for want of facts.

It appeared, by the statements of the bill, that the Plaintiff had employed the defendant Mr. Tipping for a number of years, as his agent and factor, and that very private accounts subsisted between them.

In the year 1840, the Plaintiff having become embarrassed in his circumstances, entered into an arrangement with his creditors; and, upon that occasion, it was suggested by Mr. Tipping, and, as the Plaintiff [589] said, believed by him, that Tipping was a creditor to a considerable amount; and the amount of his debt, having been ascertained, was computed at the sum of £2000.

The intended arrangement was carried into effect by a deed-poll dated in November, and a deed of trust dated in December in the same year. By the former, after

reciting that the Plaintiff's debts amounted to £7600, and that the Plaintiff was indebted to the several persons named in the schedule, in the several sums set opposite their names, the several creditors released, &c., the Plaintiff from all demands, &c. This deed was executed by the Defendant Mr. Tipping; but no amount was set opposite his name in the schedule. By the deed of trust, the Plaintiff conveyed certain property to trustees, in trust to convert into money, and divide amongst the creditors, parties to the deed-poll, "in proportion and according to their respective demands."

The Plaintiff, by his bill, alleged that he was induced, by the representations of Mr. Tipping, to believe that there was a debt of the estimated amount due to him; but that he had subsequently discovered that he was, in that respect, deceived, and that, in point of fact, if the accounts were properly taken, not only would the £2000 not be due to Mr. Tipping, but the balance would probably be the other way. The bill prayed, that the accounts might be taken, and that the Defendant might be decreed to pay the Plaintiff what might be found to be due from him, the Plaintiff being willing that the Defendant, if anything should be found due to him on taking the accounts, should "receive satisfaction for the same, according to the arrangement of the year 1840, and in the manner provided by the indenture of December 1840. And that it might be [590] declared that the release of 20th November 1840 was binding on the Defendant John Tipping."

The bill did not make the other creditors, who had executed the composition deed, parties, and contained no offer to pay any balance, which, on taking the accounts, might be found due from the Plaintiff to the Defendant, but it contained the following allegation: "And the said Defendant pretends, that the creditors who may have executed the said deed-poll, are interested in the matters in question in this case, and are necessary parties thereto, whereas your orator charges the contrary of such pretences to be true, and that, by express agreement, such creditors are not interested in any part of the monies subject to the trusts of the before-stated indenture, except the portion thereof which may bear the same ratio to the whole, as the debt claimed by such creditor bore to the sum of £7600 aforesaid, of which it formed part: and that the benefit to arise from the partial or entire failure of the said Defendant's claim to a debt of £2000, or of the claim of any creditor to any debt, belongs not to a person party to the said deed-poll, but exclusively to the Plaintiff."

To this bill the Defendant Tipping put in a general demurrer for want of equity and for want of parties.

Mr. G. Turner and Mr. Rolt, in support of the demurrer. The Plaintiff is not entitled to the relief which he asks: he seeks to set aside the arrangement partly only. It cannot be said that the fraud vitiates a transaction in part only; *Myddelton v. Lord Kenyon* (2 Ves. jun. 408). [591] Lord Loughborough there observes, "If a case was made out, &c., it is impossible upon such a case so stated, that a Court of Equity could give the relief prayed by the bill. The relief prayed is not to set aside the deed as null and void, but to declare that all the trusts are void after that payment of the debts, leaving all those parts to stand and obtain their full effect so far as the payment of the debts goes. The species of relief, it is totally incompetent to the Court to give. The deed may be set aside *in toto*. Any bargain the parties enter into with each other may be declared null, and set aside upon grounds of fraud, practice or influence, &c. These grounds would entitle the Court to set it aside in whole, but I cannot make a new bargain for the parties."

Secondly. The Plaintiff is not entitled to the account, he not having, by his bill, submitted (as he ought) to pay what may be found due from him. The point was decided in *Hickson v. Aylward*, (1) and Sir A. Hart observed, "Where a bill for an account omits the offer on the part of the Plaintiff, to pay what shall appear to be due in balance turn against the Plaintiff, Lord Eldon often decided that would not do." *Huddell v. Watts* (2 Anstruther, 543), *Fife v. Clayton* (13 Ves. 547), the Defendant was driven to a cross-bill if the record remains in its present state.

Thirdly. The other creditors who were parties to the arrangement, are necessary

(1) 3 Molloy, 16. (See *Mason v. Gardiner*, 4 B. C. C. 435; *Parker v. Alcock*, 1 Younge & Coll. 15; and *Graves v. Wright*, 2 D. & War. 77.)

parties to this bill, for they have an interest in cutting down the Defendant's [592] claim, so as to increase the proportions which will belong to them, and not to the Plaintiff; besides which, it is possible that they were induced to sanction the arrangement on the faith of the Plaintiff being indebted to the Defendant to the extent represented. The allegation, that they have been satisfied, is not supported by the facts stated, and if there be any doubt, the statement must be taken against the pleader.

They also cited *Cave v. Foulkes* (Rolls, March 28, 1836).

Mr. Pemberton and Mr. Bazalgette, in support of the bill. The old rule certainly was, that a bill for an account ought to contain a submission to pay, but the contrary is now long been settled. *The Colombian Government v. Rothschild* (1 Sim. 102). Such an offer would contradict the statements of the bill which allege that nothing is due. The Court in granting relief, will do it on proper equitable terms as regards the Defendant. [THE MASTER OF THE ROLLS. There have been cases in which, to the very great surprise of the Plaintiffs, the Court has directed an account against them; in *Buxton v. Buxton*.]

As to the objection for want of parties, it is said, that the dividends to the others could be increased by destroying the Defendant's claim, but that is not so, for the other creditors were entitled in the fixed proportion which the aggregate of their own and the Defendant's supposed debt bore to the whole trust fund; and according to the allegations of the bill, the other creditors have been paid, and by agreement have no further claim. If the other creditors concurred in the arrangement, on the faith of a debt of £2000 being due to the Defendant, [593] and which is not stated on the bill, it might be a ground to set aside the release as fraudulent, but it does not make them necessary parties.

If there be any doubt as to their being necessary parties, it will be more convenient to err by not making them parties at present, than to make them parties now, and for the Plaintiff hereafter to sustain the expence of dismissing the bill against them because they appear to be unnecessary parties. *Mare v. Malachy* (1 Myl. Cr. 574).

Mr. G. Turner, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. It is not disputed that this bill contains sufficient allegations of fraud to entitle the Plaintiff to bring this clause to a trial, provided he has shaped his bill in a proper form. It is said, however, that the bill is informal in this respect:—that the Plaintiff has not offered to account himself, or to pay what, upon the taking of the accounts, may appear to be due from him to the Defendant Mr. Tipping; instead of doing that he has insisted that he is entitled to the benefit of the arrangement in one respect, whilst he seeks to be relieved from it in another.

The argument turns upon the proposal which is made, to confine Mr. Tipping to a sum of money as he may be entitled to on the footing of the trust deed, instead of offering to pay the whole sum of money, which, upon the taking of the accounts, may turn out to be due to him.

[594] In the first place it is to be observed, that a general demurrer for want of relief cannot be allowed, if the Plaintiff appears, upon the record, to be entitled to relief whatever.

The Defendant, alleging, upon the argument of this case, that the Plaintiff cannot be bound to render any account beyond that which he has offered upon the bill, says, that he has not offered upon the bill to do that, which, upon the hearing of the cause, may turn out to be entitled to; he says also, that he ought now to be considered as entitled to have full payment, if the account or the arrangement is in any way disturbed, and that as the Plaintiff has not offered him full payment, he is therefore not entitled to any relief at all.

The real foundation of this argument is the assumption, that the Plaintiff is not bound to account beyond his offer; that is, that he is not bound to account for more, or to give greater relief to the Defendant, than the Plaintiff has offered to give upon the bill.

This point has certainly been a subject very often discussed. It was the subject of difference of opinion between two very great and eminent lawyers; and I

recollect an occasion where, in the presence of two Judges of this Court, it was asked, what would happen upon such a demurrer as this. It was answered by one of them, I should have no hesitation in overruling it—not the slightest. The answer made by the other was, that it required a good deal of consideration, and a difference of opinion was certainly expressed; but occasions have repeatedly occurred, where the Plaintiff, not offering at all to account, and not admitting himself to be an accounting party, but seeking an account against a person acknowledged to be an accounting party, has appeared, at the hearing, to be himself accountable, and there the Court has ordered him to account, and that without any offer having been made on his part. Notwithstanding the opinion of Sir Anthony Hart, which entirely coincided with the opinion he had formed long previously to his deciding the case of *Hickson v. Aylmer*, I think that this Court has often (notwithstanding the doubts which have been raised) ordered the Plaintiff to do that which was just, when he was applying at the hearing to have justice done to himself; and I cannot have any doubt, that if this case were before me at the hearing, and the Plaintiff were to try to confine his liability to the offer he has made, such attempt would fail.

I think that there is in this Court quite sufficient jurisdiction to compel the Plaintiff seeking equity upon a matter of account of this kind, to do equity on his part; and without saying that the Defendant may not be perfectly right in the claim he makes, or that the Plaintiff may not be quite wrong, in insisting that he can have the benefit of the arrangement when he seeks to be relieved from a part of it, I am of opinion that this is not a proper case for a general demurrer. The Defendant, therefore, cannot by general demurrer relieve himself from the duty of answering.

With respect to the demurrer for want of parties, I think it is impossible to be sustained on the allegations in this bill.

It is said, that the allegations that the other creditors are not interested on the bill, are not to be taken to be true; because there is a statement in the bill, from which it may, by a somewhat strained inference, collect a contradiction, and (as it is quite true) that the Defendant is, in [596] such a case, entitled to take the allegations in a most strongly against the Plaintiff, you must take that inference and allegation from his statement, in priority to the subsequently distinct statements which are made in the bill. I think, however, that the allegations in this bill are sufficiently distinct to remove the objection for want of parties.

I am not satisfied that the objection may not in substance be well founded; when creditors enter into a composition with their debtors, they have a right to be made fully acquainted with the circumstances, and to be assured that the statements made at the time are precisely true, in order that they may judge for themselves whether they will enter into such an arrangement or not; the circumstance of the debt being or not being to the amount of £2000 to Mr. Tipping, might have materially affected the other creditors in coming in under the deed. However, on the allegations in the bill, it being distinctly stated that no other creditor has now any interest in the matter, I cannot allow this objection for want of parties. It may also be recollected that this is an objection which the other creditors might be entitled to take advantage of when they come here in a suit of their own, and yet it may not be necessary for Mr. Tipping to bring them here to contest the point. The whole I think I must overrule this demurrer.(1)

[597] HINDE v. BLAKE. May 7, 1842.

[For subsequent proceedings, see 5 Beav. 431.]

Administrator ordered on motion to transfer a sum of consols into Court, upon admission in his examination before the Master, that he had possessed it, and sold it out after the bill had been filed, and had invested it in other securities, which he did not specify.

(1) The case was heard on appeal on the 9th and 11th of March 1842, before Lord Lyndhurst C., who affirmed the decision.

This case is reported on a demurrer, *ante* (3 Beavan, 234). So far as it is material to state them, the facts were as follows:—

William Blake, a lunatic, died in 1838, possessing £11,403 consols; and the Defendant R. D. Blake obtained letters of administration. The Plaintiff, who claimed to be entitled to a part of his estate as the assignees of one of the next of kin, filed this bill in June 1839, for an account of the consols and debts, &c., of the lunatic, and for a division of the residue amongst the next of kin. R. D. Blake was one of such next of kin.

In November 1841 a decree was made for taking the usual accounts.

The cause being brought into the Master's office, the Defendant, the administrator, was examined on interrogatories. By his examination he admitted he had possessed himself of the £11,100 consols belonging to William Blake the lunatic, and that he had since sold out, transferred, or otherwise disposed of all the said Bank annuities; and that "the said Bank annuities were transferred or disposed of by him in or about the month of July 1839, according to the best of his belief. But he said he did not know, &c., when the said Bank annuities were so transferred or disposed of save as aforesaid, nor for what respective sum or sums of money." He also said, "that he considering it advantageous to the estate of the said intestate, and for the benefit of the Plaintiff, should they ultimately be deemed entitled in this suit, but which he had been advised and believed they were not), exchanged, transferred, or otherwise disposed of the said Bank annuities, and obtained or took in lieu thereof securities or property."

Mr. Pemberton and Mr. Bagshawe now moved that the Defendant Robert Dudley Blake might be ordered to transfer into Court, in trust in this cause, the sum of £11,100 3 per cent. consolidated Bank annuities, admitted by his answer and examination to have been possessed and received by him as administrator of William Blake deceased; and also the amount of all dividends which had accrued due thereon since the death of the said intestate. They contended that this sum of money being admitted to have been possessed of by the administrator, and to have been sold out by him, ought to be brought into Court; that the burthen was on the Defendant to show that it had been otherwise properly invested or applied. They referred to the cases in which executors, who had improperly invested the assets on personal securities, had been ordered to pay the amount into Court. *Vigars v. Binfield* (Mad. 62), *Johnson v. Aston* (1 Sim. & St. 73).

Mr. Tinney, *contra*, contended that upon the present admission the order asked should not be made. That the Plaintiffs ought to have required a further answer, and ascertained how the fund was now invested, as it might possibly have been laid upon proper securities, and that, therefore, the cases referred to did not apply. There was no charge of insolvency made against the [599] administrator, and there were no grounds for taking the property out of the hands of the legal personal representatives until the cause came on for further directions.

THE MASTER OF THE ROLLS [Lord Langdale]. I must deal with this case in the way as if the motion were made upon admissions contained in the answer of the Defendant. He apparently has charged himself with this sum, therefore he is *facie* liable for it; but then he says he has disposed of it, but does not explain. What, therefore, I must do is to order the transfer into Court of this sum, leaving the Defendant a sufficient time to enable him to state if he has invested this sum on such securities as can be relied on, and as will entitle him to a reasonable time to call it in.

Therefore, order the Defendant to transfer the whole fund into Court within a month, with liberty for him to apply in the meantime.

See Meyer v. Montrieux, 4 Beavan, 343, and the cases there cited.

[600] JAMES V. BYDDER. July 3, 6, Nov. 12, 1841.

[S. C. 5 Jur. 1076.]

A. B. voluntarily assigned to trustees bonds and promissory notes amounting £600, in trust for himself and his wife and children, and he handed over securities. The trustees gave no notice to the debtors. A. B. received £200 part of the £600 (the securities having been returned to him by the trustees), the remainder was lost by the insolvency of the debtors. A. B. invested the £200 with other monies of his own on freeholds, and by writing acknowledged the £200 to be trust property. He afterwards deposited the title-deeds with the trustees as a security for the whole £600. Held, that the equitable mortgage was valid to the extent of £200 but no further.

In 1819 John Betts voluntarily executed a post-nuptial settlement, whereby he assigned to trustees certain bonds and promissory notes amounting to £600, which were due to him from different persons, and he gave them the usual power of attorney to receive the same. The trustees were to hold the monies when recovered upon trust for the settlor for life, and after his decease for his wife for life, and after their deaths upon certain trusts for their children, of whom there were then three. And the settlor further covenanted with the trustees that he would, within the space of twelve months after the decease of his then wife, pay to the trustees an additional sum of £300 upon the trusts of the settlement.

The bonds and promissory notes were delivered over by Betts to the trustees, but the promissory notes were not indorsed to them, and no notice was given to the persons indebted upon these securities of the assignment to the trustees.

John Morgan, who was one of the trustees, afterwards handed over to John Betts the bonds and promissory notes, and he recovered a sum of £100 secured by a bond and another sum of £100 due on a promissory note, but the remainder of the £600 was lost by the insolvency of the debtors. The £200 received by Betts with other money, applied in purchasing of the Greyhound Inn at Swansea.

In the year 1828 John Betts was pressed by the trustees of the settlement to pay or secure to them [601] the £600 included in the settlement, and on being threatened with proceedings to compel him to comply with their request, he offered to mortgage to them the Greyhound Inn to secure the £600, and instructed his solicitors to prepare a mortgage. A draft of the mortgage was prepared, containing a recital that part of the purchase-money of the Greyhound Inn consisted of a part of the £600 assigned by the settlement. The draft was read over to and approved of by Betts, but on the expense of perfecting it being stated, he refused to execute any deed of mortgage, and proposed, in lieu thereof, to deposit the title-deeds of the Greyhound Inn, in the hands of the trustees, as a security for the £600. The proposal was acceded to by the trustees; the deeds were placed in the hands of the solicitors and continued in their possession or power until the decease of John Betts. No legal mortgage was ever executed.

The wife of the settlor died in 1820; he married again, and had four children by his second wife. In 1836 John Betts, being seized in fee of the Greyhound Inn, made his will, by which he directed, amongst other things, that the Greyhound Inn and premises should be sold, and the proceeds paid to the four children by his second marriage.

John Betts, the settlor, died in 1837, whereupon his widow took possession of the Greyhound Inn, and she afterwards married the Defendant Bydder.

The Plaintiff, who was the surviving trustee of the settlement, filed a bill against Bydder and wife, and against the settlor's four children by the second marriage, and the executor of the testator, claiming, as trustees, on behalf of the objects of the settlement, the benefit of the equitable mortgage of the Greyhound Inn, and praying an [602] account of what was due and a sale of the premises, and an account of the personal estate of the testator, and for payment of what was due out of his real and personal estate.

The following memoranda in the handwriting of Betts were proved :—

"Swansea, 22d of July 1820.—I hereby acknowledge that Mr. John Morgan has turned to me Mr. John Benyon's bond for £100, which he held in trust for my children, and that the amount of the said bond has been received by me and deposited in the bank of Messrs. Gibbins & Eaton, Swansea. The above sum was laid out in the purchase of the Greyhound Inn in the town of Swansea.

"Memorandum, that I have to acknowledge that Mr. John Morgan has the 19th January 1822 returned me the note I delivered to him in trust for my children to Mr. John French for £100, which amount I have laid out in the purchase of the Greyhound Inn in the town of Swansea. JOHN BETTS."

Mr. Kindersley and Mr. Stinton, for the Plaintiff. The equitable mortgage is actual, either to the extent of £600, or at least for the £200 received by the settlor. Where a party voluntarily settles property in favour of others, he cannot afterwards recall it; *Bill v. Curleyn* (2 Myl. & K. 503), *Petre v. Espinasse* (*Ib.* 496). By assignment of the securities and the delivery of the *indicia* of the [603] debts, was done that could be done to give effect to the settlement. That is sufficient, as held in *Fortescue v. Barnett* (3 Myl. & K. 36), in the case of a policy, where one of the assignment had not been given to the office. If the first transaction is incomplete and voluntary, still there was a good and valuable consideration for the second arrangement, for arrears accrued under a voluntary bond form a valuable consideration, sustaining a subsequent conveyance even as against creditors; *Gilham v. Locke* (9 Ves. 612), *Stiles v. Attorney-General* (2 Atk. 152), *Tanner v. Byrne* (*Ib.* 160).

The settlement, being in favour of children, is also supported by a meritorious consideration, which is sufficient to induce the Court to aid it in its operation; *Ellis v. Hume* (1 Lloyd & G. 333), *Ellison v. Ellison* (6 Ves. 656).

As to the sum of £200, the testator received it as agent of the trustees, and he afterwards acknowledged the trust on which it was held.

Mr. Addis, for the Defendants. The first transaction was incomplete, and no assignment of the bonds and notes of hand was or could be made by the parent, and no notice was given to the debtors; the settlement being voluntary and incomplete as an assignment, the Court will not assist those claiming under it, as the children claiming under the will. The equitable mortgage does not assist the Plaintiff in his claim, because that likewise is an incomplete transaction, and it must be contended that two incomplete transactions will, together, have [604] the effect of a perfect one. The relation of trustees and *cestui que trust* was never established, as the trust fund was unreceived, and at the time of the execution of the settlement was in the pockets of the persons owing the money; except as to £200, which was never received. The peculiar circumstances of this case illustrate the advantage of the "*locus penitentiae*," which Sir W. Grant said belonged to a voluntary mortgage; it enabled the parent to act consistently with common justice and his duty, to make a provision for the younger branches of the family who otherwise would have been wholly unprovided for. At all events, £200 only can be recovered by the Plaintiff. He cited *Pulvertoft v. Pulvertoft* (18 Ves. 84), *Antrobus v. Smith* (12 Ves. 404), *Stearns v. Jones* (1 M. & C. 226), *Jefferys v. Jefferys* (Cr. & Ph. 138), *Holloway v. Hopley* (8 Sim. 324), *Ward v. Audland* (*Ib.* 571).

Mr. Kindersley, in reply.

No. 12. THE MASTER OF THE ROLLS [Lord Langdale]. This bill is filed for the purpose of enforcing an equitable mortgage; and being merely equitable, it is necessary to ascertain the consideration for which it was given, and for that purpose to go into the prior transactions.

He found that the mortgagor voluntarily executed a post-nuptial settlement, by which he assigned to trustees certain bonds and notes, and the monies thereby realised to the amount of £600. The securities were deposited with trustees, but it did not appear that any notice whatever was given to the debtors upon that point.

[65] Now, if the matter had rested there, and those monies had afterwards been

realized by the trustees, a state of things would have arisen very different from the which now exists.

As to £400, part of the £600, nothing was ever received, and the securities do not appear to have been delivered back to the settlor; but as to the other sum amounting to £200, the case is very different. It being possible and desirable to recover the sum, the trustees placed the two securities in the hands of the settlor, who actually received the money and signed the memoranda, and identifying the sums, and acknowledging that he had received them in terms which, I own, appear to me to affect him with the trust which he had himself created in respect of those sums. True, the sums which were subject to the trust which he had voluntarily created were in his hands; but, I think, after he had so received those sums, the dealing with them was no voluntary matter upon his part. It appears he laid out the £200 together with other sums in the purchase of the property, which is the subject of the equitable mortgage. What passed precisely on the occasion of his depositing the deeds does not appear, but I infer that all he did upon that occasion was entirely voluntary, that he did not consider that he was submitting to an enforcement of right; he gave instructions for the mortgage which was to extend, not only to the sums which he received, but to all the other sums comprised in the voluntary arrangement. Finding that arrangement more expensive than he at first anticipated, he refused to perfect it. The obligation, if any there was, was not then sought to be enforced against him, but the trustees accepted that which he voluntarily offered, namely, this equitable mortgage. I think that that equitable mortgage cannot extend further than the good consideration which was retained for it, namely, those two sums of £100 each, [606] which, I think, he held affected with the trust which he created, and which he had no right afterwards to dispute at his own pleasure. Plaintiff is therefore entitled to an equitable charge to the extent of £200.

See *Dillon v. Coppin*, 4 Myl. & Cr. 647.

[606] *HYDE v. DALLAWAY. Feb. 17, 1842.*

[S. C. 6 Jur. 119.]

In a suit for specific performance, a purchaser who set up a defence which prevented the Plaintiff obtaining on motion a reference as to title, and failing in establishing it, was ordered to pay the costs up to, and inclusive of, the hearing. Observations on special conditions of sale.

In 1839 the Plaintiffs put up an estate for sale by auction, subject to special conditions of sale. By these, the vendors were to deliver an abstract within four days, and objections were to be taken within twenty-one days after, or the purchase was to be held to have accepted the title. The vendors were to be at liberty within ten days after the return of the abstract with observations thereon, to rescind the contract, on repayment of the deposit and interest in full of all demands.

The sixth condition was as follows:—"All the statements and recitals in any order or document abstracted, or recited in a deed or document abstracted, shall be conclusive evidence of the facts and circumstances, and of the contents of the statements stated and recited; and the vendors shall not be required to produce further evidence of the same, or to deduce the representation to any trustee, in case a term or other legal estate has been vested, or to get in any such legal estate, or procure the concurrence, in the sale or conveyance, of any parties interested in the equity of redemption of the property sold, or to produce any deed or document in their (the vendors') possession; and all certificates of births, burials, and marriages, and all declarations [607] and copies of deeds or documents and assignments, renders and conveyances of outstanding legal estates, shall be at the expense of the person requiring the same, and the completion of the purchase shall not be delayed till such outstanding estate can be got in."

The Defendant became the purchaser for £2700, and signed a contract written

the conditions of sale, by which it was agreed, "that the said particulars and conditions of sale should be taken as the terms of agreement for the said sale and purchase respectively, and be observed and fulfilled by the said J. S. Hyde and H. Dallaway respectively in all things."

The principal question between the parties was, whether, under the terms of the condition, that "the purchaser should not require the concurrence of the parties interested in the equity of redemption," the purchaser could be compelled to take a mortgage which a mortgagee had acquired under 3 & 4 W. 4, c. 27, s. 40.

The vendors filed a bill for specific performance, and the Defendant set up the following defences:—First, that the Plaintiffs had not shewn a good title. Secondly, that both the auctioneer and Mr. Gregg (the vendor's solicitor), repeated several times at the sale that "a good and marketable title could be made;" and that the Plaintiffs were consequently bound to make "a good and marketable title." And, Thirdly, that the Defendant "was the only real bidder," and that the "other biddings" were not real or *bona fide*, but were made by the auctioneer on behalf of the Plaintiffs." In consequence of the two latter defences, the Plaintiffs were unable to obtain, on the usual reference as to title, and at the hearing, the Defendant failed to rebut the two latter defences.

[1808] The cause came on for hearing, when

Mr. Pemberton and Mr. Dunn asked for a decree for specific performance with costs up to and including the hearing, on the ground that the conduct of the Defendant prevented the usual reference. *Taylor v. Brown* (2 Beav. 180).

Mr. Kindersley and Mr. Ramsden, *contra*, contended, that having regard to the conduct of the vendors, and the oppressive nature of the conditions of sale, (1) the Court ought not to decree a specific performance.

THE MASTER OF THE ROLLS [Lord Langdale] held, that the Defendant must pay the costs as had been occasioned by the allegations that the Plaintiffs were bound to make a good and marketable title, and that the Defendant was the only real bidder, including therein the costs of the hearing; and that there must be a reference to the Master to inquire whether a good title could be made according to the conditions, and if so, when it was first shewn.

The Lordship afterwards observed on the difficulty which the Court sometimes has in dealing with special conditions of sale. On the one hand it was hard to say that parties should not enter into contracts suited to their convenience and to the nature of their titles, but, on the other hand, conditions of sale were sometimes of a nature, that it was scarcely practicable to carry them into execution, consistently with the settled principles of Courts of Equity.

[See *Hobson v. Bell*, 2 Beav. 17; *Page v. Adams*, 4 Beav. 269; *Tanner v. Smith*, 2 Beav. 410; *Blacklow v. Laws*, 2 Hare, 40; *Morley v. Cook*, 2 Hare, 106.

Reports of CASES in CHANCERY ARGUED &
 DETERMINED in the ROLLS COURT during
 the time of LORD LANGDALE, Master of
 Rolls. 1841, 1842. By CHARLES BEAVER
 Esqr., M.A., Barrister-at-Law. Vol. V. 1844.

[1] FARRAR v. THE EARL OF WINTERTON. Jan. 12, Feb. 23, 1842.

[S. C. 6 Jur. 204. See *In re Clowes* [1893], 1 Ch. 218. Cf. *Ex parte Hawkins*, 13 Sim. 569; *In re Carter* [1900], 1 Ch. 801.]

A testatrix devised a real estate, and afterwards sold it. The purchase was not completed till after her death. Held, that the purchase-money belonged to the personal representatives, and not to the devisees of the testatrix, notwithstanding her lien on the estate for the purchase-money, and notwithstanding the 1 V. 26, s. 23, which directs "That no conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal therein comprised, except an act by which such will shall be revoked as aforesaid shall prevent the operation of the will with respect to such estate or interest in real or personal estate as the testator shall have power to dispose of by will at the time of his death."

The question in this case was, whether a sum of £2250, 3s. 9d. belonged to the legal personal representatives or to the devisees of the testatrix Ann Chapman.

She made her will, dated the 17th of December 1834, and thereby devised certain freehold estates to trustees, for a term of 500 years, on certain trusts; and as to the term, and to the trusts thereof, to the use of the Petitioners Charlotte Chapman, Catherine Chapman, and Jane Chapman, for their respective lives, as tenants in common, and after the death of any one, to the surviving two for their respective lives, as tenants in com-[2]-mon, and after the death of two, to the surviving one for life; with remainder to Adolphus Cottin, in fee; and she appointed the Petitioners executrices of her will.

She made a codicil of the same date, and by another codicil, dated the 2nd of June 1838, reciting that Adolphus Cottin was dead, she devised the same freehold estates (subject to the trusts to take effect antecedent to the use in favour of Adolphus Cottin in fee), to the use of the Earl of Winterton for life, with remainder to any of his children.

On the 8th of January 1839 the testatrix entered into a contract with Farrar and others; and thereby, in consideration of the sums of £2250 and £250 to be paid as therein mentioned, she agreed to sell to them the freehold estates therein described (being part of the freeholds devised by the will and codicil); and it was agreed, that on receiving payment of the purchase-money, the testatrix or on or before the 26th day of June 1839, execute a conveyance of the land to the purchasers and their heirs.

The purchase was made by or for the trustees of a Wesleyan chapel, and

purchase-money was to be paid out of certain funds standing in the name of the accountant-General of the Court of Exchequer; and by an order of that Court, dated 22d of April 1839, it was referred to the Master, to inquire whether the contract was a fit and proper contract to be carried into execution.

The Master, by his report dated the 29th of June 1839, certified, that the contract was a fit and proper contract to be carried into execution, and that it would be proper to invest part of the funds in Court in the [3] purchase; and he found that good title could be made to the estate.

The report was confirmed on the 5th of July 1839, and it was then ordered that the Master should settle a proper conveyance; but some of the trustees having died, trustees were appointed, and before the draft conveyance had been settled or proved, Ann Chapman, the testatrix, died, without having revoked her will and codicils.

At the date of the will and codicils and of the contract, and at the time of the testatrix's death, the legal estate in the freeholds comprised in the contract was held in Elizabeth Wegg, who, after the death of the testatrix, conveyed it to the trustees of the will.

A bill was afterwards filed by the trustees of the chapel, against the trustees and persons under the will and codicils, praying for a specific performance of the contract; by a decree of the Court of Exchequer, dated the 27th of March 1841, it was ordered that the contract ought to be performed, and a conveyance was ordered to be made to the purchasers; but a question having arisen as to whom the purchase-money belonged, it was ordered that the purchase-money should be carried over to an account, to be entitled, "The account of the personal representatives or devisees of Chapman, deceased."

Certain costs were to be paid out of the funds standing to that account, and the trustees or any other persons were to be at liberty to apply touching the residue of the fund, after paying such costs, as they should be advised.

The Petitioners who were, as already stated, the legal personal representatives of the testatrix, now applied to have the residue of the fund transferred to them.

The argument turned principally on the effect of the recent Statute of Wills (1 & 2 Vict. c. 36), which was applicable to the present case. By the nineteenth section, it is enacted, "that no will shall be revoked by any presumption of an intention, on the ground of an alteration in circumstances."

The twenty-third section it is enacted, "that no conveyance or other act, made subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as afore-said, shall prevent the operation of the will with respect to such estate or interest in real or personal estate as the testator shall have power to dispose of, by will, at the time of his death;" and by the next section, the will is to speak as from the death of the testator.

Tinney and Mr. G. Law, in support of the petition. The fund belongs to the personal representatives, and not to the devisees. By the contract for sale, the testatrix parted with her estate, and must, constructively, be considered a trustee of the fund for the purchaser, and the latter as a trustee of the purchase-money for her; see *Bright* (1 Jac. & W. 500). The testatrix became entitled to the purchase-money, but had no beneficial interest in the estate at her death. The statute does not apply, for, by the sale, the devise was adeemed, and became inoperative. The effect of the twenty-[5]-third section was this: before this act, a devise was frequently defeated by the testator's taking a new limitation of the property to himself, and thus changing the nature or quality of the estate was held to operate as a revocation; the twenty-third section was intended to prevent this effect, and not to abridge the power of a testator of dealing as he pleased with his property. If the words be taken literally, the property would pass to the devisee in a case in which the testator, after making and conveying to the purchaser, took a mortgage on the property or acquired an interest therein.

The most absurd consequences would follow if it be held that the devisee is to have the equitable estate has passed to the purchaser, and would descend to his heirs; it would be strange to hold that it passed also to the devisee of the vendor. If

the devisees take anything, they must hold in the same way as the testatrix; viz., as trustees only for the purchaser. The words of the statute will be satisfied by holding that the legal estate passed to the devisees in trust for the purchaser. They also referred to *Knollys v. Shepherd* (cited 1 Jac. & W. 499; affirmed in the House of Lords, 1 Sug. V. & P. 291, note *z* (10th ed.)) as deciding that the devise of an estate contracted to be sold, was not entitled to the purchase-money beneficially.

Mr. Pemberton and Mr. Dixon, for the devisees. Before this statute, a contract to sell revoked the devise in equity, but not at law. The Legislature has now interfered and expressly declared the contrary, and declares that nothing but a revocation under the Act shall prevent the operation of the will on a devised estate, or, *survivorship* estate and *interest*, in such real estate as the testator may, at his death, have power to dispose of by will. [6] The consequence is, that both the legal and equitable interest passed in the same way as if the testatrix had expressly devised them. The lien on the estate for the unpaid purchase-money, which was a beneficial interest in the estate which the testatrix had the power of devising at the time of her death, therefore passed to the devisees, who can only be compelled to part with the legal estate, upon payment to them of the unpaid purchase-money. There can be no redemption while there is an interest on which the will can operate; *Knollys v. Shepherd* depended on the particular terms of the devise.

Mr. J. H. Law, for another party.

Mr. Tinney, in reply, referred to *Arnald v. Arnald* (1 B. C. C. 401); and an unreported case of *Curre v. Bowyer* (1)

Feb. 23. THE MASTER OF THE ROLLS [Lord Langdale] (after stating the circumstances of the case) said: The Petitioners, who are the legal representatives of the testatrix, now apply to have the residue of the fund transferred to them. They allege that by the contract, the testatrix in equity revoked or annulled the devise; that she ceased in equity to have any interest in the property sold, and that the purchase-money due to her became a part of her personal estate, and was such at the time of her death.

On the other hand, the devisees, stating, as the fact is, that the provisions of the Act for the amendment of the laws with respect to wills, are applicable to the will and codicils of the testatrix, in consequence of the last codicil being executed in the month of June 1838, insist, that according to the provisions of that Act, the will is not revoked:—that, in fact, an interest which would carry with it the purchase-money remained in the testatrix, and make that the subject of the devise.

By the Act, the will speaks from the death of the testator, and all property which a testator possesses at the time of his death passes by the will; and moreover, there are express enactments, that no will shall be revoked by any presumption of intention on the ground of an alteration in circumstances, or otherwise than as in the Act is mentioned, or by another will or codicil, or some writing declaring an intention to revoke the same.

(1) *Curre v. Bowyer*.

(Reported on other points, 3 Swan. 357, and 3 Mad. 456.)

A. contracted to sell an estate; the contract was valid at his death, but the purchaser lost his right to a specific performance, by subsequent *laches*. Held, that the estate belonged to the next of kin, and not to the heir at law.

This case was thus stated by Mr. Tinney, who had been counsel in the cause. A party entered into a contract for the sale of a real estate, and afterwards died before it had been completed. After the lapse of many years, the purchaser filed a bill for specific performance. This was resisted on the ground that the contract had been improvident, and had been obtained at an under-value, and by undue influence. John Leach, however, held that the contract was binding at the death of the vendor, but that by the lapse of time, and by his *laches*, the purchaser had lost his right to have a specific performance, and that the estate belonged to the next of kin, and not to the heir at law.

The testatrix entered into a contract, by which she agreed to alienate her whole interest in the estate; but she did not, in any of the ways pointed out by the Act, revoke the will and codicils; and because she has not done so, the argument is, that the purchase-money, as representing the estate, passed by the devise; but revocation, in the manner directed by the Act, is not [8] the only mode in which a will may be rendered inoperative.

If she had conveyed the estate, and thereby completed the alienation, the will could have had no operation upon it, or upon the purchase-money; and it was necessarily admitted, that the will could not, by the devise of the land, have any operation upon that part of the purchase-money, which was actually paid to the testatrix in her lifetime.

The question, whether the devisees can have any interest in that part of the purchase-money which was unpaid, depends on the rights and interests of the testatrix at the time of her death. She had contracted to sell her beneficial interest in the equity she had alienated the land, and instead of her beneficial interest in the land, she had acquired a title to the purchase-money. What was really hers in right and equity was, not the land but the money, of which alone she had a right to dispose; and though she had a lien upon the land and might have refused to convey the money was paid, yet that lien was a mere security, in or to which she had no right or interest, except for the purpose of enabling her to obtain the payment of the money. The beneficial interest in the land which she had devised was not at her disposition; but was, by her act, wholly vested in another, at the time of her death; and the case is clearly distinguishable from cases, in which testators, notwithstanding revocations made after the dates of their wills, have retained estates or interests in property which remain subject to their disposition.

Being of opinion, that by the contract, the testatrix must, in this Court, be deemed to have alienated the whole of her beneficial interest in the estate:—that at the time of her death, she had no beneficial interest in the land at her disposition, and that the will only passes that which was at her disposition, I am of opinion, that the devisees of the land have no interest in the purchase-money, and that the prayer of this petition must be granted. (NOTE.—See 1 Jarman on Wills, 146; 1 Sugden's Wills (10th ed.), 301; and H. Sugden on Wills. 53.)

[9] LANGTON v. HORTON. Dec. 7, 20, 1841; Jan. 14, 15, April 18, 1842.

[S. C. 11 L. J. Ch. 233; 6 Jur. 357, 594.]

of sale of a whaler, then absent on a fishing adventure, together with all masts, keels, boats, oars, and appurtenances. Held, not to pass the cargo of oil, &c., acquired during the adventure.

of sale of a ship, though absolute in its terms, may, notwithstanding the Ship Registry Acts, be, in equity, held a mortgage, if such appears to have been the real intention of the parties.

mortgagee out of possession of a whaler is not entitled, as against the mortgagor or his assignee of the cargo, to an allowance for the use of the ship.

In the beginning of the year 1837 the Defendant Mr. Birnie, trading under the name of Alexander Birnie & Co., was considerably indebted to the Defendant Mr. Horton. The debt was secured by acceptances of Birnie which were then running, and Birnie, having occasion for further advances, requested Horton to afford him the accommodation.

At that time Birnie was the owner of a moiety of the ship "Ann" and stores, which he then on a whaling adventure in the South Seas, and with a view to the further accommodation which Birnie required, he addressed to Horton a letter, which was in the words:—

"London, 27th January 1837.—Dear Sir,—From the difficulty at present existing in the money market, I am desirous of making the following arrangement with

you : to grant you a bill of sale of the moiety I hold of the ship "Ann" and stores, and deposit with you a policy of insurance for £3000 effected in the Marine Insurance Company on that vessel, and to value on you in bills, to the extent of £4200, which bills I engage to provide for when at maturity, and I propose to pay, out of the bill drawn on you, my acceptances falling due as under :—

£1230	7	6	due 1st of February.
490	7	0	6th.
496	5	0	13th of March.

Your further putting me in funds for £850 as soon as you may be able to do, say the 1st of March," &c.

The proposal made by this letter was acceded to by Mr. Horton, and was the foundation of the transaction, the effect of which was the subject of contest in this cause. Mr. Horton accepted four bills of exchange, which were drawn upon by Birnie for several sums amounting in the whole to £4200, and which were payable at three and four months. Mr. Birnie executed a bill of sale, dated the 1st of January 1837, whereby it was purported, that in consideration of £4200 paid by Horton to Birnie, he, Birnie, granted and sold to Horton, his thirty-two and fourth parts of the ship "Ann," then on a voyage to the Southern Whale Fishery, together with thirty-two sixty-fourth parts of all and singular the masts, sails, yards, anchors, cables, ropes, cords, guns, gunpowder, ammunition, small arms, tools, apparel, boats, oars, and *appurtenances* whatsoever to the ship belonging, or in any way appertaining, to hold the same to Horton, his executors, administrators, and assigns, to his and their own use, and as his and their own proper goods and chattels forever. He covenanted for further assurance. Birnie at the same time deposited a policy of assurance with Horton, who, on [11] the 1st of February 1837, caused a bill of sale to be duly registered at the Custom House.

The four bills were not paid when they came to maturity, but were renewed several times, the stamps, interest, and commission being charged to Birnie.

On the occasion of the last renewal, Horton became the drawer and Birnie the acceptor of the bills. In June 1838 Birnie became insolvent, and he neither paid the bills nor provided funds for their payment.

Down to his insolvency Birnie acted as the owner of the ship, and he, with the knowledge of Horton, made payments on behalf of the seamen, and for keeping the insurance on the ship.

After the insolvency Horton claimed to be the absolute owner. On the 2nd of June 1838 he wrote to the captain stating that he had become the owner, and that time continued to make the different payments on behalf of the ship, and the insurance, and, in short, acted as the absolute owner.

In July 1839 Birnie assigned the same half of the ship, and also of the cargo to the Plaintiffs for securing £3000, and they immediately gave notice to the Defendant. The Plaintiffs tendered their mortgage at the Custom House for registration, but the comptroller refused to register it, on the ground that the Defendant Horton appeared on the register to be the absolute owner of the ship.

The ship having arrived in London on the 9th of July 1839, the Defendant took possession of it and of the cargo, and he afterwards sold them, and retained the produce.

[12] The Plaintiffs, alleging that the bill of sale of the 27th of January 1837, though absolute in form, was intended to operate only by way of mortgage, or as a security for payment of the bills which had been accepted by Mr. Horton, and that the bill of sale comprised only Birnie's moiety of the ship, tackle, and appurtenances, and that they gave to Mr. Horton any interest whatever in the cargo, filed this bill against Horton and Birnie, whereby they prayed for an account of the cargo brought home by the ship "Ann," and of the monies received in respect thereof by the Defendant Horton, and that Horton might be decreed to pay to the Plaintiffs, as trustees under the indenture of July 1839 executed by the Defendant Birnie, a moiety of the proceeds of such monies, after deducting a due proportion of payments made by Horton on account of the master and crew of the ship, and of the insurances; and that

agreed to deliver up to the Plaintiffs any part or the moiety of the cargo which might remain unsold; and that an account might be taken of the money due to Horton on mortgage of the moiety of the ship, and for other relief.

The Defendant Horton by his answer stated that a sale was intended, but that Mr. Birnie provided cash to meet the acceptances for £4200, he should be entitled to have a retransfer of his moiety of the ship; and on the other hand, that if Birnie should fail to provide cash to meet the acceptances when the same became due, Horton was to become absolutely entitled to Birnie's moiety of the ship, tackle, and appurtenances, including therein Birnie's moiety of the cargo of the ship; and he also said "that though he consented that the said bills should, from time to time, be renewed, yet he so consented on the express understanding and condition with Birnie, that if Birnie should fail to provide funds to meet the said renewed bills respectively, when they [13] ultimately became due, he should not be entitled to a retransfer of his moiety of the ship called the "Ann." And he submitted, and humbly insisted that if Birnie failing to provide such funds as aforesaid, he lost all right or title to call on the Defendant to retransfer the said moiety."

There was some parol evidence entered into as to the intention of Birnie and Horton when they entered into the arrangement of the 27th of January 1837; but it is not necessary to state, as the Court, as will be seen in the judgment, deduced from the whole of the circumstances, that a mortgage and not a sale was intended by the parties.

The amount of the debt due from Birnie to Horton, was admitted to exceed the value of the half of the ship and appurtenances, exclusive of the cargo.

Mr. Pemberton and Mr. C. Hall, for the Plaintiffs. The letter of the 27th of January 1837, the evidence in the cause, and the conduct of the parties throughout the transaction, shew that the ship was conveyed to Horton by way of mortgage to secure the payment of the bills, and not by way of sale. Why should Birnie engage, by that letter, to provide for the bills when at maturity, if the transaction was a sale? Why should he pay the seamen, keep up the policy, and incur the expense of renewing the bills, if the ship were the property of Horton? The whole conduct of the parties, until after the insolvency of Birnie, is consistent with the idea of mortgage, but quite inconsistent with a sale.

The bill of sale to Horton did not profess to pass the cargo acquired or to be sold. The words "all [14] masts, &c., and appurtenances" are insufficient for a bill of sale, and the expression "appurtenances," must be construed with reference to other words with which it is associated, and which relate to the equipment of the ship.

Again, cargo acquired by a ship, will not pass as incidental to a ship; it is freight which is the mere rent for the use of the ship, but is the result of a speculation of the owner. A test of Horton's being absolute owner is this, liable for the expenses of the undertaking? Would he have been personally liable if the speculation had been a losing one? He clearly entered into no such speculation. At all events, the Defendant, as mortgagee, can only be entitled to the possession of the ship from the time he took possession, which was in July 1839.

The Plaintiffs have an assignment of the freight and are entitled thereto, and the Registry Acts do not affect the question, for freight and *à fortiori* cargo is payable quite independently of the ship, *Douglas v. Russell* (4 Sim. 524), and is not affected by the Registry Acts, *Davenport v. Whitmore* (2 Myl. & Cr. 177). The policy of the law was to prevent foreigners having an interest in British ships. The Act is retrospective only; *Heath v. Hubbard* (4 East, 110), *Underwood v. Miller* (1 Taunt. 387); the non-registration of the Plaintiffs' mortgage, is the consequence of the Plaintiffs not accurately stating the effect of their bill of sale on the registry.

G. Turner, Mr. J. Russell, and Mr. E. R. Adams, for the Defendant Horton, submitted that the transaction was one of conditional sale, and not of mortgage; *see v. Grierson* (2 Ball & B. 275), *Tasburgh v. Echlin* (2 B. P. C. 265), [15] *Sevier v. May* (19 Ves. 413), and *Perry v. Meddowcroft* (4 Beavan, 197). That the subsequent circumstances were quite consistent with this view of the case, and that upon the failure of Birnie to provide funds, the ship, &c., became the absolute property of the Defendant. That this Court would not relieve against the strict effect of the condition, *Davis v. Thomas* (1 R. & M. 506).

Secondly, that the oil and other cargo passed by the assignment, as one of the "appurtenances"; *The Dundee* (1 Haggard, 121); *Gale v. Laurie* (5 B. & C. 186), where it was held, that whatever is on board a ship for the object of the voyage and adventure on which she is engaged, belonging to the owner, constitutes a part of the ship and her "appurtenances" within the meaning of the 53 G. 3, c. 159; and independently of which, it would pass to the legal owner of the ship, as incident thereto, in the same way as accruing freight would; *Morrison v. Parsons* (2 Taunt. 407), *Case v. Davidson* (5 M. & S. 79, and 2 Bro. & B. 379; but see *Stephenson v. Down* 3 Beavan, 343). That even a mortgagee taking possession before the conclusion of the voyage was entitled to accruing freight; *Dean v. McGhie* (4 Bing. 45), *Kerrwill v. Bishop* (2 Cr. & Jer. 529); and here the Defendant must be considered in possession from the date of his letter to the captain.

Thirdly, that the registry was conclusive evidence of the ownership; *Ex parte Yallop* (15 Ves. 60); and that, on principles of public policy, the Court could not give relief against the evidence of the registry; *Mestaer v. Gillespie* (11 Ves. 626) [16] *Speldi v. Lechmere* (13 Ves. 588), *Thompson v. Leake* (1 Mad. 39), *Battersby v. Smyth* (3 Mad. 110; and see *Slater v. Willis*, 1 Beavan, 354).

They also argued that the claim in this suit, was a matter for the decision of the Court of law; and that the Plaintiffs, who were mere assignees of a legal right, could not sustain a suit in equity, unless they shewed that their assignor would not lose his name to proceedings at law; *Hammond v. Messenger* (9 Sim. 327).

Mr. Rolt, for the Defendant Birnie, supported the Plaintiff's case.

Mr. Pemberton, in reply.

April 18. THE MASTER OF THE ROLLS [Lord Langdale]. As it is admitted that the debt due from Birnie to Horton exceeds the whole value of Birnie's moiety of the ship and appurtenances, exclusively of the cargo, it is clear that if there were a question as to the cargo, it would be immaterial to either party whether the transaction ought to be deemed a sale or mortgage, because, in either case, Horton would be entitled to the whole value of Birnie's moiety of the ship and appurtenances.

I have, however, thought it right to consider what was the intention of the parties, and the nature of the contract between them independently of the mere legal effect of the bill of sale.

From the claims which they respectively make, it is plain that the bill of sale does not constitute, or is not [17] evidence of the whole contract which subsisted between them. Even the case of Mr. Horton requires him to go out of the bill of sale, to support his proposition that the sale was conditional; and on considering the transactions which took place between Mr. Birnie and Mr. Horton, from the date of Birnie's letter the 27th day of January 1837 until the time when Birnie's embarrassment became fully known, I have no doubt the transaction was intended to be, and was both parties understood to be, a security or mortgage, and not otherwise a sale, absolute or conditional. If, as Horton says, the ship was intended to be Horton's, unless Birnie provided cash for the bills when at maturity, and if cash was not provided for them, then, according to his case, the moiety would have become absolutely his, on the bills becoming due and not being paid; but no such claim was then made by Horton. Birnie wanted cash to take up the bills, and he obtained it upon renewed acceptances granted by Horton himself. In one view of this case might be considered, that Birnie having provided cash, though with Horton's assistance, had performed the alleged condition, and so was entitled to a retransfer of his moiety of the ship, and that the bill of sale was continued, or a retransfer of it was made, in order that there might be security for the payment of the renewed acceptances; but there is no evidence of any new agreement, and Birnie was from time to time charged with commission, with stamps, and with the expense of renewals; his insurance was continued in his name, and he made payments and allowances to the families of the sailors. All these acts are consistent with his being owner, subject to a mortgage, or security, but wholly inconsistent with the notion of Horton becoming the owner by breach of condition; and having regard to them, and the evidence in the cause, I am of opinion that this was intended and [18] understood to be, not a sale absolute or conditional, otherwise than as a sale for the purpose of a mortgage or security is to be considered as a conditional sale; and even if the in-

tion were to be considered as a conditional sale in the sense that the ship might be deemed only in a limited time and by the performance of a particular condition, I incline to think, that by the transaction which subsequently took place between the parties, the condition ought to be considered as waived, and that Birnie was entitled to redeem on payment of what was due on the bills.

But it was argued, that whatever might be the intention of the parties, the transaction must, under the Ship Registry Acts, be deemed to be an absolute sale entitling Birnie to the property as purchaser, notwithstanding any contract of his to permit Birnie to redeem, and that this Court ought not to interfere in such a case as this, and indeed in any case, however fraudulent.

The statute of the 3 & 4 W. 4, c. 55, ss. 35, 42, 43, provides, that the bill of sale of a ship or any share thereof, after the particulars have been entered in the book of registry, shall be valid and effectual to pass the property thereby intended to be transferred, against every person and to all intents and purposes, except subsequent purchasers and mortgagees, who shall first procure an indorsement to be made on the certificate, as in the Act mentioned; and further provides, that in the case of mortgages, the collector and comptroller of the port where the ship is registered, shall, in the entry in the book of registry, and also on the certificate of registry, express that the transfer was made only as security or by way of mortgage; and that in such cases, and except for certain purposes, the mortgagor and the mortgagee shall be deemed to be the owner of the ship, [19] and that the rights of the mortgagee are not to be affected by the bankruptcy of the mortgagor, notwithstanding his reputed ownership.

When the transfer is not expressed to be by way of mortgage and security, the protection, which the Act intended to afford to the mortgagees against the creditors of a bankrupt shipowner, is not obtained, and the vendee, appearing on the registry as owner, may be subject to all the liabilities which belong to him in that character; but it may, I think, well be doubted, whether, under the provisions of the Act, there can be any valid mortgage, in any case, in which the parties do not secure themselves the protection which the statute gives by the mode of proceeding which therein directed. I do not, however, think that the circumstances of this case make it necessary for me to express any opinion on the subject.

As I have already stated, the only question which is to be decided with a view to relief prayed, is, whether Mr. Horton has any interest in the cargo.

The bill of sale purported to grant the moiety of the ship masts, sails, tackle, apparel, boats, oars, and appurtenances.

It is admitted, that independently of special contract, the sale or mortgage of a ship will carry freight accruing due at the time of the sale, or after possession is taken by the mortgagee. And upon the hypothesis of sale it is argued, that by the word "appurtenances," all stores would pass, and that the ship and stores having become the property of Horton, he became entitled to the subsequently acquired cargo. It is said, that in the voyages or adventures of whale ships, the cargo [20] constitutes the whole earnings of the ship; that such earnings are incident to the ship as much as freight, and that no distinction can be made between subsequently acquired cargo and subsequently earned freight.

The case upon the ship "Dundee," upon which we have judgments by Lord Gifford (1 Hagg. 109, 126) and by Lord Tenterden (5 B. & C. 162), has only gone to the extent of establishing, that under the Act 53 G. 3, c. 159, in the expression, "the ship and her appurtenances," the word "appurtenances" must be construed to extend to anything belonging to the owners, which is on board a ship, for the accomplishment of the object of the voyage and adventure on which she is engaged. But the cargo is not the object and purpose of the adventure, not something provided as a means for the attainment of the object. I cannot construe the cargo as something appurtenant to the ship, although it is that which the ship carries, and for the attainment of which the ship and its appurtenances were provided. And I cannot consider cargo of this kind as freight incident to the employment of the ship, and as necessarily passing by the transfer on sale.

Freight is the reward which the law gives for carrying goods. It arises upon a contract for the conveyance of merchandize, which is said to be in its nature an entire

contract, so that, as a general rule subject to some exceptions and to special agreements, until the contract is completed by the delivery of the goods at the place of destination, nothing can be demanded for the freight. When a ship at sea is sold, the seller is subject to an obligation, as well as entitled to a profit, in respect of the freight accruing due. And the duty and the profit [21] may well be held to pass together with the ship, by means of which the duty is to be performed, and the profit to be acquired. Nevertheless, the title to the freight and the title to the ship are often separate, and the argument founded on analogy to the case of freight does not rest on a sure foundation.

The cargo of a whale ship is an acquisition, from time to time, made by the employment of the ship and of the crew; but there is nothing in the nature of the contract for the conveyance of merchandize; the employment of the ship is not governed by a contract with other persons, but subject to the directions of the owners who may be under no obligations to complete the voyage, or to continue the employment of the ship, any longer than suits their own convenience or interests. Suppose that, at the time of sale, the ship is engaged on her adventure, such, if any, part of the cargo as is then acquired is already the property of the owners, and if intended to be sold, ought to be expressly named or described in the transfer; and as to the parts of the cargo as may be afterwards acquired, it is acquired under the direction and by means of liabilities of the owners, which, as it appears to me, do not necessarily enure to the benefit of the purchaser, without an express stipulation for the purpose. Between the inconveniences of determining, in the absence of express contract, what may be due to the purchaser for the employment of the ship, in acquiring a cargo from the seller after the sale, and the inconvenience of giving to the purchaser, under the description of the ship, the uncertain cargo acquired at the time of the sale, and which may afterwards be acquired, I incline to think that the first is the least; but independently of that, it does not appear to me that the cargo of a ship, or that which it carries, can [22] be considered as part of, or as an incident to the ship itself.

I am therefore of opinion, that it does not pass by an assignment of the ship and its appurtenances without any specification or allusion to the cargo. And that the Plaintiffs are entitled to the account which they ask of the moiety of the cargo.

Mr. Turner asked that an allowance might be made to the Defendant for the use of the ship during the whaling expedition.

THE MASTER OF THE ROLLS. That claim would depend on the transaction being a sale. I am of opinion that it was a mortgage. If it becomes necessary, I must decide it.

[22] COOKSON v. REAY. Feb. 26, March 3, 1842.

[S. C. affirmed on appeal, sub nom. *Cookson v. Cookson*, 12 Cl. & Fin. 121; 8 E. R. 1344 (with note); 9 Jur. 499.]

A sum of money directed to be invested by an executrix "in land or some other securities," for the benefit of one for life, with remainder to his children, "but in failure of these, to A. and his heirs for ever," and which had not been invested in land, held to have been originally impressed with the character of real estate; but by the subsequent dealing therewith by the parties beneficially interested, to have acquired the quality of personalty.

The question in this case was, whether a sum of money ought, in equity, to be considered as real or personal estate; in other words, whether it belonged to the testator or personal representatives of Isaac Cookson.

The testator John Cookson the elder by his will dated in 1774, after giving to his eldest son and his heirs a [23] real estate, gave his residuary real and personal estate to his wife; and he appointed her sole executrix "with the tuition and education of all and every such younger children, and to provide for them with regard to their fortunes as they might deserve and merit."

He executed another testamentary paper which was as follows:—"Instructions or advice to my wife with regard to my younger children. As to my son John, I

intends for the law, I would have £250 per annum paid him until a sum of £10,000 be invested in land or some other securities, which is to be invested in trustees for his use, as to the interest of such money or produce of such lands for his natural life, and if he marries with your consent and approbation first obtained in writing, and not otherwise, that he make such settlement on such wife as he may marry as you judge proper, and that the remainder shall go to such child or children he may have lawfully begotten; but in failure of these, to my eldest son Isaac and his heirs forever. As to my son Thomas, I propose that he should have the same sum, but with the same limitations as my son John. As to Joseph, I would have him brought up to business, and to give the amount in some business I am concerned, in the like manner, to prevent its being spent, to fix the like £10,000 in the same manner above mentioned," &c.

In 1784 the testator's son John married with the consent of the widow; and by the settlement made on his marriage, dated in February 1784, to which the widow as a party, after reciting his father's will, John Cookson the younger covenanted that he would procure the £10,000 to be raised out of the assets of his father, and paid to the trustees of the settlement, on trust that they should, with the approbation of himself and wife or the survivor of them, testified in writing, *when [24] and so soon as a convenient purchase could be found, lay out the £10,000 in the purchase of lands, to be conveyed to the trustees, to the use of John Cookson for life, with remainder to trustees to preserve contingent remainders, with remainder to the use of the testator's wife for life in lieu of dower, and after her decease, "to the use of such child or children as the said John Cookson the younger might have lawfully begotten, in such estate and in such manner as the said testamentary paper so signed by the said testator John Cookson, in its true construction, directed, with such limitation as was in the said testamentary paper was mentioned."* The settlement contained a power for the trustees, with the approbation of John Cookson the younger and his testator's wife, "in the meantime and until the purchase should be made, or in case, by the true construction of the will and testamentary paper, the sum of £10,000 might not be laid out or invested in the purchase of lands," to invest the same on public or private securities; and a declaration, that the interest should belong to the person who would be entitled to the rent of the land, if purchased, by "virtue of the settlement and the testamentary paper so made by the testator John Cookson."

John Cookson paid the sum of £10,000 pursuant to the covenant contained in the settlement, and £5000 part thereof was lent to him on mortgage; and by the mortgage deed, dated in February 1785, it was recited, "that no convenient purchase had yet been found whereon to lay out and invest the said sum of £10,000." The other sum of £1000 was afterwards lent to him on the same security.

In 1792 new trustees were appointed, and the trust funds were transferred to them. By the deed of appointment the mortgage for £6000 was recited, and [25] that the sum of £4000, the residue of the sum of £10,000 so paid by John Cookson, the trustees had been, by them, laid out in the purchase of £5325, 19s. 8d. 4 per cent. annuities until a proper purchase of messuages, lands, tenements, and hereditaments could be found, whereon to invest the same, upon the trusts of the will of the said John Cookson, the testator, and of the settlement made previous to the marriage of John Cookson the younger." The new trustees were to hold the trust property in and for the several intents and purposes, and subject to the several provisos and covenants mentioned, expressed, and declared of and concerning the sum of £10,000, the recited indenture of settlement of the 23d day of February 1784, and to or for no other use, intent, or purpose whatsoever."

There was no child of the marriage. John Cookson the younger died without issue in the year 1802, and there being no child, Isaac Cookson and the widow of John were then the only persons interested in the property.

New trustees were afterwards appointed by Isaac Cookson and Hannah Jane, the widow of John Cookson the younger, by a deed dated in July 1804. The deed recited the will and codicil of John the father, the settlement and the various investments of parts of the £10,000. It then recited as follows:—"And whereas the said John Cookson the younger, some time ago, departed this life without leaving lawful issue, by reason whereof the said Isaac Cookson, or his representatives will, upon the

death of the said Hannah Jane Cookson, become entitled to the actual receipt of the said sum of £10,000 *trust monies*. And whereas the said Charles Wren " (who was a former trustee) "some time ago departed this life, leaving the said Samuel Castell" (his co-trustee) "him surviving. And whereas the said Samuel Castell [26] hath received payment of the said two several sums of £5000 and £1000 secured on mortgage of the hereditaments and premises hereinbefore described and before mentioned and recited, which he doth hereby acknowledge and declare, and doth now admit the same to be in his hands, testified by his sealing and delivering them presents. And whereas the said sum of £5325, 19s. 8d. 4 per cent. annuities are now standing in the books of the Governor and Company of the Bank of England in the sole name of him the said Samuel Castell. And whereas the said Hannah Jane Cookson and Isaac Cookson, being the only persons at the time of the execution of these presents interested in the said sum of £10,000 *trust monies*, have, with the concurrence and approbation of the said Samuel Castell, testified as aforesaid, agreed and determined to nominate and appoint two other persons, to act in conjunction with the said Samuel Castell in the several trusts now remaining unexecuted and capable of taking effect, relative to the said sum of £10,000, which are in and by the said hereinbefore recited indenture of settlement of the 23d of February 1781 mentioned, expressed, and declared of and concerning the same; and they the said Hannah Jane Cookson and Isaac Cookson have in consequence requested "two other persons "to accept the same trusts and to act therein in conjunction with the said Samuel Castell, which they have respectively agreed to do," it was witnessed that Isaac Cookson and Hannah Jane Cookson directed the surviving trustee to transfer the £5325, 19s. 8d. into his name jointly with the new trustees; and they did also thereby further direct and appoint the said Samuel Castell, his executors or administrators, forthwith and as soon as conveniently might be, to place out and invest upon *real or Government securities* the said sum of £6000, so lately received by him, and then in his hands, in the joint names of them the said Samuel Castell, [27] Joseph Cookson and Anthony Surtees; and it was then declared and agreed between the parties thereto, that the stock and the £6000, when so placed out, and all interest, dividends and proceeds thereof, respectively, in the meantime, should be upon such and the same trusts and to and for such and the same intents and purposes, and under and subject to such and the same provisos, conditions, covenants, and agreements, as were mentioned, expressed, and declared of and concerning the said sum of £10,000 in the indenture of settlement and for no other intent or purpose whatsoever; and then there was a provision that the trustees should only be charged with such monies as they should respectively actually receive, and they were not to be accountable for the insufficiency or deficiency of any *securities*.

The stock was afterwards fraudulently sold out by a trustee, but it was got back and paid into Court. On the application of the widow, an order was made for payment to her of the dividend, with liberty to apply on her death.

Both the widow and Isaac Cookson being dead, the question was, whether the fund which had never been invested in land and now consisted of £8500 3s. 8d. 3 per cent. belonged to the heir at law or personal representatives of Isaac Cookson.

Mr. Pemberton and Mr. James Mitchell, for the personal representatives of Isaac Cookson, contended, first, that the testator's will contained no imperative trust to lay out the money in land, that the direction was to "*invest in land or some of the securities*," and meant an investment in landed or other securities, or that the money was to be laid out on *mortgage* of land or other [28] security, for an absolute purchase could not be considered a "*security*." That the subsequent gifts shewed that the parties were to take in the character of personality. Thomas was to have the said "*sum*" with the same limitations as John, Joseph was to have £10,000 to be "*fixed*" in the manner above mentioned; and the amount was to be given in some business. How, then, they asked, could Joseph have the sum in the business, if it was to be "*fixed*" in the manner above mentioned, that is (as contended by the other side), it was to be invested in land.

Secondly, they argued that even if the property were to be considered as real estate, still by the subsequent dealing therewith by the parties interested they shewn an intention of taking it as personality.

Mr. Kindersley, Mr. Goodeve, and Mr. Greening, *contra*, for the heir at law of Isaac Cookson. First, it was the intention of the testator that this sum should be invested in land; the investment "in other securities" was intended as a temporary arrangement until a prudent investment in land could be found. The limitation over Isaac "and his heirs for ever," shews that the testator considered he was dealing with real estate; and how could the words "produce of such lands" have been used in reference to the purchase of a real estate?

Suppose the words implied an option, still the authorities shew that the trustees must alter the quality of realty attached by the general intention of the testator to money. Thus in *Johnson v. Arnold* (1 Ves. sen. 169) the trust was to lay out in "if G. I. should be willing and desirous to have it laid out in lands." In *Earlom v. Saunders* (Ambler, 240) the direction was to trustees to lay out £400 "in a purchase of land or any other security or securities as they should think proper and convenient;" in *Cowley v. Hartstonge* (1 Dow. 361) the trust was to lay out a sum of money "in the purchase of lands of inheritance, or at interest as the trustees should think most fit and proper." In all these cases the fund was in equity considered as invested with the quality of real estate.

Thirdly, the subsequent mode of dealing with the property was such as to retain the very quality with which it was impressed by the will of the testator.

Wheldale v. Partridge (5 Ves. 388, and 8 Ves. 227) was also cited. (See *Davies v. Shaw*, 6 Simons, 585.)

Mr. Pemberton, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. The question in this case is whether a sum of £8500, 3s. 8d. 3 per cent. Bank annuities belongs to the heir at law, or to the executor of Isaac Cookson deceased.

The stock in question represents part of a sum of £10,000, which John Cookson father, by his codicil, dated in March 1774, directed to be applied for the benefit of his son John and his children, with a limitation over to the testator's son Isaac and his heirs.

It is contended by the heir of Isaac, that by the terms in which the codicil is expressed, the character of real estate was given to the £10,000, and that no act was done to alter that character; and the heir, therefore, claims under the limitation

For the executor it is contended, that it is consistent with the codicil to consider the £10,000 as personal estate; but that if the character of real estate was impressed upon it, an intention to alter that character is shewn by an act of the testator; that at the time of Isaac's death it was part of his personal estate, and that it now belongs to his personal representative.

The testator John Cookson having, by his will, given to his wife his residuary with the tuition of his younger children, and to provide for them, by a codicil and testamentary paper which he entitled, "Instructions or advice to my Wife," he directed, &c.

Upon the authorities of *Earlom v. Saunders* (Ambler, 240), and *Cowley v. Hartstonge* (1 Dow. 361), I incline to think that the testator ought to be deemed to have intended that the money should be laid out in the purchase of land, and that the intention to invest on some other securities, should be considered to have reference to a time which might elapse before a purchase of land could be procured. The testator has not so expressed himself, as clearly to shew the nature of the investment intended, or what interests the children of John were to take, or in what way the provision for their benefit was to be effected; and I think that the difficulty which has been raised in that respect had a reasonable foundation; but it seems to me more probable, that whatever benefit the children were to take was to be in the form of an interest in real estate.

That the testator's widow and her son John had considerable doubt on the subject, but, for on the marriage of John, a settlement, to which the widow was [31] made, was made on the 23d of February 1784; and thereby John covenanted, &c.

The marriage was duly solemnized. No land was ever purchased pursuant to the covenant in the settlement, and the securities on which the money was invested, from time to time, changed; but nothing appears to have been done, during

the life of John, to alter the character, whatever it was, which was impressed on the money by the codicil, and by the settlement.

John Cookson died without issue in the year 1802, and there being no child there was an end of all questions respecting the interest which the children were to take, or the limitations which were to be made to them.

Mrs. Cookson, the widow, and Isaac Cookson were now the only persons interested in the property, whether to be considered as land or money. They had, together, power to do with it what they pleased. An investment in land might have been made by the trustees, with the approbation of Mrs. Cookson, as the survivor of her husband and her husband; and even if it is considered independently of any act done by Isaac, the money ought, for the benefit of his heir, to be considered as land, after the death of John; yet, as the property was his, he had a right to dispose of it, or to treat it as money, and any act of his shewing an intention to alter its character, or to treat it as money, would be considered sufficient to remove the character of real estate which had previously been impressed upon it.

In July 1804 there was only one trustee of the £10,000 or of the securities which it was invested; [32] and Isaac Cookson and the widow of John, who were the sole owners of the property, thought fit to appoint a new trustee. The occasion required consideration how the property was to be dealt with, and the question whether it is to be collected from the deed appointing new trustees, that Isaac Cookson intended to treat the £10,000 as money to be invested in land, and to be considered the character of land, or as money which was to remain on security, and to be received by him as money, after the death of the widow of John.

(His Lordship stated the recitals.)

Now it is to be observed, that in these recitals, it is particularly noticed, that Isaac Cookson is to become entitled to the actual receipt of the £10,000 trust money upon the death of Hannah Jane Cookson; there is notice taken here, that the sums of £5000 and £1000 in money were in the hands of the surviving trustee; here is an intention expressed that the £10,000 trust monies were to be in the hands of the new trustees, who were to act in conjunction with the survivor of the surviving trustees of the trusts then remaining unexecuted and capable of taking effect.

Those trusts were for the sole use of Mrs. Cookson for her life (as previously noticed), with the actual right to receive the money vested in Isaac when she died.

How is it then that they have disposed of this by the settlement? "This indenture witnesseth, that it shall be lawful for the surviving trustee to transfer into the names of all the trustees." What were they to do with it? "They further do hereby direct, and appoint [33] Samuel Castell, his executors or administrators forthwith, as soon as conveniently may be, to sell out and invest upon real and Government securities the sum of £6000 so lately received by him, and now in his hands, in the joint names of Samuel Castell, Joseph Cookson, and Anthony Surtees." There was £6000 in the hands of the surviving trustee, and that was to be laid out forthwith and invested upon real or Government securities; there being, in the express words here mentioned, no reference whatever to an investment in the purchase of land, then it was "declared and agreed between the parties to these presents, that the sum of £6000 when so placed out, and all interest, dividends, and proceeds thereof, respectively, in the meantime, should be upon such and the same trusts, and for such and the same intents and purposes, and under and subject to such and the same provisos, conditions, covenants, and agreements, as are mentioned, expressed, and declared of and concerning the same sum of £10,000 in the indenture of settlement; and for no other intent or purpose whatsoever." And then there was a provision that the trustees should only be charged with such monies as they respectively actually receive; and they were not to be accountable for the deficiency or deficiency of any securities.

Now to say that this is perfectly clear, when there is such a reference to the trusts (amongst which is the trust for laying out in the purchase of land), we think, be expressing an opinion which could hardly be formed upon this instrument, but seeing that all the words, directly used, tend solely to the actual receipt of money, and the investment of the money upon real or personal security; and the only persons who had any interest in the settlement, were then dealing with

money, I do not think that the [34] words which have general reference to the trusts of the settlement, are sufficient to outweigh the effect which ought to be given to the first words; and without saying that this matter is perfectly clear, it does appear to me that even if it were originally impressed with the character of land, it ceased to be by the act of Isaac, who at the time he executed this deed, had a perfect right to that he considered it either as land or as money.

I think, therefore, that the intention was to convert it into money. (NOTE.—See *Reford v. Ravenhill*, 5 Beav. 51.)

[34] HOPKINSON v. ELLIS. March 1, 1842.

able bequest to the Rector and Corporation of W. W. being a vicarage, payment was ordered to be made to the vicar and corporation.

A testator bequeathed to the rector for the time being of the parish of New Windsor, and to the Mayor, Aldermen and Burgesses of the Borough of New Windsor, the time being, the sum of £1000 to be held on certain charitable trusts.

It appeared that New Windsor was a vicarage, and that the lay rector or proprietor was entitled to the rights, &c., of the rectory. The incumbent "for the time being" was the vicar who was living on the spot. It was proposed to pay the sum to the Vicar and the Corporation of New Windsor.

Mr. K. Parker and Mr. Kindersley, for parties to the suit.

Mr. Jemmett, for the vicar,

And Mr. Wray, for the Attorney-General, not objecting.

THE MASTER OF THE ROLLS [Lord Langdale] ordered payment to the Vicar and Corporation of New Windsor.

[35] ACEY v. SIMPSON. March 5, 1842.

See *Roper v. Roper*, 1876, 3 Ch. D. 718; *In re Greenwood* [1892], 2 Ch. 298.]

by to a widow in lieu of dower or thirds at common law, or by custom, has no priority over other legacies, where the testator leaves no real estate.

A testator gave his widow a legacy of £50, and an annuity of £100 for life; and directed that the said annuity should be paid without any deduction, "and should be paid and taken by his said wife in lieu and full satisfaction of and for all dower at common law or by custom, which she might otherwise claim from or upon any of his real estates."

There was a deficiency of assets to pay all the legacies; and the question was, whether the usual rule was to prevail, that the widow's annuity should take in priority of the other legacies. (*Burridge v. Bradyl*, 1 Peere Wms. 127; *Blower v. Morret*, 10 Ch. 420; *Davenhill v. Fletcher*, Ambler, 244; *Heath v. Dendy*, 1 Russ. 543.)

It appeared that there were no real estates out of which the widow was dowable. Mr. Pemberton and Mr. Mylne, for the Plaintiff, insisted that the widow was not entitled, as there were no real estates, and that she ought to come in *pari passu* with the other legatees.

Mr. Kindersley and Mr. Symthe, for the widow, admitted that they could not successfully maintain the contrary.

THE MASTER OF THE ROLLS [Lord Langdale] was of the same opinion, and decreed accordingly.

[36] UNDERWOOD v. HATTON. Dec. 24, 1841; March 9, 1842.

An estate was administered under the Court, and all claims being provided for, the devisee was let into possession. A further claim was afterwards made against the estate. Held, that the trustees of the will were not justified, of their own authority, in taking possession to provide for it.

Where the Court administers the assets, the trustees are protected against all claims on the testator's estate, but legatees still remain liable in respect of their beneficial interest.

This petition was presented by William Underwood, the devisee, and Elizabeth Arrowsmith, the annuitant under the will of William Underwood, deceased, and it prayed that John Hatton, one of the trustees under the same will might pay to Elizabeth Arrowsmith a half-year's payment in respect of her annuity, and to the Petitioner William Underwood the remainder of the Michaelmas rent received by Hatton, and that the trustees might be directed not to interfere with the possession of the house, or the receipt of the rents of the house.

The testator, William Underwood, died in February 1830, having made a will, whereby he gave and devised his estates to John Hatton and John Craven, on trust to pay his debts and legacies, and out of the rent of a copyhold house at Cheltenham to pay £50 a year to Elizabeth Arrowsmith for life; to maintain the Plaintiff out of the residue of the rents, till he attained the age of twenty-three years, to accumulate the remainder for his benefit, and after he attained that age to suffer him to receive the rents for his life, subject to the payment of the annuity of £50 to Elizabeth Arrowsmith, and, after his death, upon certain other trusts.

[37] By a decree in the Court of Exchequer pronounced in 1833, the will was established, the usual accounts were directed to be taken, and a receiver of the rents and profits of the copyhold estate at Cheltenham was appointed.

The Master reported that no debts had been proved before him, but that certain sums were due to the Defendants Hatton and Craven and to certain legatees. By the decree on further directions dated the 18th of February 1834, directions were given for payment of the costs of suit, and of the sums due to Hatton and Craven, and it was ordered that the receiver should be continued, and declared that William Underwood, on attaining his age of twenty-three years, would be entitled to the accumulations of the personal estate, and to the accumulations of the rents of the real estate; and subject to the annuity to Elizabeth Arrowsmith, would be entitled to the rents and profits of the real estate for his life.

The Plaintiff having attained his age of twenty-three years on the 5th of April 1834, an order was made by the Court of Exchequer in the following month of June whereby certain sums were ordered to be transferred to him and the receiver was discharged, and soon afterwards the trustees Hatton and Craven let the Plaintiff in possession of the estate, and he remained in quiet possession up to the month of September 1841.

It appeared that Underwood, the testator, was the executor of the will of Thomas Wallace, and in April 1841 the Petitioner Underwood was informed by the solicitor of Hatton and Craven, that a part of the funds which had been transferred to the Plaintiff, under the order of June 1834, as being part of the estate of Underwood the testator, did, in fact, belong to the estate [38] of Wallace; and the Plaintiff being on investigation, satisfied that the information was correct, submitted to the claim and paid the amount.

But whilst that inquiry was pending, the solicitor of Hatton and Craven called on the Plaintiff Underwood to make good other claims, amounting to nearly £120, which they alleged to be due from the testator Underwood to persons claiming under the will of Wallace; and the Plaintiff having disputed these claims and refused to satisfy them, Hatton and Craven gave notice to the occupying tenant to pay the rent to them, and prevailed on her to do so; and they procured themselves to be admitted to the copyhold premises, with the view of enforcing the claims which they alleged to be just debts; and they insured the premises for £1060. A half-year's annuity

payable to Elizabeth Arrowsmith, not having been paid, this petition was presented by Mr. Underwood and Mrs. Arrowsmith, praying for payment of what was due for the annuity to Mrs. Arrowsmith, and payment of the remainder of the rent to Mr. Underwood, and that the trustees might be directed not to interfere with the possession of the house, or the receipt of the rents of the house.

Mr. Pemberton and Mr. Hall, in support of the petition, said, that the account of the testator's debts had been taken under the decree of the Court of Exchequer, and that no such debt as that now claimed had appeared to be due; that if any such debt ever was due (which they did not admit), it had long since ceased to be recoverable. That the decree of the Court of Exchequer had declared Underwood to be entitled to the rents of the house, subject to the annuity to Elizabeth Arrowsmith, which he had duly and regularly paid; that pursuant to the decree and the right thereby declared, the receiver had been discharged, and Underwood had [39] been let into possession, and that his possession could not now be disturbed by the trustees, without violating his rights as declared by the decree; and that if they had any just demand against him in respect of the estate, they should have applied to the Court for relief, and to have the receiver reappointed.

Mr. Kindersley and Mr. Geldart, for the Defendants Hatton and Craven, alleged, that a debt was really due from the estate of Underwood the testator to the estate of Wallace; and that it was their duty and right, as trustees of the will of Underwood, to pay the debt, and for that purpose to take and hold possession of the property till they had been enabled to pay the debt and the expenses of admittance and insurance.

March 9, 1842. THE MASTER OF THE ROLLS [Lord Langdale]. As the right of the Petitioner Underwood has been declared by the Court, in a suit between him and the trustees Hatton and Craven, his possession, founded upon that right, is not to be disturbed without lawful cause.

It must be admitted, that notwithstanding the accounts which have been taken, and the declaration which has been made, there may still be subsisting lawful and just claims against the estate of the testator Underwood; and if the persons entitled under the will of Wallace have just subsisting claims against the estate of Underwood, there is nothing to prevent them from prosecuting these claims, for although Hatton and Craven, the trustees of Underwood, are protected (*Knatchbull v. Fearnhead*, Myl. & Cr. 126), the Petitioner Underwood the devisee is not. (*Greig v. Somerville*, Russ. & Myl. 338; *Gillespie v. Alexander*, 3 Russ. 130.)

[40] But the claims, if contested by the Petitioner, must be established against him; and under the circumstances which have taken place, I do not think that it is enough for the trustees to say, we are satisfied that the debt is due, and you must pay it. I think that the Petitioner is not bound by the admission of the trustees as executors, and if he has a just defence to the claim, I think that they have no right to use their powers, arising from the possession of the legal estate, in such a manner as to deprive him of that defence.

Although the accounts have been taken, and the fund was cleared to the satisfaction of the Court, I will not venture to say that all duty of the trustees, except to the Petitioner, terminated; because I conceive that circumstances might occur, which, notwithstanding all that has taken place, it might have been proper, and the duty of the trustees to apply to the Court for directions upon some unexpected contingency; but I am of opinion, that after the proceedings which took place, the trustees had no right, of their own authority, for the purpose of enforcing claims which could not be established against themselves, and by means which would deprive the Petitioner of any just defence which he may have, to take the matter into their own hands, and use the legal estate, which ought to be the protection of the Petitioners, against them, for the purpose of enforcing an adverse claim.

I must, therefore, order the Respondents to account for the rents which they have received; order them not to interfere further with the possession, or with the receipt of the rents of the house; and order them to pay the costs of this petition.

[41] BRETHAM v. BERRY. Feb. 10, 1842.

To entitle a Plaintiff to an order for leave to enter an appearance for a Defendant, it must be shewn, by affidavit, that the copy of the *subpoena* served contained the memorandum directed by the 14th Order of August 1841.

Mr. Keene made an application, under the 8th General Order of August 1841 (Ord. Can. 165), for leave to enter an appearance for the Defendant.

THE MASTER OF THE ROLLS [Lord Langdale] held, that the affidavit in support of the application must shew, that the copy of the *subpoena* which had been served, contained the memorandum required by the 14th Order of August 1841 (Ord. Can. 168). (NOTE.—See *Tatham v. Williams*, 1 Hare, 159.)

[41] WILLIAMS v. FLIGHT. Feb. 19, 1842.

Where there are alternative allegations of facts, the opposite party is entitled to adopt, as against his opponent, whichever of the alternatives he pleases. A bill was filed for relief in respect of a lost bond, which was alleged to have been altered after its execution. Held, that the doctrine laid down in *Simpson v. Lord Howden* did not apply, for the bond being lost the objection would not, at law, appear on the face of it.

This case came before the Court on general demurrer.

According to the statements of the bill, the Plaintiff Mrs. Williams, in 1835 executed to the Defendant Mr. Flight a bond for £1000, conditioned for indemnifying him against any sum which he should pay, by reason [42] of any guarantee entered into by him for the firm of Papps & Co., in which her brothers were partners.

The Defendant brought an action on the bond against the Plaintiffs Mr. and Mrs. Williams. The bond being stated to be lost no *proferat* was offered by the declaration.

The Plaintiffs then filed this bill, alleging, first, that the bond had been altered and varied since its execution; secondly, that it had been framed in a manner conformable to the actual agreement between the parties; and, thirdly, that the Plaintiffs were relieved as to part of the liability, in consequence of time having been given to the principal debtors, without the concurrence of the surety; the decision of the Court did not, however, rest on the third objection. The charge in the bill particularly relied on, in the argument of the demurrer, was as follows:—"That either the said bond or instrument hath been altered or varied since the execution thereof by the Plaintiff Caroline Williams, or the execution thereof by the Plaintiff Caroline Williams was obtained by fraud, and such bond is not according to the real terms of the guarantee agreed to be given by the Plaintiff Caroline Williams and under the circumstances aforesaid, the said bond of indemnity ought either to be delivered up to be cancelled, or the same ought to be reformed so as to be conformable to the actual agreement entered into by Caroline Williams, and should stand as a security, to the extent of £1000 only, for such sum and sums of money as, under the circumstances, the Plaintiffs shall appear to be justly bound to pay."

The bill prayed that the bond might be delivered up to be cancelled or reformed and limited in a parti-[43]-cular way, and for an injunction to restrain proceedings at law.

To this bill the Defendant filed a general demurrer.

Mr. G. Turner and Mr. Wood, in support of the demurrer. The allegation that the bond was *either* altered since its execution *or* was obtained by fraud. Where a Plaintiff states facts in the alternative, the Defendant has a right to adopt such of the alternatives as he thinks fit. *Balls v. Margrave* (3 Beav. 284), *Vernon v. Vernon* (2 Myl. & Cr. 145). The Defendant has therefore a right to say, that the bond has been altered. If so, the Plaintiff would have a good defence at law; if

(11 Rep. 47); and the bond being void on the face of it the Plaintiffs have no right to come into equity, *Simpson v. Lord Howden* (1 Keen, 583, and 3 Myl. & Cr. 37), except by bill of discovery at their own expense.

Mr. Pemberton, Mr. Lloyd, and Mr. Bennett, *contra*. Taking either alternative the Plaintiffs are entitled to some relief in equity. Suppose the bond altered, then if it is lost, the objection will not appear on the face of it, and having been fraudulently dealt with the Court has jurisdiction; *Simpson v. Lord Howden*. On the other hand, if the bond was not prepared according to the agreement there is a clear equity to have it reformed; but quite independent of this objection, it is distinctly alleged that time was given to the principal debtors, and in equity, the surety is bound; the bond, however, [44] being under seal, the Plaintiffs could not avail themselves of that defence in a Court of law, for at law, an instrument under seal can only be discharged by force of an instrument of equal validity, it cannot be set by parol. *Davey v. Prendergrass* (5 Barn. & Ald. 187).

Mr. G. Turner, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. I am of opinion that this demurrer is not to be overruled, notwithstanding the ingenious argument by which it has been attempted to be supported.

The Plaintiffs admit that they were under certain obligations, but they allege that the bond was either prepared in a form different from that agreed upon, in other words, that it was obtained by fraud, and that on this ground they are entitled to relief, or if not, then, that it has been altered since its execution, and on this ground, that they are entitled to relief. Moreover they say they are discharged from their liability, because the Defendant has delayed his remedies against the principal debtors without their concurrence.

On the other hand, the Defendant says, that the allegation being that the bond was either obtained by fraud, or has been altered since its execution, he has a right to take it either way. I quite agree, that where there are such alternative allegations, the Plaintiffs would be entitled to relief if one be admitted, but would not, if the other be adopted, then the Defendant has a right to take his choice of the allegations; if the Plaintiffs are entitled to relief either way, how is it possible that [45] this will assist the Defendant on this demurrer? I am bound by the decision in *Simpson v. Lord Howden* so long as it stands unaltered by higher authority; but I think it does not apply to this case, for how will this bond appear void at law, on the face of it, when the Defendant admits it is lost and cannot be produced. There is nothing on the face of it to shew the alteration, and it is only by other evidence that it can be proved. Saying nothing as to the other objection, I am of opinion that there is equitable relief stated on the bill which the Plaintiffs would not obtain by demurrer: I must therefore overrule the demurrer.

[45] EVANS v. HARRIS. Feb. 22, 1842.

A fund was given to A. B. until some child of his should attain twenty-one, £1000 consols was to be paid thereout to each of his children as they attained twenty-one. The fund was insufficient to provide for all the children. A child died twenty-one. Held that he was, notwithstanding the deficiency, entitled to 1000 consols.

Had issue at the death of the testatrix. Held, also, that the children born after her death were also entitled.

The testatrix, by her will, dated in 1819, gave to trustees the sums of £6000 3 per cent. consolidated Bank annuities, and £5000 4 per cent. Bank annuities, upon trust to pay the dividends to her nephew Solomon Harris during his life or until his child of his should attain his or her age of twenty-one years, and when and as long as his children should attain his or her age of twenty-one years, to pay or to each such child the sum of £1000 3 per cent. consolidated Bank annuities, and the principal of the said trust funds, and the dividends of the residue of the said trust funds were to be paid to her said nephew for his life. And from and after

his decease, in case he should leave at his decease any child or children under the age of twenty-one years, [46] to set apart for each such child the sum of £1000 3 per cent. consolidated Bank annuities, and apply the dividends thereof towards their maintenance during minority, and to transfer the principal to each such child, when and as he should attain twenty-one years. And in case of the death of any such child before he attained twenty-one, to fall into the residue of the said trust fund.

The testatrix directed the dividends of the trust fund, after satisfying the above legacies, to be paid to the wife of Solomon Harris for life, if living at his death, and after their deaths, she directed the principal to be divided between all the children of Solomon Harris who should be then living.

The testatrix died in 1820. At the time of her death, Solomon Harris had one child living; he afterwards had ten other children, of whom seven were now living, the remaining four having died in their infancy. The Plaintiffs were two of the children who, having attained twenty-one, claimed by this bill to be entitled to receive the legacy of £1000 consols each out of the trust funds, which now consist of £5760 3 per cents., and £5000 3½ per cents.

The trustees declined making the payment, on the ground that there would remain sufficient to provide £1000 consols for each of the other children now living and any other children which Solomon Harris might have during his life. There was also a question, whether the children born after the death of the testatrix were entitled.

Mr. Pemberton and Mr. Rogers, for the Plaintiffs.

Mr. Tennant, Mr. Nichols, and Mr. R. W. H. Smith, for the Defendants.

[47] Mr. Rogers, in reply.

Deftis v. Goldschmidt (19 Ves. 566, and 1 Mer. 417), *Butler v. Lowe* (10 Sim. 120) were cited.

THE MASTER OF THE ROLLS [Lord Langdale]. In this case there seems to be a serious difficulty, which the Court must contend with, and get over in the best way it can. I have no doubt at all that this testatrix fully intended that each and every child down to the very last should have £1000 upon attaining twenty-one.

If, as in the case cited, she had directed a sufficient fund to be provided for answering the gifts to the whole family, then there would have been no difficulty. The difficulty which arises in this case is, that she has provided a limited fund for answering an unlimited object.

What I think ought to be done in this case is, to follow the first directions, which are clear and distinct, and pass over the difficulty which arises from the inference of intention which arises in the case.

There is a most distinct direction to pay the sum of £1000 consols out of the trust fund when each child attains twenty-one, and this must be followed. I therefore I ought to order the payment of £1000 consols to each of the two children who have attained twenty-one.

[48] KENT v. JACOBS. May 23, 1842.

Where husband and wife are Defendants, and the suit does not relate to the separate estate, service of a copy of the bill on the husband alone, under the 23d General Order of August 1841, is good service.

A husband and wife were parties to this suit; and on a motion for an adjournment under the 24th General Order of August 1841 (Ord. Can. 171), a question was mooted, whether service of a copy of the bill under the 23d General Order upon the husband alone was good service, so as to be a sufficient foundation for the adjournment under the 24th General Order.

The suit did not relate to the separate estate of the *feme covert*.

Mr. Shebbeare, for the motion, observed that the service of a copy of the bill ought to be similar to the practice in cases of a *subpoena*; and if a *subpoena* be served on the husband and wife, service on the husband is good service on him and his wife. (Reg. 402, 403; Hinde, 85; and 1 Daniel's Pr. 216.)

THE MASTER OF THE ROLLS [Lord Langdale] was of opinion that the service of one copy on the husband alone was sufficient.

[49] ROBINSON v. MILNER. March 11, 1842.

An application made at the Rolls, in a V.-C.'s cause, to discharge an order to sue *in forma pauperis*, obtained of course at the Rolls, can only be founded on irregularity; if merits are relied on, the application must be made before the V.-C.

The Plaintiff, in a V.-C.'s suit, obtained as of course at the Rolls, an order to sue *in forma pauperis* upon the usual affidavit that he was not worth £5, the matters in question in the cause only excepted. A motion to dispauper on the ground that he was in possession of the property in question of considerable value, involves the merits, and ought to be made to the V.-C., and not to the M. R.

This was a bill filed by a vendor, for the specific performance of a contract for sale of an estate for £1000. The Plaintiff, having made the usual affidavit that he was not worth in the world the sum of £5 after payment of his just debts, his wearing apparel and the matters in question in the cause only excepted, obtained the Rolls an order of course to sue *in forma pauperis*.

It was now moved on behalf of the Defendant, that this order might be discharged with costs.

The cause was one attached to the Vice-Chancellor's Court.

It did not appear by the bill who was in possession of the estate, but an affidavit was filed on behalf of the Plaintiff, stating on information and belief that the Defendant was in possession; on the other hand, it was sworn positively on the behalf of the Defendant, that the Plaintiff was and had been since 1836 in possession of the property.

Mr. Phillips, in support of the motion, cited *Spencer v. Bryant* (11 Ves. 49; and Wy. Pr. Reg. 320, 321; and *Perry v. Walker*, 1 Y. & C. (N. C.) 677), and contended that the Plaintiff ought not to be allowed to sue *in forma pauperis*, he being entitled [50] either to the £1000 purchase-money, or to the estate of that value, and moreover he being in possession.

Mr. Bichner, on behalf of the Plaintiff, objected that this motion ought to have been made before the Vice-Chancellor, to whose Court the cause was attached. 9th Order of May 1837 (Ord. Can. 114).

Mr. Phillips, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. The Plaintiff has obtained this order upon the usual affidavit that he is not worth £5 after payment of his just debts, &c., the matters in question in this cause only excepted. It might happen that this affidavit is perfectly consistent with the Plaintiff's being a very wealthy man, because the matters in question may be of very great value, and the Plaintiff may be in possession. This may be the ground for applying to discharge the order on the merits; but I cannot say that the Plaintiff who has complied with all that is required of him by the practice of the Court, has been guilty of any irregularity, or that the order has been irregularly obtained; in such a case alone I have authority to interfere in a cause attached to the other branch of the Court. (See 6th Order of May 1837, Ord. Can. 137.)

I am of opinion that the order is not irregular, and if it is to be discharged, it must be done by a proper application on the merits in another place.

[51] HEREFORD v. RAVENHILL. March 12, 1842.

[S. C. 11 L. J. Ch. 173.]

The testator directed his trustees, with the consent of his widow, to invest his personal estate in freehold, leasehold, or copyhold messuages, tenements, or hereditaments, and to settle them upon certain trusts which were applicable to realty. Held, that a conversion into real estate was intended.

The testator directed a part of his personal estate to be converted into realty, and settled

on certain trusts. These being exhausted, and no investment having been made: Held, that the residuary legatee was entitled to the fund, and took it in the character of personalty.

This case again (1 Beav. 481) came before the Court for further directions on the Master's report.

Subject to the life-estate of his wife, the testator, Howarth Crooke, had absolute power of appointment over estates at Holmer, Dilwyne, and Lingen.

By his will he devised these estates to his son Charles for life, with remainder trustees to preserve, &c., with remainder to the first and other sons of Charles in fee, with remainder to the daughters of Charles as tenants in common in fee, with similar limitations to his son John and his sons and daughters; and in default thereof, the testator devised the estates to certain persons in fee, but which subsequent devolution failed by the death of the devisees in the lifetime of the testator; it is, therefore, unnecessary to state them. The testator also gave his ready money, and money which should be due and owing to him to trustees, in trust, as soon after his decease as convenient purchase or purchases could be found, by and with the consent and approbation of his wife if she should be then living, signified in writing, otherwise their own discretion, to lay out and dispose of all such residue and overplus of ready money, and money which should be so due and owing to him, save as aforesaid, either together or in parcels, in one or more purchase or purchases of freehold, leasehold, or copyhold messuages, lands, tenements, or hereditaments in the county of Hereford, and thereupon settle, convey, [52] and assure them "to the use and behoof of his loving wife Mary Crooke for and during her life, and after her decease, to, for, and upon such or the same and the like uses," &c., subject to such powers, as were thereinbefore expressed, &c., of and concerning the hereditaments then before mentioned to be situate in the parishes of Holmer, Dilwyne, and Lingen; he thereby directed his trustees, "with the approbation of his wife, whilst living, in case of her decease, at their own discretion, in the meantime and until such purchase or purchases could be procured, to lend and place out all such residue and overplus of his ready money, and money which should be due and owing to him, upon any public or private security at interest, or invest the same, or any part thereof, in the purchase of stock in any of the public funds, subject to the trusts aforesaid." And he directed that until the ready money, &c., should be laid out in the purchase of hereditaments, &c., the interest thereof should, from time to time, be paid to and received by any person or persons as and to whom the rents and profits of the premises so purchased as aforesaid, if purchased and settled would for the time being belong, appertain by virtue of that his will.

And the testator gave and bequeathed the residue of his goods, chattels, and personal estate to his wife absolutely.

The testator died in 1788, leaving Mary Crooke, his widow, John Crooke his son at law, and Charles Crooke his only other child, him surviving. John died in 1802 without issue; the widow died in 1802; and Charles died in 1838, without issue.

The testator's ready money had never been laid out in land by the trustees, but had been invested on mortgage [53] and Government securities, and the interest had been paid to the widow during her life, and afterwards to Charles Crooke until the time of his death, and the question now was, to whom the fund belonged.

The Plaintiff, the heir *ex parte maternâ* of Charles Crooke the heir at law of the widow, claimed the fund as realty.

The Plaintiff and his five sisters, who were made Defendants, were the next of kin of Charles Crooke the sole next of kin of the widow. The Defendants claimed the fund as personalty.

Mr. Pemberton and Mr. Stinton, for the Plaintiff, the heir, contended that the will of the testator the fund had, in the consideration of equity, been converted into realty, and belonged to the heir at law, and not to the next of kin. The Defendants contended that the limitations were applicable to real estate only, and that the word "leasehold" either meant leaseholds for lives or leaseholds to be settled to the same uses as real estate. That the trust imperatively required the investment in land; and that no subsequent event had occurred to change its quality.

Mr. Kindersley and Mr. Romilly, *contra*, for the next of kin, argued, that no absolute conversion had been intended; for the trust was not imperative, the trustees having the option of investing in leaseholds, or personalty; and on that point it was held by Lord Loughborough in *Walker v. Denne* (2 Ves. jun. 170; and *Van v. Barnett*, 19 Ves. 102) that personalty directed to be so invested was not converted into realty. That if, however, an absolute conversion was intended, it only applied to those persons taking under the limitations of the real estate, and the purposes for which the conversion was directed having been satisfied, the residuary trustees took the fund in the character of personalty; *Cogan v. Stephens* (1 Beav. 322). That it could not be realty, for then it would belong to the heir of the testator, and not to the heir of the residuary legatee of the personal estate.

They also contended that if the property were considered as real estate, still the subsequent mode of dealing with the property by the widow, who had received the lands and adopted the investment, had the effect of reconverting the property into personalty.

They referred to *Cookson v. Reay* (5 Beav. 22) and *Earlom v. Saunders* (Amb. 240). Mr. Collins and Mr. Bacon, for other parties.

Mr. Pemberton, in reply, admitted the principle of *Cogan v. Stephens*, but said that decision only proved the exclusion of the heir at law of the testator, and did not decide in what character the residuary legatees took the property, or profess to determine the rights of the real and personal representatives of the residuary legatees. THE MASTER OF THE ROLLS [Lord Langdale]. The first point which is raised here whether there was a trust for conversion. I am of opinion there was. This case is from *Walker v. Denne* in this respect, that the leaseholds to be purchased were expressly directed to be for "very long terms of [55] years;" and that instance accounts for the decision. Considering, however, the object for which conversion was to be made in this case, and having regard to all the words which are to be construed, I think a conversion was intended.

There being a trust for conversion, this carries us a very little way in the solution of the real question in this cause; because the conversion being for certain purposes distinctly stated in the will, which have been satisfied, and others which have failed, the rule that the conversion is only to be to the extent to which the purposes can be carried into effect then comes into operation; and it has been generally admitted, that to the extent to which the limitations cannot take effect, the property remains personalty of the testator, and being so, belongs to the residuary legatee under the will.

If there had been an actual investment in real estate, the ultimate limitation would have been such as to have given the residuary legatee a right to it, and she might have had it to be limited and disposed of as she thought fit, either to her or her heirs, or any other way. Unfortunately nothing was done; and we have therefore to consider what are the rights of the parties independent of any act done by them to carry out their intention. Being personal estate in the first instance, as regards the residuary legatee, and nothing having been done to alter its quality, I see no reason to conclude, that it was to devolve in a form different from that in which it was left by the testator, or that its character was altered. It must, therefore, be considered as personalty, and consequently belongs to the next of kin, and a declaration of effect must be accordingly made.

[56] ASHTON v. M'DOUGALL. Feb. 11, April 18, 1842.

11 L. J. Ch. 344; 6 Jur. 447. See *White v. Cox*, 1876, 2 Ch. D. 396; *Wrigg v. Pike*, 1882, 7 P. D. 64. For subsequent proceedings, see *Harnett v. McDougall*, 1845, 8 Beav. 187.

On marriage of a female infant, her reversionary interest in choses in action was vested under the Court for her separate use for life, with remainder to her children. Afterwards contracted two subsequent marriages, but no further settlement was made on those occasions. Part of the reversionary interests fell into possession

during the first coverture, and part during the second, and were transferred to the trustees. Held, first, that although the deed made during infancy was not binding in respect of the reversionary interests, as against the wife surviving, still she might, while discoverer, adopt it if for her benefit. Secondly, that the wife having survived, and not having called for a transfer of the fund, must be deemed to have acquiesced in and adopted it, as it was for her interest to do so. Thirdly, that she must be deemed to have married her second husband on the faith that her property was protected by the settlement, and that he was bound by it. Fourthly, that the third husband, who had notice of the settlement previous to his marriage, and had for some years after acquiesced in it, was bound thereby, and had no interest in the settled property; and, fifthly, that the arrears of separate estate due at the time of the third marriage also belonged to the wife as her separate estate.

The question in this case was, whether the third husband of a lady, who at the time of her first marriage was an infant, took any interest in her property settled on that occasion, part of which consisted of a reversionary interest in choses in action. The facts which gave rise to the question were as follows:—

The Defendant, Mrs. Ashton, whose maiden name was Susannah Eliza Paddon, was one of the four children of Elizabeth Paddon, a daughter of the testator John Stacie, who, by his will, dated the 3d day of October 1812, gave to Trimby and Redman

A freehold tenement at Bath, on trust to pay the rents to Sarah Russell for life, with remainder in trust for the sole use and benefit of Susannah Eliza Paddon, if living at her death,

The sum of £5000 3 per cent. consolidated Bank annuities, on trust to pay the dividends to Sarah Russell, for her life, and after her death, to transfer the capital to his granddaughter Susannah Eliza Paddon for her sole use and benefit,

A house in Lamb's Conduit Street, on trust to receive the rents and pay them to Susan Wright during her life, [57] if the lease so long lasted; and if she died (the lease continuing), on trust to sell the lease, and stand possessed of the money arising from the sale thereof, on trust to invest the same for the benefit of the children of his daughter Elizabeth Paddon, of whom Susannah Eliza was one,

The sum of £5000 3 per cent. annuities, on trust for the separate use of Susan Wright for her life, and after her death for Susannah Eliza Paddon,

A house in St. John Street, and a house in Howland Mews, after the death of Susan Wright, to the children of his daughter Elizabeth Paddon,

The residue of his estate, on trust to pay the income thereof to the children of Mrs. Paddon, to whom he also gave £2000 3 per cent. annuities, and a sum of £400 long annuities.

He appointed the trustees executors of his will, and died on the 16th of March 1815. Trimby alone proved the will. At the testator's death, Mrs. Russell, Mrs. Wright, Mrs. Paddon, and the four children of Mrs. Paddon, were living.

Soon after the testator's death, a suit was instituted, by a legatee of the name of Gullan, against Trimby the executor, for payment of the legacy, and in that suit the usual accounts of Mr. Stacie's estate were taken.

On the 8th of June 1818 Susannah Eliza Paddon, being then between seventeen and eighteen years of age, married her first husband James Harnett. Soon after the marriage, a bill was filed on behalf of three other children of Elizabeth Paddon against the trustees of Mr. Stacie's will, and Mr. and Mrs. Harnett, for a general administration of the estate, and by an order, made in the two causes of *Gullan v. Trimby* and *Paddon* [58] v. *Trimby* on the 8th of December 1818, it was referred to the Master to approve of a proper settlement to be made of the fortune of Mr. Harnett.

A settlement, bearing date the 12th day of July 1819, and made between James Harnett and Susannah Eliza his wife of the one part, and Alexander M'Dougall and Thomas Dobson of the other part, was afterwards executed, in pursuance of the Master's report.

The settlement recited the will of Stacie, the institution of the legatee's suit, the taking of the accounts; and that, upon taking the accounts, it appeared that the general personal estate was insufficient to pay the general pecuniary and stock legacies.

full, and that an apportionment had been made; that the sum of £117, 7s. 1d. sterling, which was invested in the purchase of £151, 13s. 4d. 3 per cent. annuities, had been apportioned to Mrs. Harnett in respect of her share of the legacy of £2000 per cent. annuities, given to the children of Mrs. Paddon, and was carried to the account of Susannah Eliza Paddon; and that by several orders made in the cause of *Ashton v. Trimby*, the sum of £5000 3 per cent. annuities had been carried over to the account of Sarah Russell for her life, and another sum of £5000 had been carried over to the account of Susan Wright for her life, and the sum of £100, part of £400 long annuities, had been carried over to the account of Susannah Eliza Paddon; and after reciting the order of reference, and the Master's report, it was witnessed, that James Harnett covenanted with the trustees, that if his wife should attain twenty-one years, and his wife would, by fine or otherwise, convey the house at Bath to the trustees of the settlement, upon the trusts therein mentioned; and it was witnessed, that James Harnett and wife sold and assigned the £5000 3 per [59] cent. annuities standing to the account of Sarah Russell for life, and Mrs. Harnett's share of the money to arise from the sale of the house in Lamb's Conduit Street, and the £5000 3 per cent. annuities, standing to the account of Susan Wright for her life, and the sum of £1, 13s. 4d. 3 per cent. annuities, and the sum of £100 long annuities respectively standing in the name of Susannah Eliza Paddon, and all right and interest of Harnett's wife and each of them in the premises, to hold to the trustees on the trusts therein mentioned. The trusts were, to raise £500 for the use of Harnett, either when Mrs. Harnett's attaining the age of twenty-one years, or otherwise upon the death of Mrs. Russell or Mrs. Wright. And subject to that, during the life of Mrs. Harnett, to pay the rents of the freehold house and the shares of the messuages therein assigned, and the interest and dividends of the monies, stocks, and funds, or any part thereof as should be, from time to time, vested in possession, to such person for such purposes, as Susannah Eliza Harnett should, notwithstanding her present coverture, from time to time, when and as the same should become due, but by way of anticipation, direct or appoint, and in default of appointment, into her proper hands, for her own sole and separate benefit, free from the controul or interference of the said James Harnett, or any future husband; and after her decease, to be paid, if there should be any child or children by Harnett or any future husband or husbands, with whom she might marry after the decease of Harnett, for the benefit of such children.

On the 24th of December 1821 Mrs. Harnett attained her age of twenty-one years; a fine was levied, to the uses of the settlement, of Mrs. Harnett's reversionary interest in the freehold house at Bath, and on the 22d day of January 1822 an order was obtained, upon the [60] petition of James Harnett, who claimed the benefit of the settlement, for the sale of so much of the long annuities then standing in the name of Susannah Eliza Paddon, as would be sufficient to pay the costs of the application, and the balance of the fine, and the sum of £500 to be paid to Harnett for his own use.

On January 1823 Mrs. Russell, the tenant for life of one of the sums of £5000 3 per cent. annuities, died, whereby the interest of Mrs. Harnett in that sum became vested in possession; and on the 29th day of April in the same year, the trustees of the settlement, upon a petition, in which they stated the marriage of James Harnett with Susannah Eliza Paddon, and the settlement which had been made, obtained an order for the transfer of the £5000 3 per cent. annuities, which then stood to the account of Sarah Russell for her life, to the account of Susannah Eliza Paddon; and it was ordered, that the dividends, subject to the costs of the application, should be paid to the trustees of the settlement. The stock was not carried over under the order, but by virtue of a subsequent order of the 14th of November 1828, made after the marriage of Mrs. Harnett with a second husband, the stock was carried to the account of the trustees of the settlement.

James Harnett died on the 16th of August 1828. Very soon afterwards (viz., on the 1st of October 1828) Mrs. Harnett married Charles Edward Birch.

On the 15th of May 1829 an order was made for payment of the dividends on the sum of £54, 17s. 8d. long annuities to M'Dougall and Dobson, as trustees of the settlement, during the life of Susannah Eliza Harnett, therein described as then Susannah Eliza Birch, the wife of Charles E. Birch. And by a subsequent [61] order,

dated the 19th of December 1829, and obtained on the petition of M'Dougall Dobson, it was ordered that the long annuities should be transferred from the account of Susannah Eliza Paddon to M'Dougall and Dobson the trustees of the settlement.

On the 12th of June 1830 Susan Wright, who was entitled for her life to one of the sums of £5000 3 per cent. annuities, died; and on the 1st day of July 1831 order was made on the petition of M'Dougall and Dobson, entitled in a cause in which Charles Edward Birch and Susannah Eliza his wife, late Susannah Harnett, were stated to be Defendants, for the transfer of the £5000 3 per cent. annuities from the account of Susan Wright for her life, to M'Dougall and Dobson upon the trusts of the settlement of the 12th of July 1819.

In the year 1830 the leaseholds, in which Mrs. Birch was interested, were sold, and in respect of them, a sum of £142, 15s. 3d. 3 per cent. annuities had been transferred into Court since the institution of this suit.

On the 30th of March 1831 Mr. Birch died. At this time the real estate had been subjected to the settlement by the fine which had been levied in the lifetime of Harnett the first husband; the two sums of £5000 3 per cent. annuities and the leaseholds had been transferred to, and become vested in, the trustees of the settlement, and were, if the settlement was valid, held by them, on trust for the separate use of Mrs. Birch, with remainder to her children, of which she had four by her marriage; and the trustees were responsible for the money arising from the sale of the leaseholds.

Mr. Birch having died on the 30th of March 1831, his widow, on the 18th of April following, married [62] the Plaintiff. No settlement was executed on their marriage, but the Plaintiff had notice of the settlement made in 1819, and by his conduct acquiesced therein, and after his marriage concurred in the appointment of a trustee thereunder; he also joined his wife in a power of attorney to enable the agents to receive the dividends from the trustees of the settlement.

Mrs. Ashton had children by her first and third marriage. Differences arose between Mr. and Mrs. Ashton they separated, and, in June 1838, Mr. Ashton filed this bill, praying in substance, for a declaration that the Plaintiff, Robert Ashton, was entitled, in right of his wife during the marriage, to the rents and dividends of the property comprised in the settlement of 1819, which the Plaintiff insisted was binding upon him; and the bill, charging that in respect of the estate and the annuities alleged to be subject to the trusts of the settlement, there had been several breaches of trust, prayed for relief in respect thereof against the Defendant, Alexander Henderson M'Dougall, as representative of the deceased trustee of the settlement.

It should also be stated, that the Plaintiff made a claim to certain dividends of interest on the property which had accrued between the second and third marriages, and which he alleged had not been paid over by the trustees.

The Defendants insisted that the settlement of 1819 was a valid and subsisting settlement; that by the trusts thereof, the Defendant, Mrs. Ashton, was entitled to the income of the property therein comprised for her separate use; that the Plaintiff had no interest therein, and that his bill ought to be dismissed with costs.

[63] The question in reality was, whether the Plaintiff Mr. Ashton took an interest in the property settled on the first marriage.

Mr. Pemberton and Mr. Hubback, for the Plaintiff. Mrs. Ashton was alive at the time of the execution of the settlement on her first marriage; the settlement, therefore, was a nullity as far as it purported to be the contract of an infant; *Doe v. Lane* (1 Bro. C. C. 106), *Stamper v. Barker* (5 Mad. 157). At the utmost it was binding only to the extent to which the first husband could bind his wife's property; *Simson v. Jones* (2 Russ. & Myl. 365). As to the wife's reversionary interest, it is clear that the husband had no power of binding them as the wife surviving, as he had not the power of reducing them into possession; *v. Jackson* (1 Russ. 1), *Honner v. Morton* (3 Russ. 65; and *Stiffe v. Everitt*, 1 Cr. 37). As they did not fall into possession during the first coverture, the Plaintiff in right of his wife is entitled to the amount, subject to his wife's equity to a settlement. As to the arrears, they belong to the wife absolutely, and the husband is entitled thereto in her right.

It is said that the Plaintiff acquiesced in the settlement; even if he did so

ignorance of his rights, and that will not affect him; *Murray v. Palmer* (2 Sch. & 474), *Groves v. Perkins* (6 Sim. 576).

The words "sole use" in the testator's will, are not sufficient to limit the property to the wife's separate use; *Stanton v. Hall* (2 Russ. & Myl. 175), *Tyler v. Lake* (183).

[64] Mr. Kindersley and Mr. Purvis, for Mrs. Ashton, and Mr. Tinney and Mr. Shaw, for the trustees. First, as to the leaseholds, it is clear that the settlement binding both on the husband and wife; *Trollope v. Linton* (1 S. & St. 477), *Donne v. Hart* (2 Russ. & Myl. 360); and according to the decision in *Harvey v. Ashley* (11 610), even the wife's contingent interest would be bound. The settlement binding on the husband; *Middlecome v. Marlow* (2 Atk. 519); and being made with the sanction of the Court it was binding also on the wife. Even if it were otherwise still if it were for the interest of the wife so to do, she might, while discoverd, resist it. From her subsequent conduct when she was no longer under coverture, it appears that she adopted and confirmed this settlement, and it was not competent for her or her after-taken husband to defeat it.

Again, by the will of the testator, the property was settled to her separate use; the words used were sufficient for that purpose; *Adamson v. Armitage* (19 Ves. 416), *Wright v. Bay* (1 Mad. 199). Admitting she could not, while an infant, affect the property of her separate estate, still it remained separate estate upon her subsequent marriage; *Johnson v. Johnson* (1 Keen, 648), *Tullett v. Armstrong* (1 Beav. 1, and 11 & Cr. 377). The arrears of separate estate are subject to the same qualification and are held independent of the husband's marital right.

Whatever may be the effect of the settlement, the Plaintiff has repeatedly acted in it, and dealt with [65] the property on the faith of its validity, he cannot, therefore, now dispute it. The Plaintiff has, therefore, no interest in the property, and the bill ought to be dismissed with costs.

Mr. G. Turner and Mr. Austen, Mr. Wood and Mr. Lewin, for other parties.

Mr. Pemberton, in reply. The settlement of an infant's property under the Statute has no greater efficacy than one made by an infant with the consent of her parents or guardians. In neither case can a power of contracting be given to an infant. The settlement is only good as the settlement of the husband; and as to those interests which he has not the power to affect, the settlement is wholly inoperative. The property or some portion of it, at least, belonged to the wife at the time of her third marriage, and the Plaintiff has entered into no contract to surrender or limit his marital rights. Acquiescence is not sufficient to defeat a vested

claim. Even if the Plaintiff be wrong, this is not a case for costs: the bill was filed after the decision in *Massey v. Parker* (2 Myl. & K. 174), and before that in *Tullett v. Armstrong*.

THE MASTER OF THE ROLLS [Lord Langdale]. I do not find anything, which, as it appears to me, ought to induce a Court to consider the settlement as invalid for the protection of Mrs. Ashton. The first marriage took place during her infancy, and the interests to which she was entitled and which formed the subject of the settlement, were, for the most part, reversionary, and the reversionary interests of a married woman are [66] not assignable as against herself surviving her husband; but the assignment of a reversionary interest which falls into possession during the husband's life may be valid, and there seems to be no reason why she may not adopt an assignment made during her coverture, for her own benefit during the whole of her life, and for the benefit of her children after her death. A part of the reversionary interests fell into possession during the life of her first husband, who claimed and enjoyed the benefit of the settlement, and was bound by it. After his death, I think the wife surviving him, and not claiming to have the funds transferred to herself, was deemed to have acquiesced in and adopted the settlement, as it was for her benefit so to do. I conceive that she ought to be deemed to have married her second husband, Mr. Birch, on the faith that her property was protected by the settlement, and that he was bound by it. The remainder of her reversionary interests fell into possession during his life, and became subject to the settlement, and so continued to be at the time of his death, when the lady again became a widow.

Within three months after the death of Birch, viz., on the 18th of June 1831, she married the Plaintiff; and if she had practised any fraud upon him by misrepresentations respecting the property, or given reason to suppose that he would become entitled to it in her right, or, if a single woman, entitled to property limited to her sole use free from the control of any husband she might marry ought to be deemed by the act of marriage, to have conferred such property on her husband, Mr. Ashurst might have been entitled to relief: but the case is entirely different; Mr. Ashurst before his marriage, was perfectly well acquainted with the settlement. He married his wife, knowing that her property was limited to her separate use, and for many years after the marriage he entirely acquiesced in it. Under the circumstances, I am of opinion, that the Plaintiff is not, in right of his wife, entitled to any part of the property which he claims, and that the whole foundation on which he asks relief entirely fails.

It was argued, that the Plaintiff, if not entitled to more, was at least entitled to such part of the income as became due between the death of Birch and Mrs. Ashurst's marriage with the Plaintiff: but I am of opinion, that any sums to which she was entitled when she married, were due to the trustees for her benefit, and were payable to the trusts, and payable to her for her separate use.

As the Plaintiff appears to me to have no interest in the property comprised in the settlement, I can give no relief in respect of the breaches of trust which have been committed; and the bill must be dismissed with costs against all Defendants.

[67] BAMPTON v. BIRCHALL. April 19, 1842.

[S. C. 5 Beav. 330; 6 Jur. 815; 1 Ph. 568; 41 E. R. 749.]

An ejectment bill filed in 1842, stated that the Plaintiff's alleged right to the property accrued in 1812, that a bill had been filed in 1824 to recover the property, and an ejectment had been brought in 1832, which was stayed until the Plaintiff paid the costs of a former ejectment; but it did not state the result of the action. Held, that it must be inferred that they had failed, and that they did not prevent the operation of the Statute of Limitations.

The Defendant having obtained liberty to file a double plea (4 Beav. 558) the Plaintiff amended his bill. The Defendant thereupon filed a general demurrer, and now came on for argument.

The amended bill stated, that Sir Frank Standish died in May 1812, leaving certain real estates, leaving [68] Thomas Standish his heir at law; and, after setting out the pedigree, it stated, that, at the time of the death of the said late Sir Frank Standish, there were outstanding, certain terms for years of the estates of which he died seized, which had been in his lifetime satisfied, and that the same still remained outstanding, and also certain mortgages of, and incumbrances upon, the said estates and premises, for small sums of money, and also leases of the said estate and premises which were not yet expired. That upon, or soon after the death of the said Sir Frank Standish, Frank Hall entered into possession or into the receipt of the rents and profits of the whole of the said estates and premises, and remained and continued in such possession or receipt up to the time of his death, which happened in or about the month of December 1840, without having any title thereto; and upon his death the Defendants entered into possession under his will, and continued and were in such possession and receipt, without having any actual title thereto. That in order to protect such possession, Frank Hall, during his life, procured some of such terms as aforesaid and some of such leases to be assigned, to or upon trust for the Plaintiff and the Defendants or some or one of them did also procure some of such mortgages or incumbrances as aforesaid, to be assigned to or upon trust for them or some of them; but that other of such terms, mortgages, and leases then remained and continued vested in other persons, so that the Plaintiff, who was entitled to the real estate of Thomas Standish, as his assignee, was unable to proceed at law

recover the possession of the said estates and premises. It stated that the mortgages assigned to Frank Hall and the Defendants had been paid off.

That Thomas Standish took the benefit of the Insolvent Act in October 1820, and died about the 13th of [69] July 1836. That Blackburn and Johnson had been originally appointed his assignees; and after their decease, and on the 5th of April 1841, the Plaintiff was appointed assignee, and as such became entitled to the estates.

The bill alleged that the Defendants pretended that the Plaintiff was barred by the Statute of Limitations; whereas the Plaintiff charged the contrary, and that he was entitled to recover the lands, &c.

And the Plaintiff charged, as evidence of the matters aforesaid, that, on or about 15th of June 1824, Blackburn, as the then surviving assignee of Thomas Standish, deceased, exhibited his bill of complaint in this Court against Frank Hall, deceased, for the purpose of recovering from him the possession of the said lands, &c., and for account and payment to him of the rents and profits of the said estates, &c., and for such other relief as therein mentioned. And the Plaintiff further charged, as evidence of the matters aforesaid, that the said Frank Hall, deceased, appeared to the bill, and did, on or about the 12th of April 1825, put in his answer to the said bill, by which he admitted the seisin of the estates by Sir Frank Standish at his death, and his death, and certain specified parts of the pedigree, and that there were outstanding terms, and submitted and undertook not to set up or avail himself of the said terms, in any proceedings at law which Blackburn might take respecting the said estates; and he admitted the insolvency, and that he had no claim on the estate in respect of any mortgage.

The bill also charged, as evidence of the matters aforesaid, that, in the month of June 1832, various actual entries were made upon the estates, by Thomas Standish, his assignee, and by his agent duly authorised, and [70] that shortly after such entries were made, and in or as of Easter term 1832, an action of ejectment was commenced on the several demises of Thomas Standish and Blackburn, in the Court of the Bench, against Frank Hall, deceased, and the several tenants of the estates. On or about the 7th of June 1832, a rule *nisi* was obtained from the Court of the Bench in the said action of ejectment, which rule was in the words and figures, to the purport and effect hereinafter mentioned, viz. :—

Doe demises Standish, &c., v. Roe.—Upon reading the affidavit of Bethel Robinson, the Plaintiff's attorney, it is ordered, that the lessors of the Plaintiff, upon notice of this rule to be given to their attorney, shall, upon Wednesday the 13th day of June instant, shew cause why the proceedings in the ejectments served upon Frank Hall, Esq., in the said affidavit named, and his tenants, should not be stayed, until the taxes due on the former ejectments are paid, and that in the meantime proceedings be taken.

The bill also charged that the rule *nisi* was, some time in the month of June 1832, absolute (5 Barn. & Ad. 878), and that by reason of the said Thomas Standish being unable to pay the costs in the said rule mentioned, and of Blackburn having taken the estates of Thomas Standish in his hands to meet such costs, no further proceedings were taken in the ejectments, and the ejectments were pending, at the time of the death of Frank Hall, but upon such death became abated.

The bill prayed a declaration of the right of the Plaintiff to the estates, or that an injunction might be directed. [71] That the Defendants might be restrained from setting up any outstanding terms; and if the Defendants had a mortgage title, that the same might be let in to redeem.

On this bill the Defendants filed a general demurrer for want of equity.

Turner and Mr. Emsley, in support of the demurrer. The Plaintiff has not shewn any right to relief. His right of action accrued on the death of Thomas Standish in 1812, or thirty years ago. By the 3 & 4 W. 4, c. 27, s. 2, no action can be brought to recover any land twenty years after the right to bring the same has accrued, and this applies to equity. (Sect. 24.) Not only is the remedy taken away, but the right has become extinguished. (Sect. 34.) The defence of the Statute of Limitations may be raised by general demurrer; *Hoare v. Peck* (6 Simons, 51; and *Wheat v. Pole*, 3 Y. & Coll. 266).

The bill seems to rely on three grounds as preventing the operation of the Statute of Limitations. First, on the bill filed in 1824 against Frank Hall, but that suit has in fact, been, and must be assumed to have been, dismissed, and this bill is not a continuance of that suit. Secondly, it is said that entries were made in 1832; but by the above statute an entry is wholly ineffectual to prevent the operation of the statute. (Sect. 10.) Thirdly, the action at law, which is wholly abated, and cannot be revived. The allegations in the bill are uncertain, and must be taken most strongly against the Plaintiff.

[72] Mr. Pemberton, Mr. Bilton, and Mr. Johnson, *contra*.

The bill contains a charge that the Plaintiff is not barred by the Statute of Limitations, and he will therefore be enabled to enter into evidence as to that at the hearing. This, being a general demurrer, cannot be allowed, unless it is quite clear that the bill would be dismissed with costs at the hearing; *Brooke v. Hall* (3 Ves. 253).

The Statute of Limitations cannot apply to a case of this description, where proceedings both at law and in equity were commenced within the proper time; mere accident of the death of a party pending a suit cannot have the effect of destroying his rights, and upon the statements in this bill neither the action nor the suit have yet been determined. In the former a conditional rule delayed the proceedings, but did not admit the operation of the Statute of Limitations; in the latter an answer has been put in, containing an undertaking and submission not to set aside the outstanding terms: this is binding on the present Defendants, and the Plaintiff would, at least, be entitled to a decree restraining the Defendants from setting aside in an action at law.

THE MASTER OF THE ROLLS [Lord Langdale] (without hearing a reply) said: The question is, not whether I am to stop any proceedings at law, for notwithstanding any decision that I may make here, the Plaintiff will be perfectly at liberty to go on with his legal proceedings if he can support them; but the question is whether I am to afford the assistance of this Court in giving equitable relief to the Plaintiff.

[73] Sir Frank Standish died in the month of May 1812. The Plaintiff in this cause claims in the right of a person in the name of Thomas Stanley, and alleges that at the time of the death of Sir Frank Standish, Thomas Stanley was his heir at law, and that Sir Frank Standish having died intestate, his right to the estate accrued at that time, that is, in May 1812. He has stated in his bill grounds for equitable relief, which, if he had come in due time, would have been sufficient to entitle him to the assistance of this Court; for he says that he has a legal right to the estate, that he is prevented from taking the benefit of that legal right by outstanding debts which he seeks to have removed; he also states that some of those outstanding debts are held as a security of money, which has been entirely or nearly paid; (supposing that to be the case) then, upon payment by him of what is due, he would be entitled to the equitable relief which he has asked.

It has not been disputed, in the course of this discussion, that there are grounds on which equitable relief might be claimed, if the Plaintiff had come in due time. But the right having accrued in the month of May 1812, this bill is filed in the month of January 1842, within a few months of thirty years, during which time either the Plaintiff or Stanley, through whom the Plaintiff claims, had been entitled to this right, they ought to have enforced it. In answer to this claim it is said only is your remedy barred, but your right is extinguished by the Statute of Limitations; *prima facie* it is so; the statute says that if the action or suit be not brought within a certain time the right is to be extinguished. What then are the circumstances by which the operation of the statute is to be excluded? Let us look a little into the history of the case so far as it appears on this bill, for it is on the bill alone that the Court is [74] to proceed on this occasion, and I cannot in any way go out of it.

In the year 1812 the right accrued. In the year 1820 Thomas Stanley became insolvent. There was no suspension or interruption of the right by that, because whatever right was vested in the insolvent was transmitted to his assignee, and the assignee had just the same right of proceeding to recover any interest which this person was entitled as the person himself had. Nothing was done to

month of June 1824; and in the month of June 1824 the then assignee under the insolvency filed a bill, which seems, from the nature of it, as it is stated here, to be very much in the character of the present bill. Mr. Frank Hall who was at that time in possession of the estate, was made a Defendant to the bill, and in the month of April 1825 he put in an answer; in which answer he is stated to have admitted certain things, and on this demurrer I must take it that those things were so admitted by him. Now it is most extraordinary that the bill does not state anything more about that proceeding. There is an end of it in the year 1825. From the year 1825 to the year 1842, it does not seem that any step whatsoever has been taken in that suit. The Plaintiff leaves me entirely in the dark on the subject, and leaves me to draw such inferences as the circumstances of the case warrant. It is perfectly true, as stated by the Defendants' counsel, that you are to presume against the pleader. I cannot presume that the Plaintiff in that case, having a continued right, and being able to support that right by the admissions contained in the answer to that bill, thought fit to suspend all proceedings whatever from 1825 downwards. But when I connect with that fact, which is of itself extremely strong, the circumstance that this bill is in no way founded on any [75] of the proceedings which took place in that case, and does not ask for the benefit of them, and though stating those admissions, does not ask the benefit of the admissions, or of any proceedings in that cause, I think the necessary inference is, that that suit has failed. I take no notice of the statement made at the Bar, that the bill is dismissed. I know not whether it is so or not, but I necessarily assume from the facts here stated that that is not an efficient case.

The next thing that took place was in the month of May 1832, when entries were made. Now I do not collect very distinctly from this record, on what day in May those entries were made; but I will suppose that the entries were made within twenty years from the accrual of the alleged right. The Act expressly states that an entry of itself is not to have any effect in such proceedings. Those entries were allowed by an action, which, it seems, the Plaintiff had no right to prosecute, because he had not paid the costs of a prior action, and there a conditional order was made in the first instance to prevent him prosecuting that action unless he paid those costs, and that order was afterwards made absolute. The effect of making the order absolute was this, that the party was restrained from going on with the ejectment until payment of costs; but by paying the costs, or by an act of his own, he might have been at liberty to go on. It was his own omission that he did not perform it; it is said it arose from poverty; that is to be regretted if he had a right to maintain; but he did not pay the costs, and, the consequence was, that he was precluded from going on. The action being stayed in the manner I have stated, I am of opinion that the proceedings in that action do not exclude the operation of the Statute of Limitations.

[76] What happened next? Thomas Stanley died on the 13th of July 1836, but, I think, made no difference at all in the matter. Frank Hall died in the month of December 1840. What was done in the proceedings of the insolvency does not appear until the month of April 1841, when the Plaintiff was appointed assignee under the insolvency. Now I quite agree with the Plaintiff in this, that there was an extraordinary delay from April 1841 to January 1842, when this gentleman was appointed; but that is by no means the question; the question is this, when did the right accrue, when ought the party to have prosecuted his right? on the other hand, how long have the parties who claimed adversely in 1812 been left undisturbed in possession, undisturbed by any effective proceeding? I must say I am clearly of opinion there is nothing to exclude the operation of the Statute of Limitations in this case.

A question was rather mooted about the propriety of taking advantage of the Statute of Limitations by means of a demurrer. I really do not see any substantial objection to it; and I do not know how I could refuse to give effect to that branch of the clause of the statute which says that the right is to be barred. It is not a matter of remedy only, but there is actually an extinction of the right. It appears to me that this demurrer must be allowed.

[77] THOMASON v. MOSES. April 18, 22, 1842.

[S. C. 6 Jur. 403. See *Westcott v. Culliford*, 1844, 3 Hare, 275.]

A testator passing over his heir at law (the son of his deceased eldest brother), £1000 to the testator's father for life, and after his death to be continued to testator's younger brother, and proceeded thus:—"And after his death to be continued to my next nearest heir, and so on. This property is not meant to be disposed of by any of the family." Held, that the ultimate limitation was void for uncertainty.

In a suit to obtain the decision of the Court on a very doubtful will, the Plaintiff turned out to have no interest. The Court, upon making a declaration of rights ordered the costs of all parties out of the fund.

The question arose on a bequest contained in the will of the testator Thomas Moses, which was as follows:—"There is £1000 sterling, lodged in the hands Messrs. Ease & Bond, merchants, London, I wish my attorneys at home to receive as soon after my decease as possible. I wish it to be put out on interest in England and secured on landed property, the interest thereof to be received by my son during his natural life, and after his death to be continued to my brother Henry Moses during his natural life, and after his death, to be continued to my next nearest heir and so on. This property is not meant to be disposed of by any of the family."

The testator died in 1813, leaving his father and the issue of his deceased brother Richard, and two other brothers, Henry and John, him surviving.

At the time of his death, Richard, the son of Richard, the deceased eldest brother was the testator's heir at law, and John Moses, the testator's father, was his next of kin.

John Moses, the father, died in 1822, and Henry Moses, the brother, died in 1832, having respectively received the interest of the £1000 to their deaths. At the death of Henry, Richard the son of Richard, was the heir at law of the testator; the children of Richard, Henry and John were his next of kin. The question was, whom, under the circumstances, the £1000 now belonged.

[78] There were several claims advanced for this fund.

First, it was claimed by Richard the younger, the heir at law of the testator, on the ground of the money being given to the heir as a *persona designata*; *Gwynne v. Muddock* (14 Ves. 488).

Secondly, it was claimed by the daughters of Henry, the testator's second brother, as co-heirs, on the ground of their being the "next and nearest heir" to Henry, the father, it being argued on their behalf that the testator had passed over Richard his issue; that the bequest could not revert back to that line so as to confer "the next and nearest heir;" and that the word heir did not always mean the heir at law strictly, but might be qualified; *Chambers v. Taylor* (2 Myl. & Cr. 376).

Thirdly, it was claimed by the persons who were the next of kin of the testator at the death of Henry, on the ground that the word "heir," having reference to personalty, must be construed next of kin; *Holloway v. Holloway* (5 Ves. 404); *Vaux v. Henderson* (1 Jac. & W. 388), *Gittings v. M'Dermott* (2 Myl. & K. 69); that the class must be ascertained at the death of Henry, the tenant for life; *Moss v. Blamire* (4 Russ. 384).

Fourthly, it was claimed by persons representing John, the father of the testator, on the ground that he was sole next of kin at the testator's death, and who in that case the gift was void for uncertainty, and went to the father as next of kin; *Waite v. Templer* (2 Sim. 524); *Hayes v. Hayes* (4 Russ. 311).

[79] Mr. Pemberton and Mr. Rolt, for the Plaintiff.

Mr. Kindersley and Mr. K. Parker,

Mr. G. Turner and Mr. Rogers,

Mr. Walker, for other parties.

Mr. Pemberton, in reply, referred to *Lord Deerhurst v. The Duke of St. Albans* (5 Mad. 232, 8 Bli. 547, 2 Cl. & Fin. 611).

THE MASTER OF THE ROLLS [Lord Langdale]. The question in this cause depends on the construction of the words "to be continued to my next nearest heir, and so on." The testator, at the time of his death, had a father and two brothers, Henry and John, who were living, but his eldest brother Richard had previously died, leaving children. In this situation of things he made his will, containing this expression of his wishes; without any doubt he intended a perpetuity. The heir of the testator, at the time of his death, being the eldest son of Richard, he adopted this particular mode of succession; he gave it first to his father for life, then to his younger brother for life, and then "to be continued to his next nearest heir." These words seem relative, and refer to what went before, and he seems to have intended the persons next to those whom he had treated as heirs by the preceding gifts. The difficulty is this, did he mean the heir properly so called, or some other persons? And I have considerable difficulty in imputing to him that he meant the person who, as heir at law, would have succeeded to his real estate.

The first gift is to the father, who was not his heir, and the next gift is to the younger brother, who was [80] not heir, and then it is to be continued to his next nearest heir; next to whom? It is contended, that it must have been the next heir, including all those passed over. On the other hand, it is said he meant it to go to all his brothers, and then to revert back to the child of the deceased brother.

There is so much difficulty and uncertainty, that I think it impossible to give the words a satisfactory construction. If that should be the case, the gift will be void, and belong to the next of kin. I will give the point further consideration.

April 22. THE MASTER OF THE ROLLS. Having further considered this case, I remain of the opinion which I before expressed. The testator, intending the legacy of £1000 to be continued in his family, seems to have contemplated a peculiar line of succession in which he meant the legacy to devolve.

His father was to take first.

After the death of his father, his brother Henry, who was his eldest surviving brother, was to take.

After the death of Henry, the legacy was to be continued to the testator's "next nearest heir, and so on."

The words "continued to my next nearest heir, and so on," appear to me to have relation to the preceding limitations. They seem to mean a continuation to the testator's nearest heir, in some way next after him who has before enjoyed the legacy, and so on in like order of succession.

[81] What then is the succession, which, beginning with the father, and after the father's death passing over the heir, and children of the testator's eldest brother, vests in the eldest surviving brother, and is then to be continued in like succession to the testator's next nearest heir?

I think it quite uncertain who was meant to be designated by the word "heir."

In the ordinary sense of the word, the father was not the testator's nearest heir; nor was the eldest surviving son nearest heir, or heir next after the father. How then are we to determine, from the words, who is the next nearest heir, in a succession, which, having thus commenced, was to be continued "so on?"

The testator may have contemplated a line of succession, capable of being, within proper limits, carried into effect by apt words: but the word "heir," which he has used, imports, in some sense or other, the right of legal succession; and he has at the same time so expressed himself, as to shew that he did not intend the order of legal succession; and under these circumstances, it appears to me, that the persons intended to take after Henry are wholly uncertain, and that the legacy belongs to the next of kin under the statute.

Mr. Turner. The Plaintiff has therefore no interest, and the bill must be dismissed.

THE MASTER OF THE ROLLS. This is a proper case for payment of the costs of all parties out of the fund. There was once a doubt whether [82] the costs could be ordered to be paid in such a case, but it has been held otherwise. There must necessarily be a declaration of the rights.

Mr. Turner said, he remembered a case, in which Lord Eldon said, that he would make no decree, unless the parties would consent that the costs should be paid according to the equity of the case.

[82] WILLIAMS v. DOUGLAS. April 19, 21, 26, 1842.

A stranger to a cause cannot, as of course, except to and refer a pleading alleged to be scandalous as to him, and impertinent as between the parties, but he may be authorised so to do upon making a special application to the Court.

A. R. S., a solicitor, who was not a party to the cause, conceiving the Plaintiff's bill, and an affidavit in support thereof, to be scandalous and impertinent, took exceptions in writing thereto, which were signed by council, and were delivered to the Plaintiff's clerk in Court.

He then applied for an order of course, referring the exceptions to the Master, but the officer of the Court, entertaining a doubt as to the regularity, declined drawing it up without the directions of the Court.

Mr. Elderton now applied to the Court to have the order drawn up, and have referred to several of the authorities after stated.

THE MASTER OF THE ROLLS [Lord Langdale] said, as the order of reference must be obtained within six days from the filing the exceptions (Ord. Can. 7), it had better be now made, to enable [83] the parties to discuss its regularity. The applicant must undertake not to act on the order until Thursday next, and give immediate notice thereof to the Plaintiff, who must have liberty to move the Court on that day without notice (Reg. Lib. 1841, B. fol. 628), to discharge the order.

April 21. Mr. George Turner, on behalf of the Plaintiff, now moved to discharge the order referring the exceptions.

Mr. Pemberton and Mr. Elderton, *contra*.

Mr. Turner, in reply.

The following authorities were referred to: 1 Daniels Pr. 460, Lord Bacon's Order (Beames, 25), Lord Clarendon's Order (*Ibid.* 165-7), *Abergavenny v. Abergavenny* (2 P. Wms. 312), *Bishop v. Willis* (1), *Fell v. Christ's College* (2 Bro. C. C. 2), *Coffin v. Cooper* (6 Ves. 514), *Ex parte Simpson* (15 Ves. 476), *Erskine v. Gardiner* (18 Ves. 114), *Anonymous* (4 Mad. 252), which appears from the Reg. Lib. to have been a case of *Porter v. Ewors, Ex parte Morgan*, and [84] came on upon the 4th and 5th of April 1818, so that the Vice-Chancellor seemed to have had the opportunity of communicating with Lord Eldon in the interval.

THE MASTER OF THE ROLLS [Lord Langdale]. I will take time to consider the case. It is a matter of serious consideration, whether it can be possible for a party to introduce on the record scandalous matters greatly to the prejudice of a stranger to the suit; and that such party is not to have an opportunity of applying to be relieved from the imputation. If that be so, he and his memory may be injured all time. This is a state of things which I cannot think is likely to be sustained. It may, however, be, that the practice can only be settled by a general order of the Lord Chancellor on the subject.

As to the objection for impertinence, I may observe, that if the statement relative to the issue between the parties, and necessary for the determination of the rights, then, though it may happen to be reproachful or scandalous to a person a party to the suit, it may be said he has no right to complain. With respect to a stranger, the whole of the statements in a bill are impertinent. But the matter complained of may be at the same time impertinent as regards the issue.

(1) *Bishop v. Willis*.—11th of July 1749. Petition by Plaintiff and Francis Leicester, his solicitor, setting forth, that Defendant had put in his answer, and that Petitioners apprehended was scandalous as to Petitioner Leicester, and impertinent as to Plaintiff; and therefore they prayed, that it might be referred for scandalous and impertinence, which was ordered.

This answer was reported scandalous as to Petitioner Leicester; and it appeared that the Defendant's solicitor, one Owen, had inserted the scandalous matter, and counsel's name to the answer, without having any authority for so doing, the Court committed him, and ordered him to pay the costs of the scandal, which the Master taxed at £150. Deaves, Rolls MSS. 118.

scandalous towards a stranger. It is alleged, in this case, that the matter is scandalous; and I can scarcely reconcile myself to the notion that a person, not a party to the suit, has no remedy unless by action; he may however, according to the decisions, be left in that unfortunate situation. I shall look at the authorities, and in the meantime postpone my decision.

[86] April 26. **THE MASTER OF THE ROLLS.** The question in this case is, whether a person who is not a party to the cause, alleging that the bill contains matter which is at the same time impertinent as between the parties, and scandalous against him, is, of course and without leave, entitled to file exceptions for scandal and to obtain an order to refer the exceptions to the Master, with a view to have the scandalous and impertinent matter (if it be so found) expunged.

There is but little authority on the subject: but from the terms in which Lord Eldon's Order is expressed, from the *dicta* of Lord Eldon, expressed in a manner to show that he had considered the subject, and from the apparent necessity of the case, there being, as I conceive, no other way of doing effectual justice to an injured party, it would seem that the Court must have jurisdiction and authority to expunge scandal from the record, at the instance of a person who may not be a party to the cause.

Effectual justice to a person aggrieved by such scandal cannot be obtained by means of an action, or any succession of actions. Whilst the record remains unaltered there is scandal, a perpetual reproach and shame, for which no just damages can be assessed, no just compensation ever given, and which can only be removed by the authority of this Court. I own that I cannot attribute much weight to the objection which the Court could by its own order so easily remove, that a person not a party to the cause has no right to an office copy of the bill. And I see no hardship in compelling a party who has introduced into the record contumelious matter amounting to scandal to show that it is material to the purposes of justice. It is not denied [86] that the Court could, by its own order, made *mero motu*, direct apparent scandal to be expunged. If this were done, it would be in the discharge of a public duty; and why the Court would accept the suggestions of any stranger to enable it to perform a public duty.

But assuming, on this occasion, that the Court might order scandal or contumelious matter, not material or pertinent to the matters in question between the parties, to be expunged, at the instance of a person who is not a party to the cause, it does not follow that the whole proceeding is of course.

The case of *Ex parte Morgan*, in the cause of *Porter v. Evans*, which is anonymously reported by Mr. Maddock (4 Mad. 252), amounted to no more than the refusal of an application, in which respect I conceive it to have been right; and although words attributed to Sir John Leach express a general proposition, that no application can be made by a stranger to the record to refer a bill for scandal, yet it was not referred to by the particular application; the order of Lord Bacon was not referred to, although the learned Judge had communicated with Lord Eldon, the proposition being in variance with his reported opinion on other occasions.

Upon consideration, I think that a person not a party to the record cannot adopt a proceeding without special leave; he requires the assistance of a special order, which enables him to prosecute the reference with effect, and to compel the party whom he accuses of scandal to prove the materiality of the allegations so characterised; and I think that the order now in question ought to be discharged, on the ground of its not having been obtained *ex parte*.

[87] An application to the Lord Chancellor to discharge the order I now make, or to give the solicitor leave to except, with such special assistance as a person not a party to the cause may require, will bring the whole question under the consideration of the Court. (NOTE.—Discharge the order of the 19th of April, but without costs.—Lib. 1841, B. 675.)

[87] RICHARDSON v. HORTON. *March 24, April 26, 1842.*

A party having obtained and served the order *nisi* to confirm the Master's report, afterwards file exceptions thereto; and the time within which this may be done, is unlimited until the order to confirm absolute is made; but it may be limited by an order *nisi* obtained by any other party on the neglect of the party having the carriage of the report.

In the computation of time, the rules which prevail in the registrar's office and Clerks' office are different.

Where the draft report is altered, upon objections carried in after the warrant to set aside, new objections may afterwards be carried in, and exceptions founded thereon regular.

Where the draft report has been varied on the consideration of objections disposed of after the warrant to sign is attended, it is competent to any party, before the expiration of the warrant to sign the report on the objections, to carry in objections to new matter introduced into the draft, or to any part of the original draft, which has been affected, to the prejudice of the party, by any alteration made in the draft by way of addition or omission.

This was a motion, that exceptions exhibited by the Plaintiffs to the Master's separate report might be taken off the file; or that the twelfth, thirteenth, fourteenth exceptions might be expunged for irregularity, or that the same might be heard or might not be proceeded on.

The Plaintiffs, on the 22d of January 1842, obtained an order *nisi*, to confirm the Master's report, whereby it was ordered, that the report should be confirmed, unless the other parties, having notice of the order, should, within eight days after notice, shew good cause to the contrary. This order was served on the Defendants [88] on the 24th of January. On the 31st of the same month the Defendants took exceptions, and on the same day obtained and served an order to set them down. The order was served on the 3d of February, and the exceptions were set down on the 4th. The Plaintiffs also took exceptions, and on the 1st of February obtained an order to set them down to come on with the Defendants' exceptions.

In support of that part of the motion which asked that all the exceptions might be taken off the file, it was contended first, that the Plaintiffs, having obtained an order *nisi* to confirm the report, were not, themselves, at liberty to except to the report, or at least were not at liberty to do so without leave. Secondly, that if they were at liberty to except, they were bound to do so within eight days after the date of the order, when they who obtained it, of course had notice of it.

On the other hand, the Plaintiffs relied on what they stated to be the practice of the Court, which entitles a party who has the carriage of the report to obtain an order *nisi* to confirm the report, and afterwards to except to it; and entitles any party to except until the order to confirm absolute is obtained.

The other part of the motion, viz., that the twelfth, thirteenth, and fourteenth exceptions might be expunged for irregularity, depended on the following circumstances:—

On the 28th of May 1841 the Plaintiffs regularly took in the objections on which the first eleven exceptions were founded. The warrant on signing the report was returnable and attended on the 7th of June. On the same day the Defendants took their objections, and [89] nothing could be done till the objections on both sides had been disposed of. Various proceedings took place on the objections, and warrants were attended. In the result the draft of the report was varied. Some matter was introduced, and the references to an answer and to an affidavit, which were contained in the draft as it first stood, were struck out.

The Plaintiffs then took in objections, on which their twelfth, thirteenth, and fourteenth exceptions were founded.

Mr. Pemberton and Mr. Koe, for the motion, cited *Manners v. Bryan* (5 Sim. 1 and 1 M. & K. 453), and *Ex parte Baz* (2 Ves. sen. 388).

Mr. Turner and Mr. Rogers, *contra*, cited 2 Daniel's Pr. 944, 947, (Moseley 305).

Mr. Pemberton, in reply.

THE MASTER OF THE ROLLS. I will inquire into the practice before giving my opinion.

April 26. THE MASTER OF THE ROLLS [Lord Langdale]. The books of practice cited, to shew that the order nisi did not prevent the party who had obtained it excepting, but the only authority referred to was an anonymous case in Moseley's Reports, p. 305.

That case was *Pollard v. Collins*; and it appears by the registrar's minute book (1) on a motion being [90] made for an act to be done by the Defendant on payment of money reported due to him, the Court stated, that both sides were to be at liberty to report to the report, and thereupon the Plaintiff moved, and an order was made to confirm the report nisi. The only order entered in the registrar's book is the order to confirm the report which was made on the motion of the Plaintiff. The Defendant afterwards filed exceptions, and then exceptions were filed by the Plaintiff, and on motion the order nisi had been obtained. Both sets of exceptions were set to be heard; and the Defendant waiving one of his exceptions, it was referred to the Master to review his report on all the rest of the exceptions on both sides. In consequence of its being entered in the registrar's minute book, that both sides to have leave to except, this is not a clear authority, that a party who has obtained the order nisi may nevertheless except without leave.

I have therefore made inquiries as to the course of practice, and the information I have received is, that a Plaintiff or other party having the carriage of a case has always been allowed to obtain an order nisi to confirm such report, and to file exceptions thereto. And as to the time within which this may be done, it is unlimited till the order to confirm absolute is made, but it may be obtained by an order nisi, to be obtained by any other party, on the neglect of the party having the carriage of the report.

It being the course of practice, which I have no authority to alter, I can make no order on that part of the motion which asks that the exceptions may all of them be struck off the file.

On this occasion, it has become unnecessary to consider the mode of computing the number of days to elapse between the service of the order nisi and the time when the order absolute may be obtained. Upon the question, however, as to the computation of time, I find, on inquiry, that the established rules which prevail in the Master's office and in the Six Clerks' office are different. I hope that a proper arrangement will be found to reduce them to uniformity by competent authority.

The other part of the motion, which asks that the twelfth, thirteenth, and fourteenth exceptions may be expunged for irregularity, is supported by an allegation that they are founded on objections which were carried into the Master's office after the warrant on signing the report was attended.

Generally, objections are not to be taken into the Master's office after the warrant on signing the report has been attended. The question is, whether the general rule may be applied, under such circumstances as took place in this case.

And that there has been some difference of opinion upon the question, whether, under these circumstances, new objections might be carried in: but the effect of excluding any party from objecting to new matter introduced into the case after the first attendance on the warrant to sign, appears to me obvious; and I am of opinion, that when the draft report has been varied on the consideration of

(1) EXTRACT FROM REGISTRAR'S MINUTE BOOK.

THE LORD CHANCELLOR. Mr. Thomas Bennett. Mr. Elde.
 6th die. Martis 1729.—*Pollard v. Collins*.—Mr. Lutwych, *p. quer.*, moves that the Defendant may forthwith transfer to the Plaintiff 150 shares in the Welsh Company, on payment of the money reported due to him, and that the Plaintiff may be discharged out of custody.

Solicitor-General, for the Defendant.

Both sides to be at liberty to except to the report.

The Court confirms the report nisi on motion of Mr. Lutwych.

objections disposed of after the warrant to sign was attended, it is competent to a party, before the expiration of the warrant to sign the report on the objections, carry in objections to new matter introduced into the draft, or to any part of the original draft which has been affected to the prejudice of the party, by any alteration made in the draft by way of addition or omission.

It therefore appears to me that this motion must be refused altogether. I will give costs if the point had depended wholly on the first point.

[92] ANONYMOUS. *May 6, 1842.*

The Masters have no jurisdiction, under the 3 & 4 W. 4, c. 94, s. 13, to enlarge publication after it has passed.

By the 3 & 4 W. 4, c. 94, s. 13, the Masters in Ordinary are to hear and determine all applications for enlarging publication.

In this case publication passed on the 15th of April, and a warrant being taken on the 16th, the Master on the 20th had enlarged the time for passing publication. Mr. Pemberton and Mr. Kindersley, for the several parties.

[93] THE MASTER OF THE ROLLS [Lord Langdale] referred to *Carr v. Appleton* (2 Myl. & Cr. 476); and said that the Master had exceeded his jurisdiction; that the motion had come on alone he should have discharged it without costs: but being now a cross-motion to enlarge publication, that indulgence must be granted for payment of the costs.

[93] HUNTER, on behalf, &c. *v.* CAPRON. *May 6, 1842.*

An objection to the production of documents must be properly raised by the Defendant's answer, where the bill seeks their production.

Pending exceptions to an answer for insufficiency, the Plaintiff may move for production of documents admitted by that answer to be in Defendant's possession.

In November 1825 Mr. Bradley executed a creditor's deed, whereby he conveyed certain reversionary property to the Defendants Capron and Duckett, in trust for the scheduled creditors. Mr. Temple executed the deed, as a creditor for the sum of £3012.

This bill, which was filed by the Plaintiff on behalf of himself and all the persons entitled under the deed against Capron and Duckett alone, stated, that on the 10th of October 1841 Temple had assigned his debt to him, the Plaintiff, in consideration of £400. The bill charged in the usual way that the Defendants had in their possession documents "relating to the matters aforesaid," and asked for a schedule; and that the Defendants might produce and leave such of them as were in their possession in the hands of their clerk in Court, for the usual purposes. The bill prayed that the deed might be carried into execution, that the accounts might be taken, and the money paid.

The Defendants, by their answer, admitted the deed of 1825, but knew nothing of the alleged assignment from [94] Temple to the Plaintiff. The answer set out a schedule of documents relating to the matters in the bill stated or alleged; made no express objection to their production. The Defendants, however, submitted that Temple was a necessary party to the suit.

The Plaintiff took exceptions to the answer for insufficiency; and before the answer had been disposed of, he gave notice of motion for the production of the documents and the schedule.

Mr. Steers, in support of the motion.

Mr. Schomburgk, *contra*, contended, first, that the Plaintiff could not move for production of documents admitted in the answer, while exceptions to the answer were pending: that he could not allege in the same Court, and at the same time, that the answer was insufficient and no answer, and adopt it as an answer for the purpose of moving for production of documents.

he admission. That if the exceptions succeeded, a further answer would be put in, and a second motion for production might then become necessary, on further admission, thus rendering two applications necessary.

Secondly. That Temple, the assignor, being no party to the suit, and the assignment not being admitted by the answer, the Plaintiff was in the situation of a mere stranger, and had no right to the inspection of documents in which, in the present state of things, he had no interest; that there was no privity between the Plaintiff and the Defendants, and that therefore the Plaintiff was not entitled to a production. *Adams v. Fisher* (2 Keen, 754; 3 Myl. & Craig, 526), A. and other parties entitled to a testator's estate, by power of attorney, appointed B. to collect and manage the estate; [95] B. employed C., a solicitor, for that purpose, who received the assets, and deducting the amount of his untaxed bill of costs, paid over the balance to B. and a bill against B. and C. for an account, and for the delivery up of documents relating to the testator's estate. It was held at the Rolls and on appeal that A. was entitled to the production of documents relating to the testator's estate, though assigned by C. to be in his possession.

Thirdly. That the Defendants, being trustees for the other scheduled creditors, could not be called on to produce the deed and documents in their absence.

Mr. Steere, in reply. The exceptions form no objection to the production of the documents. (See *Lane v. Paul*, 3 Beav. 66.) As to the assignor not being a party, this is not raised by the answer as an objection to the production of the documents; never he will be made a party by amendment. It is necessary that the deed should be produced to give the discovery sought by the bill, of whether it does not contain a covenant to insure the life of the debtor, and which by his death has become very important.

THE MASTER OF THE ROLLS [Lord Langdale]. I think that the exceptions for insufficiency form no objection to the present motion; I cannot agree that an answer may be taken as no answer on the mere allegation of its insufficiency. It is often that an insufficient answer is no answer, and that may be true for some purposes; there is the record and the oath of the parties, which for very many purposes is treated as an answer.

The other point is attended with more difficulty; and if the objection had been made by the answer, I think I [96] must have allowed it. The answer merely states that Temple is a necessary party to the suit; but that fact is not stated as an objection to the production of the documents. I think that if it had been so, I must have allowed the objection; but, under the circumstances, I must make order for the production of the documents.

A further question arose, in this cause, under the following circumstances:—The writ being filed on the 16th of March, the Plaintiff, on the 5th of April, took depositions thereto, and on the 16th of the same month obtained the usual *ex parte* order referring them to the Master. This order was not served until the 20th of

the 5th Order of 1828 (Ord. Can. 6) it is ordered, "That when exceptions to an answer for insufficiency are not submitted to, the Plaintiff may, at the expiration of eight days after the exceptions are delivered, but not before, unless in special causes, refer such answer for insufficiency; and if he do not refer the same within the next six days, he shall be considered as having abandoned the exceptions; and in latter case such answer shall be thenceforth deemed sufficient."

On the 23d of April the parties attended a warrant upon the exceptions before Mr. Brougham, when the Defendants' counsel objected that he was not the Master on the matter ought to be heard. The objection being allowed, the parties obtained a further warrant before Master Senior, on the 26th of April, when it was ordered that Master Duckworth was the [97] proper Master; and that, objection being allowed, a warrant was taken out to proceed before Master Duckworth, returnable on the 28th: but on that day the Defendants gave notice of motion to discharge the order of the 16th of April 1842 with costs, on the ground of irregularity in its

Schomberg, in support of the motion. It has been settled, that an order for the production of an answer for insufficiency must be served as well as obtained before the

expiration of the six days allowed by the 5th of Lord Lyndhurst's Orders; *Peace v. Hodgson* (7 Sim. 347); *Taylor v. Harrison* (8 Sim. 21; affirmed 1 Myl. & Cr. 77). Carrying the order in the Master's office, and applying for a warrant to proceed on is not sufficient without notice to the Defendant; *The Attorney-General v. Clark* (1 M. & Cr. 367).

Mr. Pemberton and Mr. Steere contended that the Defendants, by their conduct, had acquiesced in the irregularity, if any, and could not afterwards complain of it. In *Davis v. Franklin* (2 Beav. 369) it was held that where, in a proceeding before the Master, "the Defendant, by acquiescence or omission to object, permits the other party and the Master to proceed as if he did acquiesce, he comes too late if he does not come at the first opportunity to complain of the irregularity."

And, secondly, that there was no necessity to come here by motion to set aside the order which had been regularly obtained, but had become inoperative in consequence of the delay of the Plaintiff in prosecuting it.

[98] Mr. Schomberg, in reply. *Davis v. Franklin* is an authority for the Defendants; for, so far from acquiescing, the Defendants have protested against the irregularity of the proceedings from the beginning, and have taken the objection to the Master's office. (See *Becke v. Whitworth*, 3 Beav. 350.)

The second point is set at rest by the cases of *Peace v. Hodgson* and *The Attorney-General v. Clark*, where the motion was made in the same form, and was granted by the Vice-Chancellor and upon appeal.

THE MASTER OF THE ROLLS. The order of the 16th of April was quite regularly obtained, and if it had been served on the 19th it would have been valid, but unfortunately it was not served till the 20th, a day too late.

I must own that if the point had been *res integra*, I should not have thought it necessary to make an application to the Court to discharge the order of reference. The 5th Order declares that the Plaintiff shall be considered as having abandoned his exceptions unless he proceeds within a certain time; and I cannot but think that it had been called to the attention of the Master, that under the General Order the Defendant was entitled to have his answer considered sufficient; he would have thought that it was not competent for him to proceed on the exception; however such applications to discharge the orders of reference have been made before, and orders have been made on them, which have been confirmed on appeal, and I must therefore rest on these decisions. They are perhaps founded on this, that there being a final order on the Master to proceed [99] to examine the sufficiency, it is not for the Court to decide whether he ought to proceed on it.

A series of blunders seem to have taken place with respect to the Masters, which I have never witnessed; but I do not think that the Defendants can be taken to have acquiesced in the proceedings. In *Davis v. Franklin* there had been an acquiescence all through; and if I had found an acquiescence in this case I must have refused to grant the motion; but seeing that there is none, I think I am bound to make the order as prayed, and with costs. (The order was reversed on the last point by the Lord Chancellor, Dec. 8, 1842.)

[99] FRY v. MANTELL. May 23, 1842.

One exception having been taken to an answer was allowed, and a further answer was given, in the Plaintiff referred back the answer on the *first, second, &c.* exceptions. The order was discharged for irregularity, with costs.

One of the Defendants having filed his answer, the Plaintiff took one exception thereto for insufficiency, and which the Master allowed.

The Defendant then put in a further answer; whereupon the Plaintiff obtained an order, referring the answer and further answer for insufficiency on the *first, second, and twenty-sixth exceptions*.

The Defendant now moved to dismiss the order for irregularity.

Mr. Pemberton and Mr. Rolt, for the Defendant.

[100] Mr. Keene, *contra*.

THE MASTER OF THE ROLLS [Lord Langdale] was clearly of opinion that the order was irregular, and discharged it with costs.

[100] MORRALL v. SUTTON. Feb. 24, March 11, May 10, 1842.

[8 C. 4 Beav. 478; 1 Ph. 533; 41 E. R. 735; 14 L. J. Ch. 266; 9 Jur. 697.]

Test of leaseholds to A., her executors, administrators, and assigns, for her life. Held on the context to give a life-estate only.

This case, reported *ante* (4 Beav. 478), was now reargued.

Mr. Pemberton, Mr. Kindersley, and Mr. G. Russell, as before, contended, that Sarah Calcott took a life-estate. On the other hand,

Mr. Tinney and Mr. Dixon insisted, that under the will she was entitled to an estate interest. They were also desirous that a case should be sent to a Court of law and cited *Sherratt v. Bentley* (3 Myl. & K. 149), in addition to the cases referred to the former hearing.

Mr. Pemberton, in reply, opposed the proposal of having a case sent for the decision of a Court of law, contending that it would be impossible to frame one which did not give an undue advantage to the other side. He referred to *Clark v. Smith* (one of Lords, 5th of August 1842).

March 11. THE MASTER OF THE ROLLS [Lord Langdale]. I still remain of the opinion as to the construction of the will; but there appears so much doubt, [101] I would willingly give the parties a case for the opinion of a Court of law; but, however, be careful not to send such a case as would give either party an advantage.

May 10. THE MASTER OF THE ROLLS [Lord Langdale]. The question which in this case depended on the construction of the will of Edward Lloyd. After the reargument I expressed my opinion that, upon the true construction of the will, Sarah Calcott the younger was entitled to an estate for life only in certain leasehold estates. I stated at the same time that the case appeared to me to be subject to great doubt. The case was afterwards reargued; and in a case which appeared attended with so much difficulty, and to depend on the construction, I was desirous, if practicable, to obtain the assistance of a Court of law, and for that purpose to state a case in such manner as to obtain the opinion of a Court of law as to the real effect of the will.

The course was acceded to on the part of the Defendants, but opposed by the Plaintiff, who contended that the case could not be stated in such a manner as to reduce the question to a mere legal question, without prejudice to the argument which was advanced in favour of his construction.

On the reargument I saw no reason to change my opinion as to the very true construction of the will, or as to the conclusion which, in a case of so much doubt, I found myself bound to adopt; but with respect to the practicability of stating a case which might not prejudice either party, I took time to consider.

[102] And after again perusing the will, and considering the case which has been stated by the Defendants, and the practicability of removing all objections to it, I am of opinion that on the whole I ought to make a decree according to the opinion I have formed upon the subject; and admitting the case to be very doubtful, it is sufficient to me to know that the case may be reconsidered before another Judge, and that he thinks it necessary or proper, may himself obtain the assistance of the opinion of a Court of Common Law.

[102] DAVIS v. PROUT. May 23, 1842.

In an order under the 24th General Order of August 1841, it is necessary to state an affidavit that no account, &c., is sought against the Defendant.

One of the Defendants having been served with a copy of the bill, under the order of August 1841,

Mr. Rogers, on behalf of the Plaintiff, moved, under the 24th General Order of August 1841 (Ord. Can. 171), for an order for leave to make an entry at the Clerks' Office of a memorandum of such service, and of the time when such service was made. A question was raised as to how it should be made to appear to the Court "that no account, payment, conveyance, or other direct relief" was sought against the party in question.

THE MASTER OF THE ROLLS said, that as the Plaintiff had no office copy of the bill to produce to the Court, from which that fact would appear, the only way in which the Court could know it was by an affidavit, which must therefore be produced.

[103] BATTY v. CHESTER. May 25, 30, 1842.

[See *Benyon v. Nettlefold*, 1849, 17 Sim. 56.]

A bill to be relieved from a security, first, on the ground that it was given for an immoral consideration, and, secondly, because it was not drawn in conformity with the agreement between the parties, cannot be sustained. This Court has authority to relieve against an instrument, which, although legal upon the face of it, was in fact executed for an illegal and immoral purpose.

But where a party to the illegal or immoral purposes comes himself to be relieved from the obligation he has contracted in respect of it, he must distinctly and exclusively state such grounds of relief as the Court can legally attend to; and must not accompany his claim to relief, which may be legitimate, with claims and complaints which are contaminated with the original immoral purpose.

This cause came before the Court upon a general demurrer to the whole bill.

The bill stated, that the Plaintiff became accidentally acquainted with the Defendant Eleanor Suter, who previously had lived under the protection of various gentlemen. That she proposed to cohabit with the Plaintiff, but insisted that the Plaintiff should make a provision for her. That the Plaintiff unguardedly assented to the said proposal, but upon the express condition that any provision that he should make for her should cease upon her quitting him. That, in alleged pursuance of the said agreement, the said E. Suter caused an indenture to be prepared and tendered for the Plaintiff's signature; and that he, acting under the influence and persuasion of the said E. Suter, executed the same. The bill then alleged that the deed was executed previous to any improper connection having taken place; and that the only consideration for the same was the prospective cohabitation to be entered into between the Plaintiff and the said E. Suter; and that the same was, as the Plaintiff was advised, wholly void.

The bill then set forth the indenture, which was dated the 1st of May 1841, and made between the Plaintiff of the first part, E. Suter of the second part, and trustees of the third part, whereby, after merely [104] reciting that the Plaintiff determined to make a provision for the said E. Suter, and had for that purpose agreed to enter into the covenants thereafter contained, the Plaintiff covenanted to give to the trustees an annuity of £300 a year during the joint lives of the Plaintiff and the said E. Suter, in trust for the said E. Suter, and also to keep up certain policies of assurance for £6000 for her benefit.

The bill stated that the deed so executed was not in conformity with the agreement made between the Plaintiff and the said E. Suter, inasmuch as the provision was to cease upon the said E. Suter ceasing to cohabit with the Plaintiff; the deed was obtained from the Plaintiff, who was ignorant of the effect thereof, who never agreed or intended to execute any deed to the effect of the deed of the 1st of May 1841. The bill further stated, that after the execution of the deed the said E. Suter cohabited and lived with the Plaintiff until the month of December 1841, when she placed herself under the protection of another gentleman; and that, by the conduct of E. Suter, the Plaintiff, according to the terms of the agreement entered into between him and E. Suter, became wholly released from every legal and moral obligation towards the said E. Suter. That E. Suter, relying on the omission

provisions contained in the deed, had insisted on the Plaintiff continuing to pay the annuity or yearly sum of £300, and on his keeping up the policies for her benefit; that she had instigated and persuaded the trustees to take proceedings at law on the deed to compel the Plaintiff to pay the amount of the annuity, and to keep up the policies.

It stated that the trustees had commenced an action at law on the deed against the Plaintiff for recovery of the [105] annuity; and it charged that the deed was void and for an immoral consideration, and was void, and that the Plaintiff executed the deed in ignorance of the effect of the same, and that the same was intended to be in accordance with the agreement entered into by the Plaintiff, though the same was contrary to the fact.

The bill prayed "that it might be declared that the said deed was in equity void, that the Plaintiff was not liable thereon, and that the same ought to be delivered up to be cancelled;" and for an injunction.

To this bill the Defendants put in a general demurrer for want of equity.

Mr. Pemberton and Mr. Shadwell, in support of the demurrer, argued, first, that the deed were given *pro turpi causa*, the Plaintiff might have relief at law; *Walker v. Rimes* (3 Burr. 1569); and that there was no necessity to have recourse to this Court for relief. Secondly, that a party to the immoral contract could not come into Court to set it aside, and no case existed where the party himself had obtained relief. In *Matthew v. Hanbury* (2 Vern. 187) the bill was by the executor, and the Court said, "Though where the party himself, who was the person culpable, comes to Court, the Court may justly refuse to interpose; yet, where the Plaintiff is another only, as in the principal case, that varies the matter;" *Bainham v. Manning* (10 Ves. 241). In *Franco v. Bolton* (3 Ves. 368) a bill was filed for a similar purpose as the present, and a general demurrer thereto was allowed; and so in *Gray v. Mathias* (10 Ves. 286), and *Dillon v. Jones* (cited 5 Ves. 290).

[106] Thirdly, the case made by the bill is, that the deed is not in conformity with the agreement, and prays a declaration that the deed is void in equity, so that the Plaintiff required will be to reform a deed between a man and his mistress. "This bill will not be a Court to examine such matters;" *Bodley v. —* (2 Ch. Ca. 15).

Mr. Kindersley and Mr. Beavan, in support of the bill, argued, first, that whatever might have been the law formerly, it was now clearly settled, that unless the signature of a deed appeared on the face of it, this Court had jurisdiction and power to order it to be delivered up. That here the nature of the transaction and the identity did not appear on the face of the deed, so that in a Court of law it might appear valid. Secondly, that if an executor could come into Court to have the deed set aside, there was no reason why the party whom he represented should not have the same right. That *Matthew v. Hanbury* did not decide the contrary; and *Whaley v. Norton* (1 Vern. 483), which was a bill instituted by a party himself, was decided on a point of pleading, the Master of the Rolls admitted, that if the deed had been properly charged in the bill, "he thought it reasonable the Court should grant relief."

In *Robinson v. Cox* (9 Mod. 263) relief was given in a case like the present. Lord Hardwicke there admits the jurisdiction: he observed, "In the case of the *Countess of Annandale v. Harris* (1 Eq. Ca. Ab. 31, 87, 1 B. P. C. 250, 2 P. W. Ch. 15) also *Cray v. Rooke*, Forrester, 153) it was admitted upon the argument (for the counsel both here and in the House of Lords), that if Mrs. Harris had been a woman, or a common whore, there would have been relief against the security; but she was [107] a modest woman until debauched, the Court decreed her the return thereof as *pretium pudoris*; and the late marquis was neither a young gentleman nor a doting old one, but a very sensible, shrewd man. And the ground whereon the Court relieves against these securities is from a presumption, that as women are full of design and artifices to impose upon people, that they therefore make use of such artifices, and are guilty of some fraud or imposition in such notes; and this presumption is made from general principles of policy, to maintain the offence, and to destroy the credit of such securities: and, to prevent women of the town taking any advantage of their artifices, the law, such a general presumption shall run against them, that they may take advantage of such securities." *Franco v. Bolton* was after a verdict at law, in

which the Plaintiff might have had the benefit of the objection; and in *Gray v. Mathias*, the first bond was held valid, and the objection to the second appeared on the face of it; there was, therefore, no necessity for coming into equity; it was, therefore, like the case of *Simpson v. Lord Howden* (1 Keen, 583, and 3 Myl. & Cr. 2). That the Court, in many instances, interfered, on public grounds, at the instigation of one who was *particeps criminis*, as in cases usurious and gaming securities and marriage brokerage-bonds. (1 Mad. Ch. 285.)

Mr. Pemberton, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. I will look into the cases but I decide, and I must consider whether the Plaintiff can have any relief independent of them.

[108] If this bill should appear founded on this, that the instrument executed not in conformity with the contract, which is illegal, I do not think that any relief can be had on it; but if it be considered as entitled to relief only because altogether illegal, if that be the only ground, then the case will require other consideration. A decision on the first ground against the Plaintiff would not prevent him from obtaining some other relief.

May 30. THE MASTER OF THE ROLLS. This will prays, that a deed, dated 1st of May 1841, may be declared to be in equity void, and may be delivered up to be cancelled; and that the Defendants, the trustees named in the deed, may be restrained from prosecuting an action against the Plaintiff. The bill states in substance, that the Plaintiff formed an illicit connection with a woman of immoral conduct; that, with a view to that connection, and in consideration of prospective cohabitation, he agreed to make a provision for her during the cohabitation, to be longer; that the deed, which was prepared, and which he executed, was so framed to secure a permanent provision for the woman, and was, in that respect, contrary to the Plaintiff's agreement; that sometime after the execution of the deed the woman left the Plaintiff to live with another man; that by such her conduct, the Plaintiff, according to the terms of the agreement, became wholly released from every obligation to her; but that she, relying on the inaccuracies in the deed, had prevailed on the trustees to proceed at law against the Plaintiff, to compel him to perform his covenants. The Plaintiff complains of this; and in a letter to the woman, which he has annexed in his bill, he alleges that "reciprocity was a positive and substantial essential" of the arrangement. The meaning of this and the grounds of complaint are obvious, and although the Plaintiff has occasionally, in the course of his bill, stated that he was voluntarily made for an immoral consideration, and void, yet it is plain that the bill and the Plaintiff's title to relief rests, in part at least, upon the supposed injury of his being required to perform his covenants after he has lost the consideration which he entered into them. In substance, the Plaintiff alleges, that he ought not to be required to perform his covenants, because he has lost the cohabitation and reciprocity, that is, the immoral connection or services which the woman agreed to afford him. The bill does not appear to me to be quite consistent with itself. If the Plaintiff alleges, that by the woman's conduct he has been released from his obligation to her, must he not be considered as saying, that if she had pursued a different conduct, that is, if she had not ceased to live an immoral life in connection with him, there would have been a valid and subsisting obligation, or, in other words, that the agreement would not have been void?

I reserved this case for the purpose of looking at the cases which were cited from any doubt which I entertained as to the result. I consider that this Court has authority to relieve against an instrument which, although legal upon the face of it, was in fact executed for an illegal and immoral purpose: but where a party, who has contracted for an illegal or immoral purpose comes himself to be relieved from the obligation contracted in respect of it, he must state distinctly and exclusively such grounds of relief as the Court can legally attend to; he must not accompany his claim with other grounds which may be legitimate, with claims and complaints which are contaminated by the original immoral purpose.

[110] In this bill the Plaintiff claims relief, in part at least, upon the ground that he is released from his obligation by the woman having ceased to live an immoral life in connection with him; and I am of opinion, that upon a bill so framed the Plaintiff can have no relief. Let the demurrer be allowed.

[110] THE BARON DE FEUCHERES v. DAWES. May 25, 1842.

[S. C. 5 Beav. 144.]

ing a litigation as to administration in the Ecclesiastical Court, a bill was filed praying a receiver, and that upon the administrator being appointed and brought before the Court the rights of the parties might be declared, and the estate administered: a demurrer to the latter part of the relief was allowed.

The bill was filed by the husband of the Baroness de Feuchères, deceased, against alleged next of kin, and in effect stated, that under the settlement, made in the usual form, on the marriage of the Plaintiff with the late baroness, the Plaintiff was, as survivorship, entitled to such part of the property of his wife as had been brought into the settlement; that she died domiciled in England, leaving very considerable personal estate: and that the Plaintiff was advised, that, as her surviving husband, he was entitled to the whole of her moveable property, and to have administration granted of her estate and effects.

The bill stated that the right to the administration was in litigation in the Ecclesiastical Court, between the Plaintiff and the Defendants, and it prayed, that, pending the said proceedings in the Spiritual Court, the personal estate and effects of the said Sophia Baroness de Feuchères might be secured by this Court, and that a receiver thereof might be appointed, by and under the order and decree of this Court, with directions as to the outstanding estate of the said Sophia Baroness de Feuchères, and that the same might be paid into Court, [111] and invested and secured; and that the Defendants might be restrained by injunction from receiving and intermeddling there-with, and that upon the appointment of a legal personal representative of the said Sophia Baroness de Feuchères, and upon such representative being brought before the Court, the rights of all parties to the said estate of the said Sophia Baroness de Feuchères might be ascertained, and declared by and under the order and decree of the Court, and that the same might be applied in a due course of administration. A receiver had been appointed in the cause.

The Defendants demurred to so much of the bill as sought, that upon the appointment of a legal personal representative of Sophia Baroness de Feuchères, and upon such representative being brought before the Court, the rights of all parties to the said estate of Sophia Baroness de Feuchères might be ascertained, and declared by and under the order and decree of the Court, and that the same might be applied in a due course of administration; but they answered the rest of the bill.

A demurrer now came on for argument.

Kindersley and Mr. Glasse, in support of the demurrer. The form of this bill is wholly unauthorized by authority. (See *Froud v. Baker*, 4 Beav. 76.) It asks for a decree in respect of a state of circumstances which may never exist. The decision in the Ecclesiastical Court will determine the questions between the parties, and it may be wholly unnecessary for this Court to make any decision on the matter. The Defendants have demurred for this reason, and because [112] they are unwilling to incur the expense of going into evidence on those points of relief now demurred to.

Mr. Pemberton and Mr. Beavan, in support of the bill. No decision in the Ecclesiastical Court will determine the rights between these parties. The only thing that will be there determined will be the right to administration; and the question as to the right to the property under the French settlement, and the effect of the divorce, must afterwards inevitably have to be decided in this Court. The decision may be different in the two Courts, as to the effect of the French divorce decree in the bill, and also as to the question of domicile. If the next of kin be admitted to the general residue, still the Plaintiff is entitled to the property brought into the settlement. It is a mere question of convenience, and it will be manifestly more convenient and less expensive to raise the questions, which must inevitably arise between the parties, in the present form, than to render a new independent bill on the appointment of an administrator.

Kindersley, in reply. If the Plaintiff succeeds in obtaining administration by

virtue of his marital right he will be accountable to no one; then what rights will there be to determine? This is a mere prospective bill.

THE MASTER OF THE ROLLS. This bill has two objects—first, to protect the property during the litigation in the Ecclesiastical Court, and until the appointment of a legal personal representative. That object has been attained, and is by no means objected to. The second object is to have the rights of the parties to the property determined after the legal personal representative should be appointed; [113] that is, to have the rights of parties not now known or existing determined, there being no means of knowing whether the legal personal representatives, when they have been appointed, and have possessed the property, will not properly distribute it, and it being at this moment totally unknown whether they will make any resistance whatever to the demands made on it.

If the fate of this demurrer depended on the question whether the right to the property could be decided by a determination of the right to the representation; or whether it would not become necessary, after the right to administration had been decided, to have the right to the property discussed here, and to have evidence entered into for the purpose of ascertaining who are the parties entitled, I think that this demurrer would not succeed; but it does not depend on that. The question is, whether this bill is not now asking for something which this Court cannot grant against parties not now known to exist, and in truth, not now existing, since their character has not been determined, and that, in the absence of any information whatever, whether, when the Ecclesiastical Court has appointed an administrator, he will refuse to administer the estate in a manner in perfect conformity with the rights of all the parties. It may be quite necessary hereafter to go into all the evidence which the Plaintiff seems now desirous of going into, and it may become necessary to have an adjudication of the rights of the parties to the property, but the necessity for it doing does not now, in any degree, appear. I think therefore that this demurrer must be allowed. (NOTE.—See *Lowe v. Farlie*, 2 Mad. 105; and *Wood v. Hitchings*, 3 Beavan, 504.)

[114] EVANS v. BROWN. May 3, 6, 1842.

[S. C. 11 L. J. Ch. 349; 6 Jur. 380. See *Viscount Downe v. Morris*, 1844, 3 Hare, 398; *In re Hyatt*, 1888, 38 Ch. D. 620.]

A testator died without heirs, seised of freeholds which he had not charged with debts. Held, that as against the lord claiming by escheat, they were assets for the payment of the testator's debts.

Whether such freeholds are liable to the debts in priority to or *pari passu* with land specifically devised, *quære*.

Thomas Llewellyn Parry, but his will dated the 16th of June 1834, after devising an estate in Cardigan to Thomas Parry Thomas, gave all his other real estates in Cardigan, Carmarthen, or elsewhere to Judith Parry for life, with remainder to trustees to preserve contingent remainders, with remainder to the sons of Judith Parry in tail male, with remainder to the daughters of Judith Parry as tenants in common in tail, with remainder to the right heirs of the testator.

The testator died on the 13th of November 1836. He left no heir at law, and a creditor's suit having been instituted, and the usual accounts having been taken under a decree dated the 4th of August 1837, it appeared by the report of the Master of the Rolls of June 1839, that the personal estate was insufficient for payment of the testator's debts, and that the testator died seised of several estates in the counties of Cardigan and Carmarthen, other than the estate devised to Thomas Parry Thomas.

The Attorney-General was a Defendant to the cause, and when it came on to be heard for further directions, on the 10th of July 1839, the will was established, and it was declared, that the reversion of the testator's real estates by his will expressed to be devised to his own right heirs, was the primary fund applicable, in aid of his personal estate, in payment of his debts; and liberty was given to the Plaintiff

make such application to the Crown as they should be advised, relating to such reversion.

[115] According to the leave thus given, a memorial was presented to the Lords of the Treasury, stating the reversion had escheated and devolved to Her Majesty, and praying a grant thereof, to the end that the same might be sold, and the proceeds applied, in aid of the testator's personal estate, in satisfaction of his debts.

In consequence of this memorial, and under a warrant duly issued, an inquisition was taken on the 7th of August 1839, and thereupon it was found, that the testator, at the time of his death, seised in fee-simple of, or otherwise well entitled to, several estates therein mentioned and described, and that the reversion thereof in fee-simple expectant on the death without issue of Judith Parry, devolved unto His late Majesty, and had since descended and then belonged to Her present Majesty in right of the Crown, and had been seised into the hands of the Crown.

The Crown afterwards, in January 1840, granted the reversion to the four first-named Defendants in this cause, on trust to sell the same, as this Court should direct, and stand possessed of the purchase-money, on trust to pay certain costs and expenses, and then in trust to apply the monies to arise from the sale, in such manner as this Court should direct, in aid of the testator's personal estate, for payment of his debts, in the same manner as if the reversion had not escheated.

This bill was filed for the purpose of having the trusts of that grant carried into execution; and it was alleged, that the suit had become necessary, in consequence of Defendant Edward Hamlyn Adams claiming to be entitled to the reversion of some of the estates in question as were situate in the county of Cardigan, as the lord of certain manors, under which the estates were held; [116] and the bill charged, that Mr. Adams sometimes alleged, that the reversion of these estates had escheated him discharged of the testator's debts, and sometimes alleged, that the testator's personal estate was not insufficient for the payment of his debts.

The Defendant Adams, by his answer, stated that on the 18th of December 1829 two manors of Gwynioneth Iskerdin, and Caerwedros were granted to him in fee of the Crown; that part of the real estates of the testator were held of the said Defendant Adams, and that certain mortuaries and chief rents were payable to him lord of the said manors; that the mortuaries and some arrears of chief rents were due to him, and he submitted that the same ought to be paid to him, out of the sums received and paid into Court by the receiver. He then submitted, that he, as lord of two manors, was entitled to the reversion in fee expectant on the death without issue of Judith Parry, of and in such parts of the aforesaid hereditaments mentioned as devolved to her, as were held of the said respective manors. He insisted, that the reversion now vested in him, was not applicable, at all, to the payment of the testator's debts, and that if the same were so applicable, it was only so, in case the real estates of the said testator and the other reversions granted by the Crown in fee for the creditors, should be found insufficient. And, finally the Defendant, Mr. Adams, insisted that the Plaintiffs had no equity against him.

The parties admitted that the Plaintiffs were creditors of the testator, and that Defendant Adams was grantee from the Crown of the two manors of Gwynioneth Iskerdin, and Caerwedros; but it did not appear to be ascertained or admitted, which lands devised to Judith Parry for life, were comprised in those two manors.

[17] By the 3 & 4 W. 4, c. 104, after reciting, "that it was expedient that the payment of the debts of all persons should be secured, more effectually than was provided by the laws then in force," it was enacted, that when any person should die testate, or be entitled to any estate or interest in lands, "which he should not, by his will, have charged with or devised subject to the payment of his debts, the same should be assets, to be administered in Courts of Equity, for the payment of the just debts of such persons, as well debts due on simple contract as on specialty; and that the heir or heirs at law, customary heir or heirs, devisee or devisees, of such debtor should be liable to all the same suits in equity, at the suit of any of the creditors of the debtor, whether creditors by simple contract or by specialty, as the heir or heirs at law, or devisee or devisees of any person or persons who died seised of freehold estates, were, before the passing of that Act, liable to, in respect of such freehold estates, at the suit of creditors by specialty in which the heirs were bound."

Mr. G. Turner and Mr. Pitman, for the Plaintiffs in the supplemental suit, who were creditors of the testator.

Mr. Tinney and Mr. W. Hislop Clarke, for the Plaintiffs in the original suit.

Mr. Spence and Mr. Wood, for the infant T. P. Thomas.

Mr. K. Parker and Mr. Bevir, for R. L. Lloyd and J. Parry.

Mr. Pemberton and Mr. Bates, for E. H. Adams. The lord's estate by escheat quite independent of the estate of the tenant which has expired; the right of the former is by a paramount title; it is not the devolution of the estate which belongs to the tenant, but that [118] which was reserved by the lord in the original grant to the tenant. To pay the debts of the tenant out of the escheated reversion, would be to pay the debts of one person out of the estate of the other. The 3 & 4 W. c. 104, does not apply to the superior lord, but only to the heirs and devisees of parties dying indebted. The heirs and devisees are to be liable, as the heirs and devisees would, before the passing of the Act, be liable at the suit of special creditors, but no new liability is imposed upon the lord; and if the lord is to be considered a trustee for the creditors, he may be left without a tenant, and thus deprived of his rents and services until the estate has been fully administered.

Again, if the reversion is subject to the debts, still it is not to be applied in priority of the other devised estates, and the other reversions granted by the Crown.

The Defendant Adams has improperly been made a party to the suit, which is to have the trusts of the grant from the Crown carried into execution, and with which he has no concern.

Mr. Wray, for the Attorney-General. The rights of the Crown in this case have been used merely as an instrument to assist the creditors of the testator; if the finding of the inquisition be wrong, the proper course would be to sue out a writ of *facias*, and traverse the inquisition. The question cannot be decided as between Co-defendants.

Mr. G. Turner, in reply. The terms of the Act are positive, that, when a person shall die seised of lands which he shall not have charged with his debts, they shall be assets for their payment. There is no hardship on the lord, for the testator had the power of devising his estates so as to [119] prevent the escheat, and he has a tenant to pay the chief rents and perform the services due in respect of the tenure.

The Defendant Adams claimed adversely, and, prevented the execution of the trust, he is therefore properly made a party to the suit; *Talbot v. The Earl of Rutland* (3 Myl. & K. 252).

May 6. THE MASTER OF THE ROLLS [Lord Langdale]. Mr. Adams, having been made a party to the original cause, is not bound by any of the proceedings therein, either by the Master's finding, from which it appears that the personal estate was insufficient to pay the testator's debts, or by the declaration that the reversion of the estate devised to the testator's right heirs was the primary fund for the payment of the debts. He claims to be entitled to the reversion of such only of the testator's lands as are held of the two manors which were granted to him. The reversion of the other lands he does not claim.

The principal question in this cause is, whether lands of which a testator died seised, without having charged them with his debts, are assets for the payment of his debts, in the case of his dying without an heir.

The statute of the 3 & 4 W. 4, c. 104, expressly declares, that when any person shall die seised of or entitled to any land, which he shall not have charged with his debts, the same shall be assets, to be administered in Court of Equity, for the payment of the just debts of such person. This part of the Act [120] is, in itself, large enough to take in every case. Whether the real estate shall be assets, is, in this part of the clause, made to depend on the seisin or the death of the debtor at the time of his death, and on his neglect to charge the estate with his debts. But the Act proceeds, in the same clause, to provide that the heir or devisee of the debtor shall be liable to all such suits by creditors, as the debtor or devisee of any persons dying seised of land was previously liable to, in respect of such land, at the suit of creditors by specialty, in which the heirs were bound. It is argued, that this notice of a remedy against the heir and devisee is to be

an indication, that the preceding enactment ought to be limited, and that instead of reading the words generally, as they stand, "the same shall be assets," we ought, in effect, to read them as if they read thus, "the same, as against the heir and devisee respectively, shall be assets to be administered," &c.

It has been held, that by the statute of the 3 & 4 W. & M. c. 14 (by which it was provided, that devises should be void as against creditors, and that the remedy of a creditor should be by action of debt against the heir and devisee jointly), no remedy was given in the case of a debtor by specialty dying without an heir. (*Wilson v. Mabley*, 7 East, 128.) So that there being a devisee and no heir, the creditor had no remedy under the statute of W. & M. That defect was supplied by the statute of G. 4 & 1 W. 4, c. 47, which gave the remedy against the devisee only.

In the present case there was an intended devise to the heir; but there being no heir the devise failed, and the question is, as to the right of the creditors in the case of both heir and devisee. The lord of the manor claims to be entitled by the Act, and the creditors claim to be paid, under a statute which expressly enacts that the [121] real estate shall be assets to be administered in Courts of Equity for payment of the debts of the person who died seised, and only refers to a remedy against the heir or devisee.

Under the statutes this Court has held the estates to be assets in the hands of the heir or devisee to pay specialty debts. The statute 47 G. 3, c. 74, makes assets for payment of simple contract debts, the estates which before were assets for the payment of debts due on specialty in which the heirs were bound. The statute of 3 & 4 W. 4 makes all the estates of which the testator died seised assets for the payment of just debts, as well debts due on simple contract as on specialty.

As the testator had not charged the estate as he might have done with payment of his debts, the Act came into operation immediately upon his death, and by the Act the estate is to be assets for the payment of debts. The words seem sufficient to give the quality of assets to the estate itself; and it would seem that whoever comes to the estate, and in whatever right, must take it with that quality. I own the case seems to be very different from that which arose in *Hunting v. Sheldrake* (10 E. & W. 256), under the Act of the 3 & 4 W. & M. By that Act the devise was made void as against the creditor, and the devisee having no title as against the creditor, the only right given to the creditor, who had previously none, was by action of debt against the heir and devisee. The creditor had no right whatever unless he brought such action; and in this respect I conceive that, notwithstanding the decision in *Gawler v. Wade* (1 Peere Williams, 99), equity has followed the law. It does not appear to me, that the right conferred by the Act now under consideration, is necessarily or properly limited by the subsequent [122] part of the Act, which provides, that as against the heir and devisee, the same suits might be brought as before might be brought against them by a specialty creditor.

The creditors have a legislative provision that the real estate shall be assets. The tenant has his right to chief rents and other payments or services; but there is a tenant in fee land, and his title by escheat cannot be complete. He has a prospect of being entitled by escheat, and in respect of that prospect claims to be interested in the reversion, and insisting on that claim, he also insists that the statute is not applicable against him, and that the reversion is not assets for the payment of debts. Whatever way the right of the lord may be conceived to arise, he must, I think, satisfy his interest, whatever it may be, which accrues upon or after the death of the tenant, subject to the qualification which the Legislature has impressed upon the Act, and I therefore cannot concur in the claim which he has set up to be wholly

that he says, that even if the reversion which he claims is subject to the payment of debts, it ought not to be applied till the devised estates and the reversion granted to the Crown have been found to be insufficient.

Considering the whole estate to be made assets, it certainly does not appear to be a necessary consequence, that the reversion now claimed by the lord ought to be held to be the primary fund for the payment of debts. The words of the statute are satisfied without going that length; and Mr. Adams is not bound by the decision made in the decree on further directions, which, being true in the case of

real assets descended to the heir, and it being well known that the Crown desires to facilitate the payment of debts, seems to have [123] been taken in this case without argument or opposition from the Attorney-General. I think that Mr. Adams has right to have the question of priority independently considered; and, if it is desired, the case may be argued on that point.

In the meantime, Mr. Adams may, if he pleases, have the account taken in his presence for the purpose of ascertaining that the personal estate is exhausted; and must be referred to the Master, to inquire which of the estates devised to Judith Parry as in the will mentioned are held of the manors of Gwynioneth Iakerdin, and Caerwedros respectively, and also to take an account of what is due to Mr. Adams for mortuaries and chief rents or otherwise. (NOTE.—An appeal is now pending in this case in the House of Lords.)

[123] GREET v. GREET. *May 31, June 1, 1842.*

Bequest of a residue to A. (who had no children) for life, and at his death £5000 to be deposited in the hands of trustees for the use of A.'s eldest son, at his attaining the age of thirty years; the rest to be equally shared, A.'s eldest son taking an equal share in addition to the £5000, and the general division to take place as each respectively attains twenty-four. Held, not too remote.

The testator, by his will dated in 1825, after making certain dispositions, gave the rest and residue of his property, freehold and personal, as follows:—"to the use of my nephew Thomas Young Greet at his attaining the age of thirty years, the produce of such parts of property as may be necessary to convert into cash, with the accumulation by rents, interest, or otherways, I direct to be deposited in the stock of the Bank of England, in the names of my nephew, Thomas Young Greet, and of two of my executors hereafter named, [124] there to remain; my nephew Thomas Young Greet, at his attaining the age of thirty years, to receive, for his use, all the produce and dividends, rents or interest, so long as he may live; and that once every year, the whole of the balances be funded for accumulation, until he, my nephew Thomas Young Greet, does attain the age of thirty years, at which time the produce of the property, with dividends on the accumulated property, which I direct to be consolidated in one sum, with any other placed in the Bank of England at his death or afterwards, as a part produce of my property and to remain as a part of the dividends of or on which, with all rents or other produce growing out of any description of my property, I give to my said nephew Thomas Young Greet, for his use and disposal during his natural life.

"If my nephew Thomas Young Greet should die previous to his attaining the age of thirty years, leaving child or children lawfully begotten, I direct each child, male or female, shall have £500 at their respectively attaining the age of twenty-four years, and the surplus of any such property and its accumulations to go, in addition, to the eldest son of my nephew Thomas Young Greet; but if the children of my said nephew are too numerous for the property to produce £500 each, in such case, I shall direct that they shall each have an equal share of the property, male and female alike.

"If my nephew Thomas Young Greet should live, and agreeable to the directions of this my will, possess this my described residue of my property with its accumulations, and have lawfully begotten a son, I direct my nephew to enjoy the produce of such property with its accumulations during his life, and at his death, £5000 to be deposited in the hands of trustees for accumulation, and placed in the Bank of England in the name of his my nephew's eldest son with two trustees (my executors preferred if surviving), for the use of my said nephew's eldest son at his attaining the age of thirty years; and the rest and residue to be equally shared, male and female alike, the eldest son taking an equal share, in addition to the £5000 funded for him. This general division to take place as each respectively attains the age of twenty-four years.

"If my nephew Thomas Young Greet should die previous to his attaining the age of thirty years, leaving no child, then I direct the next surviving nephew of Alexander Greet to receive the same." Held, that the bequest to the eldest son was not too remote.

Greet's family shall succeed to the residue and its accumulations, subject exactly to the same regulations as described for my nephew Thomas Young Greet and his family."

The testator then appointed his nephew Thomas Young Greet and three other persons executors.

The testator died in 1829, leaving his nephew, Thomas Young Greet, then of the age of twenty-two. He married in 1832, and had four children, the eldest having been born in 1833.

Thomas Young Greet the nephew died in 1841, leaving his eldest son, Thomas Young Greet the younger, and three other children, surviving him.

The property was partly real and partly personal.

Thomas Young Greet the younger, after his father's death, filed a supplemental against all the necessary parties, claiming to be entitled, first, to the sum of [126] £500; and, secondly, to his share of the general residue of the property after the deduction of that sum.

Mr. Pemberton and Mr. Lewis, for the Plaintiff. It is sufficient to prevent the objection of remoteness that property vests within the period allowed by law. It makes nothing when it is payable, for the Court will direct payment on the legacies during twenty-one, though the testator directs the payment to be postponed until thirty-five or until any other period. *Saunders v. Vautier* (4 Beav. 115, and Cr. & Ph. 240).

In this case, the gift to the children was vested both as to the reality, *Doe dem. v. Naveell* (1 M. & S. 327, and 5 Dow. 203), *Farmer v. Francis* (2 Bing. 151, and 11 M. & St. 505), *Doe v. Ward* (9 A. & E. 582); and as to personalty, *Love v. Strange* (5 Bro. P. C. 59), *Branstrom v. Wilkinson* (7 Ves. 420), *Booth v. Booth* (Ves. 399), *Saunders v. Vautier* (4 Beav. 115, and Cr. & Ph. 240), *Davis v. Fisher* (p. 201).

The £5000 clearly vested at the death of the nephew, for it was then to be immediately severed and placed in the name of trustees for the Plaintiff. The share of the residue, given "in addition" to the eldest son, is subject to the same conditions incidenta (see *Day v. Croft*, 4 Beav. 561, and the cases there cited), and is also vested. The general division refers only to the payment to the several legatees. It is observed also, that this is a gift of residue, in which case the Court leans strongly towards a vesting; and the gift over is only in case of the death of the nephew leaving child.

[27] Mr. G. Turner and Mr. Addis, in the same interest.

Mr. Kindersley and Mr. Wood, for the next of kin and co-heirs. The gift to the children of the nephew is too remote. The £5000 was given to the eldest son of the nephew, "at his attaining the age of thirty years:" he therefore took no interest during that period; and, consequently, the gift is void.

With respect to the remainder, the general division was to take place as each of the children respectively attained twenty-four years of age, which might be at a time beyond a life or lives in being and twenty-one years afterwards; it would therefore be void as to the whole class; *Leake v. Robinson* (2 Mer. 363). It is true, a separate trust was created of the £5000; but to say that it is vested merely because a separate trust is created, is begging the question: the gift may be as much contingent as a trust is created as before.

Saunders v. Vautier was a specific gift, and was limited to the legatee, his executors, administrators, and assigns absolutely. They also cited *Cambridge v. Rous* (8 Ves. 24) and *Duffield v. Duffield* (3 Bli. (N. S.) 260).

Mr. Schomberg and Mr. Hingeston, for other parties.

Mr. Pemberton, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. This is one of the many cases in which I am afraid it is impossible to come to a conclusion which can be considered as fully satisfactory. You are obliged to [128] spell out the meaning of the testator, and to try to discover the legal effect of his will, under circumstances which make it very difficult to reconcile the case under consideration with the decided authorities.

I think it is perfectly obvious, in this case, that the testator had a strong desire

to accumulate the property as much as he could, and to preserve it in the family of the Greets. Those objects clearly preponderate throughout the whole contents of the will; but the main and the principal object in the residuary clause was, to provide for his nephew Thomas Young Greet and the children of that nephew; and there is no ulterior disposition given of the residue, except only, in the event of the nephew, Thomas Young Greet, dying under the age of thirty years without leaving a child.

At the death of the nephew, the £5000 is to be taken out of the residue, and deposited for accumulation in the hands of trustees, one of whom was to be the eldest son of the nephew. The accumulation is directed to be for the use of the nephew's eldest son, "at his attaining the age of thirty years." I think it comes to no more than this:—The testator intended that the son should attain the age of thirty years before the accumulated fund should be paid to him, and not that in the meantime he was to have no interest in this sum.

It appears to me that he had a vested interest in the sum of £5000, at the moment the severance was to be made, namely, on the death of the nephew. After taking the £5000 out of the residue, the remainder is to be shared between the children, both male and female alike, the eldest son taking an equal share, in addition to the £5000 funded for him; and as the £5000 vests [129] upon the death of the nephew, it would be extremely difficult to maintain that his share of the residue does not vest at the same time, or to say that the share of the residue could vest in him at that time, and not in the other children.

Is the Court forced to come to an opposite conclusion by the words which afterwards follow, that this general division is to take place, as each respectively attains the age of twenty-four years? The testator could never have meant, that a general division should take place at different times. His object was, that there should be a general division of the whole fund, after previously severing the particular sum of £5000; after deducting that sum, which was one division, there was to be the general division of the remainder; and, according to the intent, to be inferred from the rest of the will, I think this amounts merely to a direction, that the shares should be paid to the younger children as each attained twenty-four.

I am of opinion that both the £5000 and the share of the residue were vested interests, and the Plaintiff must therefore succeed in this case. (See *Blease v. Bugh*, 2 Beav. 221; *Ring v. Hardwick*, *Ib.* 352; *Griffith v. Blunt*, 4 Beav. 248; *Newman v. Newman*, 10 Sim. 51.)

[130] HARRISON v. HARRISON. June 2, 1842.

On a motion to substitute a new next friend of an infant Plaintiff, the Court must be satisfied by affidavit of the circumstances and respectability of the party proposed to be substituted, although all the other parties to the cause consent to the substitution.

This bill was filed by an infant, by Joseph Harrison, his next friend.

Mr. Bacon, now moved that Mr. J. W. Perks might be substituted as next friend for the infant Plaintiff, in the place of J. Harrison.

Mr. Armstrong, for the Defendants, did not object to the application.

THE MASTER OF THE ROLLS [Lord Langdale]. Any person may commence a suit as next friend of an infant; but when once here in that character, he will not be removed unless the Court is informed of the circumstances and respectability of the party proposed to be substituted in his place; and that such person is not interested in the subject of the suit. You must produce an affidavit to that effect, before I can make the order.

[131] THOMPSON v. GEARY. June 2, 1842.

Whether where a special injunction is granted against several Defendants, one of them can move to dissolve in the absence of the rest, *quære*.

An injunction was granted to restrain the Defendants from entering into a contract in the name of a company. A motion was made by one of the Defendants to dissolve the injunction; and the question raised was, whether it was necessary that the other Defendants should be present at the hearing of the motion to dissolve the injunction?

Mr. G. Turner and Mr. Rogers, for the motion to dissolve the injunction.

Mr. Pemberton and Mr. Goulburn, *contrà*, for the Plaintiff.

THE MASTER OF THE ROLLS [Lord Langdale]. If you succeed, the situation of other Defendants will be materially altered in their absence: my impression is, though I do not decide it, that you ought to have them here; when here, it may possibly happen that they cannot oppose the motion, as in the case of exceptions to the Master's report, in which the excepting party alone can be heard against the rest: but the other parties must be here.

The cause stood over.

[132] OLDFIELD v. COBBETT. June 7, 1842.

A creditor of a testator filed a bill against the executor for administration, and obtained an injunction and receiver. The Plaintiff was found a creditor; and the cause was heard on further directions, but the injunction and receiver were not continued. The executor afterwards brought an action at law against the Plaintiff for monies due to the testator. The Court, by injunction, summarily restrained the proceeding.

The Defendant was the executor of the testator, his father. A creditor's bill being filed, the Defendant was restrained from receiving the assets, and a receiver appointed. Under the decree the accounts were directed to be taken, and the Plaintiff was found, by the Master, to be a creditor of the testator to the amount of £80. A decree was made on further directions, but no order was made as to continuing the receiver or the injunction.

The Defendant, the executor, afterwards brought an action against the Plaintiff, for the recovery of £5000, which he alleged to be due to the testator's estate. The Plaintiff now moved to restrain the Defendant, by injunction, from proceeding in the action.

Mr. Parker, in support of the motion.

Mr. Turner, *contrà*. The injunction and receiver not having been continued by the decree on further directions, are gone. If the Plaintiff requires an injunction, it ought to be obtained by an independent bill, and not on motion after decree. There may have been discovered, which shew that the Plaintiff is indebted to the estate of the testator, instead of being a creditor.

THE MASTER OF THE ROLLS [Lord Langdale]. I have no hesitation in granting the injunction.

[133] QUARMAN v. WILLIAMS. June 7, 1842.

On an application for a stop order, the assignor's right to the fund in Court must be shewn, either by the proceedings or by affidavit.

A party who claimed an interest in a fund in Court, in the character of next of kin, created an incumbrance thereon, and he and the incumbrancer now presented a bill for a stop order. (Ordines Can. 161.)

Mr. Sheffield, in support of the petition.

THE MASTER OF THE ROLLS [Lord Langdale] held that the Petitioners must show by some proceeding in the cause, or by affidavit, that he sustained the character next of kin, otherwise the Court might place a stop order on a fund, on the application of persons having no interest whatever in it.

It being admitted that this did not appear, the petition stood over to file an affidavit.⁽¹⁾

[134] HARVEY v. HARVEY. June 8, 1842.

[S. C. 4 Beav. 215.]

A testator after giving his real estate to the eldest son of A. for life, with remainder to the other children of A. in tail, with remainder over, gave his personalty in trust to pay the dividends to the children and grandchildren of A. who should "from time to time," be entitled to the rents of the freeholds. By a codicil declared that the children of B., C., and D., living at the death of the testator, should "take their shares" of the personal property with the representatives of A. Held, that the gift was to the children and grandchildren living at the death of the testator for life, and was not too remote.

A testator gave £150 a year to such of his relations as his widow should determine requiring and most meriting relief. Held, that a widow of the testator's brother was not an object, and the widow having given a portion to such widow, and remainder to the relations, held also, that a relative to whom no part had been appropriated, and who did not shew himself to possess the qualification, had no right to question the misappropriation.

A testator gave his widow "the full and entire enjoyment" of his real and personal estates, which, after her death, he gave to other persons; and he empowered her to retain a portion of a sum of £150 a year given to other parties, for rent of the leaseholds. Held, she was entitled to enjoy the leasehold in specie, that it was not imperative on her to renew, but that she had acted wrong in surrendering the lease, of which she was the only *cestui que vie*, as she thereby deprived herself the option of renewing for the benefit of the parties in remainder.

This case is reported *ante* (4 Beav. 215), where, to save repetition, the will is sufficiently set out, and to which the reader is referred. On that occasion the Master was directed to ascertain the next of kin of the testator living at his death, and the representatives of those who had since died.

The Master reported that such next of kin were twenty in number, of which twelve were now living, and that of the remaining eight, there were personal representatives to three only, and that the others were not represented.

The persons, parties to the cause, who would be entitled to the residue, in the gift being too remote and void, were the widow, who would be entitled to one-third, Catherine Pearson, a sister of the testator, entitled to one-sixth of the remainder, or two-eightieths, and Thomas Harvey, the representative of the testator's [135] brother Thomas, entitled also to two-eightieths; so that, of the whole, five-ninths of the next of kin were represented in the suit.

The cause again came before the Court.

The Court having determined that it would hear the cause in the absence of other next of kin, the questions were, first, whether the gift of the personalty in trust to pay the dividends "from time to time," to the children and grandchildren of James Edward was or was not too remote.

Secondly, whether the testator's widow had exceeded her discretion, in giving the widow of the testator's brother Thomas a portion of the £150 directed

(1) As to the practice on obtaining stop orders, see *Trezevant v. Fraser*, 3 Beav. 283; *Day v. Croft*, 4 Beav. 34; *Wood v. Vincent*, 4 Beav. 419; and *Parsons v. G*, 4 Beav. 521.

distributed amongst the testator's "relations;" and if not, then whether the Plaintiff had any interest in the sums misapplied, he not having proved himself as coming within the qualification.

Thirdly, whether the widow had acted wrong in surrendering the lease of which she was the surviving *cestui que vie*.

Mr. Pemberton and Mr. W. M. James, for the Plaintiff. The distribution of the real estate is to be amongst a class to be ascertained at the death of the widow, and the gift is not therefore too remote. The bequest of the dividends, though payable "from time to time," carries the capital. (See *Elton v. Shephard*, 1 B. C. C. 1; *Page v. Leapingwell*, 18 Ves. 463, and *Haig v. Swiney*, 1 S. & St. 487.) The will, which directs other persons living at the death of his wife, should take "their share of his property," removes all doubt.

[136] The widow was not empowered to give any portion of the £150 a year to the widows of the testator's relations; and she had no right to surrender the lease which the testator intended to be renewed.

They asked the usual accounts and inquiries as to the leaseholds and the £150 a year, with liberty to state special circumstances.

Mr. Turner and Mr. John Baily, *contra*. The division is to be from time to time between parties, who must be ascertained *de anno in annum*, and may not necessarily occur within the limited period: the gift is therefore void for remoteness. *Lord Hampton v. Marquis of Hertford* (2 Ves. & B. 54), *Hayes v. Hayes* (4 Russ. 311), and *Deerstun v. The Duke of St. Albans* (5 Mad. 232), were cited.

Mr. Kindersley, Mr. Rogers, and Mr. Chandless, for other parties.

Mr. Pemberton, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. The question in this case is whether the Plaintiff is entitled to the relief he asks. It must be owned that the words "from time to time" occasion considerable ambiguity, and it is very difficult to give effect to them, in any way consistent with the other expressions in this will. I think, however, that the words are intended to describe a class of persons existing at the death of the tenant for life, and not a class to take in succession. Such would plainly be the construction, unless we are to give the words "from time to time" an effect which should controul the meaning of all the other words. I do not think that it is to be done, especially having regard to the words contained in the codicil. I understand the meaning of the words is this, there is a direction "to apply the rents and interest" (and that is quite unlimited) "unto and equally amongst all my children and children, grandchild and grandchildren of James Harvey and James Harvey" (so far it would be quite free from ambiguity) "who may not, from time to time, be in the receipt of the rents and profits of my freehold estates." Now, if the words had been simply "who might not be in the receipt of the rents and profits of my freehold estates," it would be quite clear.

The person who might, "from time to time," be in the receipt of the rents and profits, anterior to the times of division, might depend upon a variety of events taking place. There might be two sons living. There might be one son and a grandchild. There might be one son of one son and several grandchildren of another son, and, in fact, a succession of rights might take place anterior to the times of division.

The words, as it seems to me, are nearly inconsistent with each other; and I am bound to decide whether the words contained in the codicil are to preponderate. The result I have come to is, that the words which imply the existence of a class at the widow's death, preponderate over the effect that ought to be given to the words "from time to time." I think therefore that the Plaintiff has an interest in the property.

With respect to the next point, I am inclined to think that the Plaintiff has no ground to complain. There [138] was a sum of £150 given by the will, to be paid by the widow to such of the testator's relations "as she should deem requiring, and most meriting, relief." She was bound to apply that sum for the benefit of the relations, and I think that the widows of relations are not persons who are comprised in the description; if therefore, it were necessary for me to decide that question, I should say that there was an erroneous application. Who, then, would be the persons who

are prejudiced by that application? Those relations who ought to have that sum applied for them. Has the Plaintiff an interest in that? I am very much inclined to think he has not.

By the codicil, the widow was empowered to reserve a portion of this sum of £110 for the renewal of the leasehold, but it was entirely optional, as it seems to me, for her part. If she had once set apart a sum of money for that purpose, the Plaintiff as being one of the persons entitled in remainder, would immediately have acquired an interest in it. She never did so, but made an erroneous application to the prejudice of other persons. I am inclined to think that the Plaintiff is not entitled to call for an account in that respect; and if he were, I think that, after the length of time which he has permitted to elapse (six or eight years), it would be rather too much to say he should have any claim whatever. I think therefore that the Plaintiff is not entitled to relief in that respect.

As to the leasehold surrendered, the widow was tenant for life, with a full power to enjoy the leasehold. The testator says, I give and devise to my wife "the whole and entire enjoyment." As she was the *cestui que vie*, she became entitled to the whole beneficial interest (*Pickering v. Pickering*, 2 Beav. 31; 4 Myl. & Cr. 289; *Gooden v. Tremamondo*, 2 Beav. 512, and cases in note); and [139] so far, the legal and beneficial interest were conjoined in her. Though I cannot think it of great importance, yet I do not approve of such a sale; for I think she ought not to have deprived herself of the option, which the testator gave her, of retaining a sum for renewing these leases. I do not think a person in that situation had a right to deprive herself of the means of preserving the estate to the trust. She had the sole right of enjoyment; the legal estate was vested in her, with an object pointed out to her, and giving her an option of retaining a fund, not given to her, but to the testator's relations, for the purpose of continuing that estate in the family. I cannot therefore think that her conduct was right. Supposing, however, that it was set aside, that the £120 was set apart as a portion of the trust fund, would she not be entitled to set off the rents of that estate against it, although she had parted with it? If she would, and therefore no benefit can come to the Plaintiff from any investigation of the matter.

I am disposed to declare (as far as it can be declared in the absence of the parties interested, and who are not to be prejudiced by what passes now), that the Plaintiff, as one of the persons described in the will, has an interest in remainder at the death of the tenant for life. I can make no other decree unless the Plaintiff desires an account.

[140] HAYNES v. BALL. Jan. 25, June 9, 1842.

[See *Oldfield v. Cobbett*, 1845, 1 Ph. 558; 41 E. R. 744.]

Defendant in contempt for want of answer filed it, and the Plaintiff replied thereto. Held, that he had waived his remedy for the costs of the contempt.

On the 25th of January 1842 the Defendant Maurice Ball was attached, for want of answer, by the Sheriff of Gloucestershire, and on the 24th of February was brought to the Bar, and turned over to the Fleet. On the 15th of April a writ of *habeas corpus* was issued to bring him up to the Bar of the Court on the return thereof, in order to answer the bill taken *pro confesso* against him. On the 23d of April the Defendant appeared in custody, at the Bar, on the return of the writ.

Mr. Prendergast moved that the bill might be taken *pro confesso*.

THE MASTER OF THE ROLLS at first thought the application premature; but, referring to the registrar, made the order.

The Defendant, however, declaring that his answer was ready, the Master of the Rolls directed the order not to be drawn up till the 28th, and then to be absolute in default of answer.

The answer, having been filed within the time limited, was accepted; but the Defendant remained in custody for the costs of his original contempt.

The Plaintiff filed a replication against all the Defendants, and served the prisoner with a *subpoena* to rejoin.

Mr. Pemberton, for the prisoner, now moved that he might be discharged forthwith without payment of costs, [141] on the ground that by replying to the Defendant's aver and serving him with a *subpoena* to rejoin, the Plaintiff had waived the contempt. *Hodkins v. Lloyd* (1 Sim. & St. 393).

Mr. Prendergast opposed the motion, contending that if the Plaintiff had not needed as he had done, his bill would have been dismissed for want of prosecution against the other Defendants.

THE MASTER OF THE ROLLS [Lord Langdale] said, that by filing the replication the Plaintiff had waived the contempt. He ordered the prisoner to be discharged, stating that when the Defendant filed his answer without paying the costs, the Plaintiff might have moved to take it off the file, as the contempt had not then been proved. (1)

[142] M'DERMOTT v. WALLACE. June 11, 1842.

[S. C. 6 Jur. 547.]

testatrix gave unto A. and B. a sum in the long annuities, to be equally divided during their lives, after which she gave the said sum to C. Held, that the survivor A. and B. took for life.

The testatrix by her will gave and bequeathed "all she possessed from the long annuities unto the persons thereafter named (that is to say), she gave to Mary and Elizabeth Grant of Chelsea the annual sum of £12 to be equally divided during their lives, after which she gave the said sum to Elizabeth French M'Dermott."

Elizabeth Grant died in 1831 and Mary Grant died in 1841, and the question was whether she was entitled to the dividends on the long annuities between 1831 and 1841.

Mr. Willcock, for the representatives of Elizabeth French M'Dermott, contended that the gift to Mary Grant and Elizabeth Grant was for their joint lives only, and immediately on the death of Elizabeth the long annuities went over to Mrs. M'Dermott.

Mr. Stinton, *contra*, for the representatives of Mary Grant, argued that the words "after which" meant after the lives of both, and that Mary was entitled for her life as survivorship.

Mr. Willcock, in reply. The words "after which" refer to some period previously referred to, and the only one is the joint lives.

THE MASTER OF THE ROLLS [Lord Langdale]. The question is doubtful; but, on the whole, I think the gift over does not take effect till after the death of Mary. *Hutton v. Finch*, 4 Beav. 186.)

[143] GARRATT v. NIBLOCK. June 13, 1842.

Order to pay a sum of money out of Court should be obtained by petition, and not by motion.

Philip Smith was entitled to a legacy of £60, which had been carried over to his account, his title thereto being determined, but he being an infant.

Being attained twenty-one, a motion was made, on his behalf, that the same should be paid out to him.

Mr. Speed, for the motion, contended that this might be done by motion, as well as by petition, especially in a case in which the sum was so very small: he cited *Re v. Edwards* (Jacob, 504) in which "a fund carried to a separate account was paid out on motion by consent, the title to it being clear."

See *Const v. Ebers*, 1 Mad. 530; *Anon.* 15 Ves. 174; *Landars v. Allen*, 6 Sim. 104; *Woodward v. Twissaine*, 9 Sim. 301; *Wilson v. Bates*, 3 Myl. & Cr. 197.

THE MASTER OF THE ROLLS [Lord Langdale] said he could not order payment out of Court, except on petition, and he refused the motion. (See *Oliver v. Beavan*, 583.)

[144] THE BARON DE FEUCHERES v. DAWES. July 7, 1842.

[S. C. 5 Beav. 110.]

The 9th General Order of December 1833 does not apply to the case of a Defendant residing abroad. A commission to take an answer abroad must therefore be obtained on motion or petition.

This was an application to take the demurrer and answer of the Defendant Thanaron and wife off the file for irregularity, upon the following grounds. Defendants were resident in France, and their solicitors in this country having presented their answer, sued out a commission to take the same without having first obtained an order for that purpose.

By the 9th of the General Orders of the 21st of December 1833 (Ordinance 45), it is directed, that a Defendant shall be at liberty, *without order*, to sue *dedimus* to take his plea, answer, or demurrer in the country, on giving two days' notice in writing to the Plaintiff's clerk in Court to give commissioners names to the same taken, and in default thereof, the Defendant shall be at liberty to sue the same directed to his own commissioners.

The Defendant's solicitors, conceiving the general order applied to this case, the two days' notice required by that order, and no commissioners having been named by the Plaintiff, they thereupon, without an order for that purpose, sued out a commission under which the demurrer and answer had been taken and filed.

The Plaintiff moved to take this answer and demurrer off the file for irregularity.

[145] Mr. Pemberton and Mr. Beavan, in support of the motion, contended that the 9th Order above mentioned did not cause any alteration in the old practice regard to issuing commissions to take answers in foreign countries; and that commissions could, therefore, only be granted, as heretofore, upon an order obtained on motion or petition (2 Dan. Pr. 283), and they argued also that the Court could never have intended to impose upon the Plaintiff the necessity of naming commissioners to take an answer in a distant part of the world within two days, stated that from the alleged state of mind of the Defendant, the Plaintiff was desirous of joining in the commission to see the answer taken.

Mr. Kindersley and Mr. Glasse, *contra*, contended that the terms of the order were general and applied to all cases.

THE MASTER OF THE ROLLS [Lord Langdale] reserved judgment, and subsequently granted the application.

[146] MEYER v. MONTRIOU. July 20, 1842.

[S. C. 11 L. J. Ch. 398.]

A trustee, having power to vary trust funds, admitted he had sold out trust property but did not shew how the produce had been invested. Held, on such an admission that he was liable to make good the fund.

This suit was instituted for the purpose of making the trustee of a marriage settlement liable for a breach of trust.

By the settlement made on the marriage of John Meyer with Margaret Meyer certain funds were vested in trustees upon trust for the husband, wife, and children of the marriage. The settlement contained a power, with the consent of the

and wife, to call in the trust monies, and invest them in Government or mortgage securities, or in the purchase of freehold, copyhold, or leasehold estates.

The bill alleged, that the principal part of the trust funds had been improperly paid out of the bank, under a power of attorney executed by the three trustees, and had been in consequence lost; and it prayed that the trustees might make good the

The answer of Montrion, one of the trustees, admitted the selling out of the trust funds under a power of attorney given by him and his co-trustees, and stated some of the dealings with different parts of the fund, but he did not shew on what securities the whole of the monies had been invested, or whether on securities warranted by the instrument. (See 4 Beavan, 343.)

Mr. Pemberton and Mr. Hetherington asked for a declaration of the liability of the trustees to make good the fund.

[147] Mr. Kindersley, for Mr. Montrion, contended that such a declaration was premature, and that there ought to be a previous inquiry as to the investment of the

Mr. Campbell and Mr. E. F. Smith, for other parties.

THE MASTER OF THE ROLLS [Lord Langdale] said, that where a trustee admitted that a trust fund had been sold out and converted from a proper state of investment, and failed to shew that it was then properly invested, he was liable, in the first instance, to have a decree made against him. Here the trustee admitted that the fund had been sold out, but could not say whether any part was now properly invested. It must therefore be declared that he was liable to make good the fund.

[147] CURTIS v. LUKIN. July 13, 1842.

[S. C. 11 L. J. Ch. 380; 6 Jur. 721.]

It is too remote, unless, according to the intention of the testator, some person must necessarily be in existence, with legal power to dispose of the property, within a period limited by the rules of law.

It must not only vest within the time limited by the rule against perpetuities, but the interests of the respective parties in the property, must be capable of ascertaining within that period, otherwise the gift will be void.

The testator bequeathed leaseholds in Church Street, having sixty years unexpired, and to which there was no obligation on the part of the lessor to renew, to A. for life, with remainder to the children she should leave, and in default to B. He bequeathed to trustees other leaseholds, upon trust to accumulate the rents, until the lease of the Church Street property "should become nearly expired," and then to apply such part thereof as should be necessary in the renewal of the Church Street property, "for the benefit of the respective persons to whom he had before, by his will, given the same;" and the residue, after answering the purpose aforesaid, he gave to his residuary legatees. The testator died before the Thellusson Act came into operation. Held, that the trust for accumulation and renewal was void for remoteness and uncertainty.

The questions in this cause were, first, whether the trustees and executors of the will of the testator, Mr. Shadrach Venden, had committed a breach of trust, by [148] investing the rents of three leasehold houses in Oxford Street and Audley Street, upon trust to accumulate and form a fund for the renewal of the leases of two houses in Church Street, which had been bequeathed for the benefit of his niece the Defendant Curtis and her children; and secondly, whether the Plaintiff, who was one of the legatees, was now entitled to call for the performance of this trust, or to charge the representatives of the executors of Shadrach Venden with the breach of trust.

The testator was possessed of two leasehold houses in Church Street for a term, of between sixty and seventy years unexpired, and he possessed three other leasehold premises in Oxford Street and Audley Street.

By his will, dated in 1794, he bequeathed the two houses in Church Street to four

trustees, upon trust for the Defendant Elizabeth Curtis (then Elizabeth Cheverell) for life, for her separate use, and from and after her decease, upon trusts which were expressed as follows:—"To the use and benefit of any child or children my said niece Elizabeth Cheverell may leave by any husband or husbands she may happen to marry, equally to be divided amongst them, if more than one, share and share alike; and if but one child, the whole to such one child; but in case my said niece Elizabeth Cheverell shall not, at her decease, leave any child or children, then to the use of my nephew Shadrach Venden Cheverell."

The testator then bequeathed to his trustees the three leasehold houses in Oxford Street and Audley Street, upon trusts which he declared as follows:—"Upon trust that they my said trustees shall and do, from time to time, receive the rents, issues, and profits of the above [149] three leasehold messuages or dwelling-houses situate in Oxford Street and Audley Street aforesaid, and lay out the same at interest till my several leasehold messuages or tenements hereinbefore mentioned, situate and being in Church Street aforesaid, shall become *nearly expired*, and then, to pay and apply *such part thereof as shall be necessary*, and in the renewal of my several leasehold messuages or tenements situate and being in Church Street aforesaid, for the benefit of the respective persons to whom I have before, by this my will, given the same." And he gave the money arising from the rents of his houses in Oxford Street and Audley Street, and the interest arising therefrom after answering the several purposes aforesaid, between Edward Venden, Shadrach Venden Cheverell, and Elizabeth Cheverell, and he also gave his residuary estate to the three last-mentioned persons.

The testator died in 1795, so that the Thellusson Act (39 & 40 G. 3, c. 98) was inapplicable to this case.

After the testator's death, the trustees and executors, for some time, continued to accumulate the rents of the Oxford Street and Audley Street property. The lease expired in 1817, and it was stated, that the accumulated fund was afterwards divided amongst the residuary legatees.

Mrs. Curtis, the tenant for life, was still living, and this bill was filed by one of her children, seeking a declaration, that the rents of the Oxford Street and Audley Street property ought to have been accumulated for the purpose of renewing the leases of the Church Street property; that the trustees and their representatives might be held responsible for the breach of trust, in not doing so, and that the money recovered might be applied in the renewal of the leases of the Church Street property.

The Defendants, the representatives of the trustees, insisted, first, that the trust was void for uncertainty; 2dly, that the period during which the accumulation had been directed might possibly exceed the limits allowed by law, and was therefore void.

Mr. Kindersley and Mr. Younge, for the Plaintiff. The trust for accumulation is valid, for the whole interest must necessarily vest in Mrs. Curtis's children and the residuary legatees within the period limited, viz., within a life in being and twenty-one years after. Immediately on the death of Mrs. Curtis every contingency will end, and her children and the residuary legatee will then have the power of disposing of the accumulated fund, and of stopping the further accumulation. This is all that is required by the rule which prescribes only the time within which the property must vest. Where there is a gift which vests within the limited period, but which is not payable until afterwards, the gift is not void, but the Court directs payment immediately on the legatee attaining twenty-one. *Saunders v. Vautier* (Cr. & 240, and 4 Beavan, 115).

Again, Mrs. Curtis may survive the leases, and then there could be no objection to the trust for renewal.

The Plaintiff, therefore, has a right to have the rents accumulated until the death of his mother; and the [151] trustees having neglected to do so, are answerable for their breach of trust.

Mr. Bailly, for the widow and the other children.

Mr. Pemberton, Mr. Hodgson, and Mr. D. James, for the representatives of the surviving trustees. The trust for accumulation and renewal is void, both for uncertainty and for remoteness.

There is to be an accumulation until a few months before the expiration of the lease, which will happen in 1863, and then an application is to be made to the landlord to renew the lease; but for what term is it to be renewed? for 100 or 1000 years; what is to be the rent; is it to be at a rack rent; or at a peppercorn rent? The meaning is to be given to the expression "nearly expired?" and what is to be done if the landlord refuses to renew the lease?—would the children in that event be entitled to the fund which would be necessary to renew? and if so, how is the amount to be ascertained?

The Plaintiff will only be entitled in the event of his surviving the tenant for life, it will be impossible, even then, for the Court to say, what sum he is interested in, for, until the expiration of the lease the amount necessary to obtain a renewal cannot be ascertained.

But assuming there is no vagueness or uncertainty in the trust, yet, it is void in consequence of its violating the rule of law against perpetuities. Every trust for accumulation which is not necessarily limited to the term of a life or lives in being, twenty-one years after, is absolutely and wholly void. Thus a trust [152] to accumulate for twenty-two years certain, is absolutely void, because it may possibly be beyond the legal limits; this is the old law, independent of the *Thellusson* case. Here the answer given by the Plaintiff is this, that he is not within the rule, because the trust is for the benefit of a party in being and her children, and that the trust must necessarily vest within a life in being and twenty-one years after; but it is not enough, you must also shew that they have a vested interest in an ascertained share in an ascertained fund. Suppose the tenant for life to die, what would be the fund to which her children would be entitled, and what proportion of accumulations would belong to the residuary legatees? It would be perfectly impossible to ascertain it, because the fund required at the expiration of the lease would not be capable of ascertainment. The consequence is that the accumulation would go on, and the rights of the parties could not be ascertained within the time allowed by the rule against perpetuities. (See *Palmer v. Holford*, 4 Russ. 403.)

It is said, that the children and the residuary legatees have the power of putting an end to the trust within the time, but that would be effected by agreement between themselves, and by defeating the testator's intentions and not by right. They have never adversely to compel the other parties to compromise their rights, or to waive by agreement, that which the law says is invalid. Again, what is to be done if one refuses to concur?—the accumulations must go on until the year 1863, and all the evils which the rule of law is intended to prevent must necessarily ensue.

The intention was to accumulate for sixty-three years certain, which is void, and the Court cannot look to the [153] events which have happened or may happen, in order to render valid a gift which is not so limited as to be beyond the possibility of being too remote. They cited *Leake v. Robinson* (2 Mer. 363), *Proctor v. Bishop of Exeter* (2 H. Bl. 358), *Lade v. Holford* (W. Bl. 428, and Amb. 479), *Ibbetson v. Ibbetson* (10 Sim. 495), *Fearne's Cont. Remrs.*

Tinney, Mr. Bacon, Mr. G. Turner, Mr. Beales, Mr. Spence, Mr. Renshaw, Mr. F. J. Hall, for other parties.

Kindersley, in reply. There are many cases in which there has been a power to renew generally, and which have never been held void for uncertainty. A lease means on the same terms, *Price v. Asheton* (1 Y. & C. 82). If it be held that this direction to renew is void for uncertainty, then every trust for the term of what is called renewable leases, which the landlord is not bound to renew, would be void, as in the case of bishops' and college leases.

THE MASTER OF THE ROLLS [Lord Langdale]. It is contended, that under this power of renewal, the trustees were to receive the rents of the houses in Oxford Street and Audley Street, and accumulate them, until the leases of the other two had become nearly expired, that is nearly to the year 1863, when the last of the leases would expire or be upon the point of expiring, and then procure the best of the leases they could.

[4] To this it is objected, that it is carrying on an accumulation of rent and interest beyond the period which the law allows, for it is not limited to a life in being

and twenty-one years afterwards, but may continue very much longer; this indeed is perfectly evident. The reply given to this objection is to this effect:—It is true, that if the trust be literally followed, it would be too remote, but it ought to be literally followed, because, within the period allowed for accumulation, the must be persons ascertained, who alone would be entitled to this fund and every of it: again, it is possible that Mrs. Curtis might live beyond the term of the lease in which case a renewal might properly be made in her lifetime; but even suppose her to die at any time whatever within this period, then that in twenty-one years after her death, the persons authorized by law to dispose of the property, might divide at once, and thus prevent the future accumulation of the fund, and obviate the mischief which the rule of law intended to prevent.

Now the persons who would be entitled in that event, would be the children which Mrs. Curtis might leave and the persons entitled to the residue of the money after answering the purposes which the testator intended to be effected. They may all be in a state competent to consent. Nevertheless, in that state of things, it is perfectly manifest, that although amongst themselves they might make a title to the fund to be accumulated for renewal, yet each of them would be uncertain as to the amount of his share, or of that which was his; no one of them could say, such a share of this property is mine, I have a right to sell or dispose of it as I please, and doing so, I am acting according to the intention of the testator.

[155] In all cases of this kind, I apprehend, we are to look at the direction of the will, with reference to the property of the testator at the time of his death, with reference to the persons, who, under the directions of the will and according to the intention of the testator, may, at a future period, have a legal power to dispose of the property. If, according to the intention of the testator, some persons must not necessarily be in existence, with legal power to dispose of the property, within the period limited by the rule of law, then, I apprehend, the gift is too remote.

Now here, such was not the intention of the testator; the intention, according to the argument which is used, was that the accumulation should go on, as to part of this at least, until the period when the last lease was about expiring, that is, 1863, which period, it is evident, might be beyond that limited by law; if the contrary were done, it would be done, not in pursuance of any power given to them by the will, but in consequence of a power which they have, of coming to an arrangement amongst themselves, by which they compromise their respective claims under the will, and create for themselves aliquot defined shares in this part of this property, doing that for themselves, but proceeding in a manner directly contrary to the intention of the will.

I should have been very willing to have attended to any authority which might have been brought forward to support the proposition, that this might be done; but has been cited. The case of *Saunders v. Vautier* (Cr. & Ph. 240, and 4 Beavan, 121), is, I apprehend, entirely different from this. It has frequently happened in this Court, that a testator has given to an individual an absolute vested interest in a defined fund, so that, according to the ordinary [156] rule of law, he would have the power, of his own authority, to receive or dispose of it immediately on his attaining legal age; but having given such a vested interest, the testator has, nevertheless, postponed the time of giving him possession, till a period subsequent to the legatee attaining twenty-one, although in such cases, the party having attained the age of twenty-one cannot, according to the direct intention of the will, obtain possession; yet he has everything but possession; he has the legal power of disposing of the thing; he may sell, charge, or assign it, for he has an absolute, indefeasible interest in the thing defined and certain; the Court, therefore, has thought fit (I don't know whether satisfactorily or not), to say, that since the legatee has such the legal power and power over the property, and can deal with it as he pleases, it will not be to his disadvantage of raising money by selling or charging his interest in the thing; the thing is his own, at this very moment. The Court has, in such cases, ordered payment on his attaining twenty-one. I don't think that case is analogous to the present, because there the property is defined and ascertained; here it is not, for the sum cannot be ascertained until the period for renewal has arrived, when it will be known what sum is necessary for that purpose.

Besides this, I think there are other objections on the ground of uncertainty, which I do not think it necessary to enter into in detail, as my opinion is clear upon the grounds I have stated; nevertheless, I may say that I think the uncertainty of shares, which the children are to have, an uncertainty arising partially from the certain demand which they have upon the fund to be accumulated; for the purpose of renewal is such, that nobody can tell what ought to be done under this

[157] On the joint ground of remoteness and uncertainty, it appears to me that the trust cannot be sustained; I think this bill must be dismissed, and under the circumstances it must be dismissed with costs.

[157] HOWELL v. GAYLER. July 20, 1842.

[S. C. 11 L. J. Ch. 398.]

ultimate limitation of a fund in a marriage settlement, after the death of a husband and wife, was to the husband if he survived his wife, but if the wife survived, then, after her death, to such person as the husband should appoint, and in default, "to his executors, administrators, or assigns." The wife survived, and the husband made no appointment. Held, that his residuary legatees and not his next of kin, were entitled.

As to the funds held in trust for the wife for life, with remainder as the husband should appoint, and in default to his executors, administrators or assigns: Held, that to pass under the will of the husband by the words, "money he might have in the books of the Governor and Company of the Bank of England."

On the marriage of William North with Mary Burghope, a sum of £1000 Navy Rent stock, which belonged to the latter was vested in trustees, on trust to pay dividends to Mary Burghope for life; and after her decease, to pay the dividends moiety to William North for life; and after the decease of the survivor of them, to pay one moiety as therein particularly mentioned, and as to the other moiety, to pay it to William North absolutely, in case he should survive Mary Burghope; but if Mary Burghope should survive William North (which happened), upon the decease of Mary Burghope, to assign and transfer it to such person as William North should, by deed or will, appoint; "and in default of such direction, election, or appointment, then unto the executors, administrators, or assigns of the William North."

The marriage took effect, and the question in the cause arose as to the second moiety, under the following circumstances. William North died in 1829, and his widow survived him, died in 1841. William North [158] executed no appointment of the fund, but, by his will, he gave "the whole of the money he might have in the books of the Governor and Company of the Bank of England, and also all the money which he might have at the time of his decease in the Hertfordshire Savings' Bank," in trust for his widow for life, with remainder to other persons; and he gave the residue of the fund to his widow absolutely.

The bill was filed by the administratrix of Mary North the widow, claiming a moiety of the fund, as residuary legatee under her husband's will.

For the Defendant, Mr. Pemberton and Mr. Bagshawe, for the Plaintiff, cited *Graftley v. Humpage* (1 Jac. 47).

For the Plaintiff, Mr. Campbell, for a trustee, and also for one of the next of kin of William North, pleaded, that the next of kin and not the residuary legatee took under the above will, *Palin v. Hills* (1 Myl. & K. 470). He also cited *Horseman v. Abbey* (1 Jac. 481).

Mr. R. W. Moore contended that either the fund belonged to the next of kin, or under the will of William North, as "money which he had in the books of the Governor and Company of the Bank of England;" he cited *Bethune v. Kennedy* (1 & Cr. 116) to shew that the gift of the stock was specific.

Mr. Pemberton, in reply. The money was not money which the testator had in

the bank at his death, as it was standing in the name of trustees, and was subject to the life interest of the wife.

[159] THE MASTER OF THE ROLLS [Lord Langdale] said, there were many cases on the subject, but he thought, on the words of the settlement, that the Plaintiff was clearly entitled. He ordered the costs of all parties to be paid out of the fund, and the residue to be paid to the Plaintiff.(1)

[159] NEALE V. HODGSON. July 22, 1842.

Subject to the life-estate of her husband, a wife had the absolute power of appointing a trust fund, which, in default of appointment, was limited to her next of kin, and there was a proviso that if the husband became bankrupt the dividends should no longer be paid to him. The wife died first, and appointed the fund to her husband. Held, that he became entitled thereto absolutely, and had a right at once to have a transfer thereof.

Elizabeth Neale, the wife of the Plaintiff Joseph Neale, was, at the time of her marriage, entitled to some freehold property and money invested on mortgage. A settlement was thereupon made, whereby it was covenanted that the trustees should invest £7800, part of her property, in their names, and stand possessed thereof in trust for Mrs. Neale for life, with remainder to Mr. Neale for life, with remainder to the children of the marriage, and in default, then, "subject and without prejudice to the life-estate of Mr. Neale in case he should survive Mrs. Neale" upon trusts, &c., as Mrs. Neale should by will appoint, and in default of appointment, the trusts following, that is to say, in trust for Mrs. Neale in case she should survive Mr. Neale, "but in case she should depart this life in the lifetime of Mr. Neale (which event happened), then in trust, subject and without prejudice to the life-estate of [160] Mr. Neale therein, for the next of kin of Mr. Neale as if she had died sole and unmarried, and in such manner as such next of kin would have taken under the statute for the distribution of the personal estate and effects of persons who die intestate."

The settlement provided, that if Mr. Neale became bankrupt or insolvent, the dividends "directed to be paid to him in the event of his surviving his intended wife should no longer be paid to him, but to such person or persons in such manner as the same would have been payable or applicable in case Mr. Neale had survived Mrs. Neale."

There were no children of the marriage. The wife died in 1839, having made no testamentary appointment, whereby she appointed all the real estate, and all the principal of her personal estate and other the property vested in the trustees of the marriage settlement unto the Plaintiff Mr. Neale absolutely.

The Plaintiff, by this bill, prayed that the trust property might be transferred to him by the trustees. The bill insisted that the Plaintiff had an absolute interest therein under the settlement and appointment. The question, raised in the suit, was whether, in the event of the Plaintiff becoming bankrupt or insolvent, the trust property would or not, under the circumstances, go over to other parties; whether the trustees had, therefore, any duties to perform in respect thereof which made it necessary for them to retain the property.

Mr. Pemberton and Mr. Bacon, for the Plaintiff.

Mr. Kindersley and Mr. Metcalfe, *contra*, for W. A. Hodgson the heir at law and next of kin of Mrs. Neale, [161] contended that the fund ought to be retained by the trustees, as it was possible they might have duties to perform; for, as the right of appointment was "subject to the life-estate of the husband," such life-estate was unaffected by the appointment, and consequently if the husband should become bankrupt, his life interest in the property would thenceforth belong to the husband.

(1) See *Stocks v. Dodsley*, 1 Keen, 325; *Collier v. Squire*, 3 Russ. 467; *Pearce v. Strange*, 6 Mad. 161; *Bridge v. Abbot*, 3 Bro. C. C. 224; *Wellman v. Bowring*, 12 & St. 24.

next of kin of Mrs. Neale during the remainder of Mr. Neale's life. That it was the clear intention of the settlement, that the property should not go to Mr. Neale's assignee in case of his bankruptcy; and that this intention would be defeated if it were now held that he now took an absolute interest.

Mr. Tinney and Mr. W. T. S. Daniel, for the trustees.

THE MASTER OF THE ROLLS [Lord Langdale]. The intention of the settlement was, that if the husband became a bankrupt, the children, if any, should take, but if there were no children, then that the appointees of the wife should take. The appointees, who were afterward to be nominated, might have been strangers; but the wife has made the husband her appointee, and he must take in the latter character. He said that as appointee, he takes subject to his own life interest, but if he became bankrupt his life interest would cease, and the appointees would immediately be entitled to the dividends, and he is the appointee. The husband, therefore, is absolutely entitled, and there must be a declaration to that effect.

The effect of the settlement is not defeated, because the intention was merely to protect the family, and there is none.

[162] LORD HUNTINGTOWER v. SHERBORN. August 4, 1842.

[S. C. 5 Beav. 380.]

subpœna to appear and service thereof set aside and discharged with costs, on the ground of an irregularity in the *teste*.

This was an injunction cause. On the 2d of August 1842, and before the bill was on the file, the Defendant was served with a *subpœna* to appear, which was *tested* the 2d of August in the fifth year of Her present Majesty.

There was endorsed on the writ the name of the Plaintiff's attorney, and a date the 2d of August 1842.

It was now moved, on behalf of the Defendant, that the *subpœna* and the service thereof should be set aside and discharged for irregularity, with costs.

It appeared by affidavit that the writ really issued in August 1842.

Mr. Beavan, in support of the motion. The writ is *tested* the 2d of August in the 5th year of Her present Majesty, or on the 2d of August 1841. By the 7th Order 1833 (Ord. Can. 44), it is ordered "that the time for serving any *subpœna*, except costs, shall be limited to the last day of the term next following the term or session in which it was sued out;" consequently it was served too late. If, however, the writ actually issued in August 1842, then the *teste* is wrong, and on that ground the writ ought to be discharged.

[163] Mr. Tripp, *contra*. The objection is frivolous, as the writ issued in August 1842, and the date is properly indorsed.

Mr. Beavan, in reply. The date of issuing cannot be shewn by affidavit so as to contradict the writ itself. As to the date indorsed, that is not part of the writ, and is warranted by the form directed by the 1st and 3d General Orders of December 1833 (Ord. Can. 42, 43, 60.)

THE MASTER OF THE ROLLS [Lord Langdale]. The Court having of late intrusted the preparation of writs to solicitors (1st Order of 21st of December 1833; see Ord. Can. 42), it is important that they should be in every respect regular. The writ must be granted, with costs.

[164] THE ATTORNEY-GENERAL v. POTTER. June 1, July 22, 1842.

[S. C. affirmed on appeal, 14 L. J. Ch. 16.]

Testator bequeathed a leasehold and his residuary estate to A., B., and C. (his executors), on trust to permit A. to receive the rents and profits for life, and afterwards to pay certain legacies, and the residue to such of three persons, D., E., and

F., as should be living at A.'s death. The executors permitted A. to retain possession of the leasehold during her life, and D., E., and F. executed a deed (which was also executed by B. the husband of D.), and whereby they agreed to take as tenants in common: A. died. Held, that the executors had not assented to the legacies, either by permitting A. to retain possession of the leasehold, or by the execution of the deed by B., and that the executors could make a good title to the leasehold.

This information prayed, that an account might be taken of the duty payable on the legacies and residuary estate given by the will of the testator Arthur Phillip, and that the amount might be declared to be a debt due to Her Majesty from the Defendant James Potter and from John Lane, deceased; and that it might be declared, that a leasehold house at Bath, which was part of the testator's estate, was liable to the payment of the debt, and that the same, or the proceeds arising from the sale thereof, might be made available for such payment; and the same having been sold by James Potter to William Bowie, that Potter might be restrained from receiving the purchase-money, and that Bowie might be restrained from paying it to any but the Commissioners of Stamps, until the debt should be paid.

The testator, Admiral Phillip, by his will dated the 20th day of May 1814, after directing all his just debts and funeral and testamentary expenses to be paid, and after giving certain specific and pecuniary legacies and an annuity, gave his leasehold house in Bath, and the appurtenances, and his residuary estate to his wife Isabella Phillip, John Lane, Osborne Standert, Thomas Sutton, and James Potter, on trust to permit his wife and her assigns to take and receive the rents, interest, and profits thereof, for and during the term of her natural life; and after her decease, he gave several pecuniary legacies of considerable amount, and the residue [165] was given to Susannah Richardson, Mary Ann Lancefield, Michael Dove, and Rebecca A. Potter, or such of them as should be living at the time of his wife's death. He appointed his wife, John Lane, Osborne Standert, Thomas Sutton, and James Potter executrix and executors of his will.

The testator died in October 1814, and the will was duly proved by Isabella Phillip, the widow, and by Lane, Standert, and Potter. Sutton, the other executor named in the will, renounced probate. Standert died in 1816.

On the 17th of February 1817 the four residuary legatees executed a deed whereby it was arranged, that they should take and enjoy their interests as tenants in common. The deed was executed by James Potter the executor and the husband of Rebecca A. Potter who was one of the residuary legatees. The widow was permitted to enjoy the house during her life. She died on the 4th day of May 1823, and thereupon John Lane, since deceased, and the Defendant James Potter became the surviving executors. After the death of the widow, the surviving executors paid the legacies which then became payable, and divided the residue, with the exception of the leasehold house, among the residuary legatees. In the month of April 1823 the leasehold house was sold, for £1800, to the Defendant Mr. Bowie, who paid a deposit of £270, and in the month of August following he was let into possession, but the contract was never completed.

The executors computed the legacy duty payable to the Crown at £1020, and was stated that they gave to their solicitor a draft for that sum, which he received from their bankers, but neglected to pay it to the [166] Stamp Office; and payment having been neglected for several years, this information was filed in the Court Exchequer for the purpose of recovering the amount due.

The decree, made on the 15th of May 1838, directed an account to be taken of the duty due to Her Majesty for the legacies and residuary effects of the testator and declared that the Defendant James Potter, as surviving executor, and Defendants Harriet Eleanor Lane and Sarah Rule, as executrices of John Lane deceased (admitting assets), were bound to pay, what, upon taking the account, should appear to be due to Her Majesty, with the informant's cost of suit, without prejudice, however, to any question between the parties entitled under the will, by whom the payment should be ultimately borne. And it was further declared, that the leasehold house was liable for the payment of the duty. And it was referred to the Master

inquire whether a good title could be made to the house, under the contract with Bowie, and if so, when a good title was first shewn to Bowie; and if a good title could be shewn, it was declared that the agreement should be specifically performed; and if it should be found that a good title could not be made, certain inquiries were directed; and the Master was to be at liberty to report any special circumstances.

On the 14th of February 1842 the Master made a separate report, by which he found that a good title could not be made to the house at Bath; and to this report an exception was taken by the Defendants, the executrixes of John Lane deceased. The Master's report was founded on this:—That the house had been specifically bequeathed to the testator's widow for her life, with remainder to the residuary legatees:—that [167] the executors assented to the legacy, and that the house had thereby ceased to be assets, and had vested in the legatees, and that therefore the executors could no longer make a title thereto.

Mr. Pemberton and Mr. Berlow, in support of the exception, argued, that this was not the simple case of a legacy to one for life with remainder to others, but that, after the determination of the estate for life, the property was subject to legacies, which were to be raised, before the legatees in remainder could take what was given to them. That during the lifetime of the tenant for life, the property was not applicable to the payment of the legacies payable on her death; but becoming applicable, before the legatees in remainder could take, and it being the duty of the executors to raise the legacies, their assent to the gift to the widow for life, did not involve their assent to the legatees in remainder, so as to transfer to them the property or the obligation which the testator had imposed on the executors. They added also, that the fact of permitting Mrs. Phillip to enjoy the leasehold, according to the trusts of the will, did not constitute an assent to the legacy; *Doe dem. v. Sturges* (7 Taunt. 217), *Richards v. Browne* (3 Bing. N. C. 493), *Doe dem. v. Tatnell* (3 B. & Ad. 675); and that the deed of 1817 was executed merely for the purpose of ascertaining and defining the shares of the parties in remainder, and that it was executed by Mr. Potter, not in his character of executor, but as the husband of Mrs. Potter, who was one of such parties entitled in remainder.

That the Master was wrong in treating the bequest of the leasehold as a specific legacy, for though the [168] testator, by directing his executor to permit his wife to take the "rents," had shewn that she was to enjoy the leasehold specifically, in the state in which they were at his death, still that this did not constitute a specific legacy, the distinction between the two being clearly pointed out in *Pickering v. Spring* (2 Beav. 31, and 4 Myl. & Cr. 289).

Mr. Romilly, for the Attorney-General, was about to support the exception, but THE MASTER OF THE ROLLS decided that not having excepted to the report, he would not be heard against it. (See *Stubbs v. Sargson*, 3 Beav. 408; *Bonser v. Cox*, 10 Beav. 382; and *Johnson v. Todd*, *post*.)

Mr. Roupell and Mr. Wood, *contra*, for Mr. Bowie the purchaser. The Master is wrong in his finding, and the executors cannot make a good title without the concurrence of the legatees, in whom the property became vested by the assent of the executors. What took place after the death of the testator had the effect of converting the executors into trustees of this property for the legatees. The bequest of the leasehold constituted a specific gift of the leasehold; *Goodenough v. Tremamondo* (2 Beav. 10).

The assent of one of several executors was sufficient to vest the legacy in the legatee (Williams on Exors. 622), and the assent to the tenant for life was an assent to the remainder. (1 Roper on Legacies, 738.) The executors' assent to the legacy is clearly proved, first, by the deed of the 17th of February 1817, to which Mr. Potter, the executor, was a party; and, secondly, by the fact of the wife being permitted to enjoy [169] the house, and permitted to use it as her own from the time of the testator's death to her own death.

They cited 2 Williams on Executors, 846, *Cheyney v. Smith* (1 Leonard, 215), *Wheat v. Yardley* (Plowden, 539), *Young v. Holmes* (1 Strange, 70), and *Adams v. Lindsell* (3 P. Wms. 12).

Mr. Pemberton, in reply. If the executors have become trustees, they are liable for all the purposes of the will, namely, to discharge the other legacies, and to pay all legal burthens on the assets.

July 22. THE MASTER OF THE ROLLS [Lord Langdale]. The Master reported that a good title cannot be made to the house at Bath, and his report founded upon the position that the house in question was specifically bequeathed to the testator's widow for life, with remainder to the residuary legatees:—that the executors assented to the legacy, and that thereby the house ceased to be an asset, and consequently that the title thereto is vested in the legatees, and not in the executors.

The assent is said to be proved, first, by the deed of February 1817; and secondly, by the fact of the wife being left in the enjoyment of the house, and permitted to use it as her own, from the time of the testator's death to her own death.

The deed of February 1817 was executed by the persons who were, or might become entitled to the [170] reversion or remainder of the testator's residuary estate expectant on the decease of Isabella Phillip the tenant for life, for the purpose of making the bequest to them more immediately and permanently beneficial and effectual, and to carry into effect an agreement into which they had entered, that such benefit, or chance of survivorship as was given to them by the will, should be waived, and that their contingent interests should be converted into vested interests, whether any of them should die in the lifetime of Isabella Phillip or not. This deed was executed by James Potter, one of the executors, whose wife was one of the residuary legatees, but considering the object and intent of the deed, I am of opinion that the execution of it by one of the executors, cannot be deemed an assent to the legacy, depriving the subject of it of the character of assets.

The effect of the widow having been permitted to occupy and enjoy the house as her own, during her life, is to be considered. The whole estate was subject to all debts and legacies. Some of the legacies and an annuity were immediate, and others were payable on the death of the widow. Subject to the debts, to the legacies payable immediately, and to the annuity, the widow was entitled to the income of the residuary estate for her life, and after her death, but subject to the payment of several legacies which then first became payable, the ultimate residue was given over. The duty of all the executors, which they undertook upon accepting the office, was to pay the debts and all the legacies payable on the testator's death, to ascertain the residue after such payments, give the widow the enjoyment of the residue during her life, and preserve it for the legacies which were to become payable on her death, and for the persons who were to be then entitled to the residue subject to those legacies. Upon the death of the widow, it became the duty of the surviving executors to provide for and pay the legacies which then became payable, and to pay the ultimate residue to the persons then entitled, and the executors do not appear to me to have acted otherwise than in conformity with their duty in these respects. Supposing the house to have been specifically given to the widow during her life, it was not the subject of a specific gift after her death, and at the time when she took possession, she had, besides her interest as legatee, a duty as executrix to preserve it, not merely for the legatees in remainder, but as part of the testator's assets, for payment of the legacies which became payable on her death. The other executors had the duty which they might have been compelled to perform, of permitting her to occupy the house according to the will, the further duty of executing those trusts of the will, which were to be executed after her death; and it appears to me, that by acting according to the will in giving her possession of the house, they cannot be deemed to have divested themselves of their legal power to perform that part of their duty, which the testator had imposed upon them till after her death.

For these reasons, I think that the exception must be allowed.

[172] CAREW v. WHITE. March 23, April 15, 1842.

Memoranda, the production of which the Plaintiff was entitled to, were entered in the same book with other matters, to a discovery of which the Plaintiff was entitled, and they could not be separated or sealed up. Held, that the Defendant must suffer the inconvenience of his own act, and produce the whole.

This was the usual motion for the production of documents, admitted to be in the Defendant's possession relating to the matters in question.

The object of the suit was to wind up the affairs of a late partnership between two solicitors.

The Defendant, by his answer, admitted that he had in his possession certain books, which he had kept during the partnership, and in which he was "in the habit of making short memoranda or notes of the business daily transacted by him," account of the partnership; he also stated as follows:—"That he had also been in the habit, during the period aforesaid, of making entries in the said books or diaries, all or many of his own private and family concerns, matters, affairs, and accounts, and that the same books did, in fact, contain the private journals of the acts, remarks, observations of him the Defendant, and which he never intended for the inspection of any one besides himself; and such private, and family matters, and affairs comprised as great, or a greater portion of the said books or diaries, than the short notes or memoranda of business transactions aforesaid, and were intermixed and mixed together with the said business memoranda in the same portion of the said books allotted for each day; and it was therefore absolutely impossible to seal up the said entries of private and family matters and affairs, from the said business memoranda, or otherwise to prevent the same from being seen or perused by any person having liberty to see or peruse [173] the said business memoranda. That the said business memoranda were very short, and were now, therefore, for the most part, become unintelligible, and that the same were entered in the said diaries, only for the purpose of enabling the Defendant to enter his work therefrom into the office work books of the said last-mentioned partnership, called the "Office Work Books," and that he did, accordingly, enter full particulars of all his said business transactions in the said office work books in due course, and which said office works were open to the inspection of the said Plaintiff at the office of the Defendants, under and by virtue of the dissolution agreement."

Mr. Pemberton and Mr. Glasse moved for the production of these books amongst the documents.

Mr. Kindersley and Mr. Hallett, *contra*, resisted the production on the ground of inconvenience and annoyance that it would occasion the Defendant, and urged that it was quite unnecessary for the purposes of this suit, as all the matters relating to the partnership business had been copied into the office work books. They moved to furnish verified copies of the entries relating to the partnership matters.

THE MASTER OF THE ROLLS said, that he was very desirous of relieving the Defendant from the production of these private memoranda if it were possible, consistently with the rights of the Plaintiff. That the case had better stand over to see what could be done, or if the usual order could be modified.

April 15. The case was mentioned again, when it appeared impossible to separate the part relating to the partnership [174] from that relating to the Defendant's private affairs, or to seal up the latter. The whole was very closely written, and bound up in large volumes.

Mr. Pemberton and Mr. Glasse were again heard for the Plaintiff, and

Mr. Kindersley and Mr. Hallett, for the Defendant.

THE MASTER OF THE ROLLS [Lord Langdale] (without hearing a reply) said, I feel a strong disposition to protect Mr. White from the liability of producing these documents. The question, however, is one of right, and if I cannot, on some general principle, applicable to other cases as well as this, relieve Mr. White from making a survey of those matters in these books which do not relate to the business of the partnership, the usual order must be made. If the entries relating to the business were in a separate book the Defendant would have been bound to produce it as relating to the partnership transactions. The Plaintiff being clearly entitled to the production of the entries as to the partnership if they had been kept separate, cannot be altered by the circumstance that Mr. White, for his own convenience, mixed them with his private concerns? When the case was before me on a former occasion, I was desirous of knowing if anything could be added by affidavit. Mr. White has sworn that, to the best of his knowledge and belief, there are no entries which have not been carried out in the partnership books, but it is admitted, that

there is a variation between the original and the entry in the partnership books; besides this the carrying out was the act of Mr. White alone, and might have been done in a manner not approved of by the other partner, who would be entitled to compare them. I have affidavits on the other side, [175] that on a former discussion as to certain partnership transactions, the entries in the partnership books not appearing clear, it was necessary to refer to the private diary to get accurate information on the subject. I am at a loss to find any general ground on which to protect Mr. White. As he has imprudently mixed his private affairs with the partnership transactions, it is his duty to separate them, and if he cannot, he must necessarily suffer the inconvenience arising from his own act. The Defendant is entitled to the usual order for sealing up those parts not relating to the partnership transactions, and he may, if he can, avail himself of this qualification.

[175] STANLEY v. BOND. June 2, 4, 1842.

An order *nisi* for dissolving an injunction having been regularly served, so as to allow two clear days before the day for shewing cause, the Court refused to give the Plaintiff further time to determine whether he would shew exceptions or merits of cause, although the answer was of considerable length.

In this cause, the common injunction for want of answer had been obtained in February; and it was afterwards extended to stay trial.

The Plaintiff suddenly pressed for an answer, which was filed on the 30th of May, and on the same day the Defendant obtained and served an order *nisi*, to dissolve the injunction. On the 2d of June, which was the day on which, by the order, cause was to be shewn,

Mr. G. Turner and Mr. Toller, for the Defendant, called upon the Plaintiff to shew cause.

Mr. Pemberton and Mr. Wright, for the Plaintiff, stated that the answer was of great length and amounted to 300 folios, and therefore it was but reasonable that the Plaintiff should have some time to ascertain whether [176] exceptions might be taken to the answer and shewn as cause, or whether cause should be shewn on the merits on the next motion day.

Mr. G. Turner contended, that the Plaintiff was now bound to elect either to shew exceptions for cause, or to undertake to shew cause on the next day of motions upon the merits confessed by the answer. That the indulgence now asked was not warranted by the general practice of the Court; and that if, on the other hand, the bill had been of great length, no additional time would have been allowed to a Defendant to file his answer so as to save the common injunction. He argued secondly, that the circumstances of the case were not such as to entitle the Plaintiff to any indulgence. *Pinheiro v. Porter* (3 Swanst. 362, n.), and 2 Dan. Pr. 310, were cited.

THE MASTER OF THE ROLLS. The order *nisi* seems to have been regularly served so as to allow two clear days between the service, and the day on which cause is to be shewn. (Ord. Can. 15.) The objections to the proposed delay are twofold; first, that there is no precedent for granting it, and if not, that I cannot make one; secondly, that this is not a proper case for extending the indulgence. I am inclined to think, under the circumstances, that I must decide on the first objection. I will see if there is any authority.

June 4. THE MASTER OF THE ROLLS [Lord Langdale] said, he could find no precedent for granting the indulgence which was asked by the Plaintiff. That he would not break through the established rule, and therefore could not give the Plaintiff any time to except, and that the Plaintiff must therefore undertake to shew cause on the merits. (1)

(1) The Vice-Chancellor of England, as I have been informed, made a similar decision in *Cresy v. Beavan*, 9th June 1842; stating that to grant the application would be to act inconsistently with the terms of the order *nisi*, by which the injunction was to be dissolved, unless some cause was shewn on a particular day.

Mr. Wakefield, for the Plaintiff, and Mr. Bethell, for the Defendant.

[177] NASH v. MORLEY. June 2, 10, 1842.

[C. 11 L. J. Ch. 336; 6 Jur. 520. See *Thomas v. Howell*, 1874, L. R. 18 Eq. 208.]

gift to be divided "among poor pious persons male or female, old or infirm, as the executors see fit, not omitting large and sick families if of good character," is a valid charitable bequest; the word "poor" extending through the whole sentence. The trustees have an option to apply funds to purposes which, though liberal or benevolent, are not such as are in this Court understood to be charitable, the trust cannot be executed here. Thus, the Court cannot execute a trust for private charity. A bill was filed by one of several trustees of a charitable gift, the validity of which was disputed, against the co-trustees, who had refused to act, and the next of kin of the testator, to have it executed. The trustees had accepted the trust. Held, that the proceeding was not improper, and that the Plaintiff was not bound to apply to the Attorney-General to proceed by information.

John Wilkinson, the testator in this cause, by his will, dated the 20th of April 1833, directed part of his estate to be laid out in the funds, and he thereupon proved and expressed himself as follows:—"And that my executors hereafter named, their heirs and assigns do receive the interest thereof, half-yearly, and divide it among poor pious persons male or female, old or infirm, as they see fit, not omitting large and sick families if of good character." The testator made a codicil, dated the 29th of July 1833, but he did not thereby alter the nature of the bequest in his will to poor pious persons. After the testator's death, doubts arose respecting the legal effect and construction of the will and [178] codicil, particularly as to the effect or sufficiency of the charitable bequest "to poor pious persons," and also, particularly, as to the liability of the estate to make up the deficiency of the estate to pay a legacy of £1000 bequeathed by the codicil, and two other legacies of £10,000 and £2000. Counsel were taken on the subject, which were in favour of the sufficiency of the charitable bequest, but considered that the fund made charitable by the will, was not sufficient to make good any deficiency of the residue of the testator's estate to pay legacies. Under these circumstances, and to remove those doubts, and to prevent delay and expense in giving full effect to the charitable and other trusts of the will, the widow and next of kin of the testator executed deeds dated in September 1833; and thereby confirmed the will and codicil, and released their interest in the estate; to the effect that the charitable bequest and the other trusts of the will and codicil might be performed and carried into execution by William Nash, John Morley, and Jacob Morley, as the executors and trustees thereof: "it being the clear intent and desire of all the parties, to enable the said William Nash, John Morley, and Jacob Morley to apply, dispose of, and distribute the said personal estate and effects (after paying debts), upon the trusts and in manner expressed, declared, and directed, by the will and codicil, according to the true intent and meaning thereof, and as the testator, as in and by the will and codicil was expressed and declared, and had ascertained and agreed upon, and consented to, as in the deed mentioned; any construction of law or equity to the contrary thereof, in anywise, notwithstanding."

After the execution of these deeds, the funds were invested, and for some time lay upon the trusts [179] mentioned in the will. Afterwards, the next of kin of the testator raised a claim to the residue, and insisted, that the bequest in the will was not a charitable bequest to charitable purposes, and that the testator's next of kin were entitled to the whole thereof. The Plaintiff Nash, one of the executors, alleging himself to be unable to apply the dividends for the charitable purposes in the will mentioned, and being unable to do so, by reason of the refusal of Jacob Wilkinson, a trustee and the next of kin, filed this bill against his co-executor and the next of kin to the directions of the Court.

G. Turner and Mr. Gaselee, for the Plaintiff.

J. Pemberton and Mr. J. Humphry, for Thomas Nash and Jane his wife, who was the daughter and one of the next of kin of the testator.

This bequest as a charitable gift, is invalid, and there is a resulting trust in favor of the next of kin. To constitute a good charitable bequest, the objects must be exclusively of a public nature, for if the trustees have a discretion to apply any undivided portion to private individuals, or for private purposes of benevolence the bequest would be invalid; as the Court could not, in such a case, interfere with the execution of the trust, or correct a mal-administration. If property be given partly for public charity and partly for private purposes, and the two objects are connected, the whole gift is void. In *Morice v. The Bishop of Durham* (9 Ves. 399), it was held that a bequest, in trust for such objects of benevolence and liberality as the trustee in his own discretion should most approve, could not be supported as a charitable legacy, and was therefore a trust for the next of kin. Sir W. [180] Grant there said, "The question is not whether the trustee may not apply it upon purposes strictly charitable, but whether he is bound so to apply it." The decision of Sir W. Grant was afterwards affirmed by Lord Eldon. (10 Ves. 522.) In *James v. Allen* (3 Mer. 17) the bequest was to be applied and disposed of to such benevolent purposes as the trustees in their integrity and discretion should agree on, and Sir William Grant held it void, saying, "If the property might, consistently with the will, be applied to other than strictly charitable purposes, the trust is too indefinite for the Court to execute." Again, in *Ommanney v. Butcher* (Turn. & Russ. 260), Sir Thomas Plumer held that a bequest for private charity was void; and he said, "A trust to be carried into execution by the Court must be of such a nature that it can be under the control of the Court; if the trust cannot be ascertained, the Court cannot see to the execution of it; it being too general and indefinite." The case of *Horde v. Lord Suffolk* (2 Myl. & K. 59) has been considered inconsistent with *Ommanney v. Butcher*, but the authority of the latter case is established by the decision of Sir C. C. Pepys in the subsequent case of *Wicks v. Kershaw* (cited 1 Keen, 227, 232, and 5 Cl. & F. 111, n.). There, a testator directed his trustees to apply the residue "to and for such benevolent charitable and religious purposes, as they in their discretion should think most advantageous and beneficial." It was held, that the gift was invalid as a charitable gift, and that the property belonged to the testator's representatives. So in *Ellis v. Selby* (7 Sim. 352, 353, 2 Myl. & Cr. 286), where the gift was "for such charitable or other purposes," and the trustees should think fit, it was held that the trust was so indefinite that it failed, and the fund fell into the [181] residue. On this point they also cited *In re Will* (1 Cr. M. & R. 143), and argued that, under the terms of this gift, the executors might distribute the fund amongst any "large families of good character," or amongst any private individuals answering that description, without reference to their peculiar circumstances; and the discretion therefore being too large, that the fund belonged to the next of kin.

As to the deeds of 1833, they contended that they merely confirmed the gift under the will, and could not operate to make a gift valid which would otherwise be invalid for the same objections to the nature of the trust would still apply.

Mr. Kindersley and Mr. Simpson, for Jacob Wilkinson, one of the executors, contended that the gift was valid, and that the fund belonged to the next of kin of the testator.

Mr. Tinney and Mr. Dickson, for John Morley.

Mr. Wray, for the Attorney-General, insisted that the construction contained in the will was not the proper one. That the plain meaning of the will was, that the fund was to be divided between "poor pious persons," but not "only large and sick families of good character," so that it was a necessary qualification that the objects to be poor, and that consequently none but poor objects could partake of the benefit of the charity.

He argued also that the executors and next of kin had bound themselves by the deeds, and were wholly excluded thereby; that the trustees held upon trusts for the poor and not beneficially for themselves, and that therefore [182] either the Crown was entitled to the fund, *Middleton v. Spicer* (1 B. C. C. 201), or that it was distributable amongst such objects as might be directed by sign manual. He cited the 43rd Statute to shew that there were many public objects which were considered charitable in the sense that this Court would see to their performance. He also objected to the frame of the record, and argued that the Plaintiff having accepted the trusts, he had no right to come by a bill of his own, against his co-trustees and the Attorney-General.

have the validity of his trust contested, but that he ought to have applied to the Attorney-General for his sanction to file an information.

Shelford on Mortmain, 60; *Waldo v. Caley* (16 Ves. 206); *Horde v. Lord Suffolk* 2 Myl. & K. 59; *Johnston v. Swann* (3 Mad. 457, and Ambler (Blunt's edition), 85, n.); and *In re Franklin* (3 Y. & J. 544), were cited.

June 10. THE MASTER OF THE ROLLS [Lord Langdale]. The question is, whether a gift "to poor pious persons male or female, old or infirm, as the trustees see fit, not omitting large and sick families if of good character," is a valid charitable gift, and I am of opinion that it is. If the words were such that this Court had not authority to compel the trustees to apply the funds to purposes strictly charitable, or technically so denominated, the trust could not be maintained; *James v. Allen* (3 Mer. 19). The question in all such cases is, whether it is not only the duty of the trustee, but a duty the performance of which will be enforced by this Court, to apply the whole fund to purposes which are here called [183] charitable. If there be any option in the trustee to apply the funds to purposes, which though liberal or benevolent, are not such as are in this Court understood to be charitable, the trust cannot be executed here. Moreover, if it be expressly declared, that the fund is to be distributed in private charity, it has been held that the Court cannot execute such a trust. The testator, in such a case, has shewn that the party to whom the control of the fund is given, is not to have the fund beneficially, and he seems to have referred the distribution to private judgment, which this Court cannot control.

In the present case, the argument has been, that from the words used, the testator must be deemed to have meant a private and not a public charity, and a private charity being incapable of execution in this Court, the next of kin are entitled. In this, as in all other cases of the like kind, the difficulty, if any there be, arises from the ambiguous application of words. The expressions "public" and "private" are not used in precisely the same sense when we speak of public and private institutions, as they are, when we speak of distributing funds in public or in private charity. In the case of *The Attorney-General v. Pearce* (2 Atkins, 87), Lord Hardwicke has stated it to be "almost impossible to say which charities," i.e. (as I understand it), which charitable institutions "are public and which are private in their nature," and in the argument of this case no one has attempted to state the difference between a public and a private charity by any accurate definition. Here the objects are distinctly stated to be poor persons, and a gift to poor persons is a valid charitable gift. The gift here is to poor pious persons, and the gift is not less charitable gift, because the objects are to be pious, male [184] or female, old or infirm. No particular persons are indeed specified, and the gift is to be among such of the described objects as the trustees shall see fit; and Lord Hardwicke says: "Where testators have not any particular person in their contemplation, but leave to the discretion of a trustee to choose out the objects, though such person is private, and each particular object may be said to be private, yet, in the extensiveness of the benefit accruing from them, they may very properly be called public charities. A sum to be disposed of by A. B., and his executors, at their discretion, among poor workmen, is of this kind." (2 Atk. 88.)

It was argued, that the word "poor" did not extend through the whole of the gift, and the direction "not to omit large and sick families if of good character" did not constitute a valid charitable gift. It appears to me, however, that by this the testator only meant to signify, that by the word "persons" he did not mean to restrict the trustees to individuals only, but to enable them to apply the property for the benefit of poor families, and I think it clear that the word "poor" extends through the whole sentence; and I am therefore of opinion that this is a valid and valid charitable bequest.

An objection was taken to the form of proceedings in this case, and there seems to be some ground for it on the part of those who make it; but I own I cannot come to the conclusion that a trustee in the situation of this Plaintiff has not a right to maintain such a bill as this. He alleges that he is desirous of carrying this trust into execution, and that he is prevented from doing so by the refusal of his co-trustee. In such a state of circumstances, though I conceive that it would have [185] been better for him to have applied to the Attorney-General, and to have informed him of

the difficulty in which he was placed, in order that the trust might be carried into execution at the instance of the officer of the Crown, still I cannot say he was bound to depend upon the Attorney-General in that respect, or that he has not a right to come here. Although there is no suggestion that the Attorney-General did, in this case, refuse his sanction, yet he might have done so, and I can hardly hold that this suit was improperly instituted without placing trustees like these more in the discretion and power of the Attorney-General than they ought to be. I cannot therefore say that this suit was improperly instituted.

As to the question, whether there is to be a reference to the Master to approve of a scheme, I should certainly direct a scheme if the Attorney-General desired it, and thought it proper or useful in this case to direct one. If he does not I must order the Defendants, the trustees, to concur with the Plaintiff in executing the trust. There seems to be no difficulty in carrying the trusts into execution, as the trustees seem already to have executed the trusts subsequently to the execution of the deeds.(1)

[186] PATERSON v. LONG. May 25, 1842.

Two houses, held under one lease, were sold in separate lots, and it was stipulated that the purchasers should be parties to each other's assignment. Held, that the purchaser of Lot 2 was not a necessary party to a suit for specific performance against the purchaser of Lot 1.

This cause came before the Court on general demurrer.

Two houses, held under one lease at a rent of £8, were sold by auction, in separate lots, and by the conditions of sale it was stipulated that the purchasers of the two lots should be parties to each other's assignment, and covenant to pay the proportion of the rent allotted to each, and to indemnify each other against the same, and also give mutual powers of distress and entry, upon and over the premises purchased by each, as an indemnity against the payment of more than the due proportion of the original rent of £8 payable by each purchaser.

One of the houses comprised in Lot 1 was purchased by the Defendant Long, and the other by another person. Long having refused to complete his purchase of the grounds which it is unnecessary to state, the vendor filed this bill against him alone for a specific performance. The bill charged that the purchaser of Lot 2 was ready and willing to concur in all proper assignments of Lot 1 to the Defendant.

The Defendant filed a general demurrer.

Mr. G. Turner and Mr. Barlow, in support of the demurrer, amongst other objections, insisted that the purchaser of Lot 2 ought to be made a party to the suit, as he was interested in the contract, and was bound to be a party to the assignment.

[187] Mr. Pemberton and Mr. Beavan, *contra*, contended he was not a necessary party, and could not properly be made a party, as he was not a party to the Defendant's contract. (*Wood v. White*, 4 Myl. & Cr. 460.)

THE MASTER OF THE ROLLS [Lord Langdale]. If there is to be a specific performance of the contract, the purchaser of Lot 2 will be bound to concur in the assignment; but is it necessary that he should be a party to all the litigation between the vendor and the purchaser of Lot 1? I think not; besides this, the bill alleges that he is ready to concur. Although it might, by possibility, become necessary hereafter to compel him to join in the assignment, still, I see no reason for making him a party to a suit until that necessity arises.

The demurrer must be overruled.

(1) And see *Ewen v. Bannerman*, 2 Dow. & Cl. 74; *Hill v. Burns*, cited 2 Dow. Cl. 101; *Miller v. Rowan*, 5 Cl. & Fin. 99; *Powerscourt v. Powerscourt*, 1 Molloy, Cl.

[188] ALDRIDGE v. WESTBROOK. PARSONS v. WESTBROOK. Feb. 23, 1842.

[See *Hepworth v. Heslop*, 1844, 3 Hare, 487.]

being entitled to a moiety of an estate, covenanted to settle it on himself for life, with remainder to his wife and children. He afterwards acquired the other moiety, and mortgaged the entirety to B., who, having no notice, obtained priority over the wife and children of A. By the will of B. the mortgage was given to C. for life, with remainder to A. absolutely. A. died, and C., by virtue of the mortgage, received the rents of the entirety to the disappointment of the wife and children of A. C. afterwards died. Held, that the widow and children of A. had no equity against the general creditors of A. to have a lien on the second moiety of the estate, to recoup the loss sustained by them by C.'s receiving the rents of the moiety of the estate bound by the settlement, from the death of A. to the death of C., but that they must come in as specialty creditors under the covenant. Mortgagee filing a bill for the benefit of himself and the other creditors of the deceased, is entitled to payment of his mortgage-money out of the mortgaged estate, before payment of the costs of suit.

The second of these two suits was filed on behalf of the creditors of Richard Aldridge. The first suit was instituted by his children, to have the benefit of articles entered into by him on his marriage.

It appeared that Richard Aldridge and his brother James Aldridge were equally tied to an estate called Woodmacotes, which, in 1792, they mortgaged for £1200 Mr. Lee.

Richard Aldridge, being about to marry, executed articles of settlement, whereby he covenanted, within three months, to convey his moiety of this estate to trustees, free from incumbrances, in trust for himself for life, with remainder to his wife for life with remainder to the children of the marriage.

In 1808 James Aldridge sold and conveyed his moiety of the estate to Richard, on the 5th of October 1808 Richard, in violation of the marriage articles, mortgaged the entirety of the estate to James for securing £1000.

In November 1810 James died, having by his will given his real and personal estate, upon trust [189] for his wife Anne for life, and after her death subject, as to his personal estate, to some legacies, in trust as to the whole of his real and personal estate for his brother Richard Aldridge.

At the death of James, Richard was indebted to him in the sum of £1000, secured by a mortgage, and in the further sum of £2000, for which he held no security. An arrangement was afterwards entered into, by means of which the trustees of James gave the first mortgage for £1200, and with it the legal estate, and Richard executed to the mortgagee of the entirety of the estate, for securing to them the sum of £4200, the aggregate amount of the first mortgage of £1200, and the two sums of £1000 and £2000 due from Richard to the estate of James.

Neither James himself nor his trustees had any notice of the articles, and they were consequently unfettered thereby. The consequence was, that the widow of James, who was entitled to an estate for life in the mortgage for £4200 secured upon the entirety of the estate, had the benefit of this security from 1810 to her death, which had recently happened, and in respect thereof, she received during her life the amount of the rents of both moieties of the estate in question.

Richard died on the 5th of September 1818 without having performed the covenant entered into in the marriage articles. Upon his death his widow and children would, if they had duly performed the marriage articles and had not mortgaged the estate, become entitled to the receipt of a moiety of the rents and profits of the estate; but in 1818 to the death of James's widow in 1841, their rights had been defeated by the paramount claims of the widow of James.

[190] The mortgage for £4200, though valid as against the marriage articles of James, had recently, by the death of James's widow, and under the limitations in the articles, fallen into and now formed part of the estate of Richard.

Some time after the death of Richard a bill was filed on behalf of his creditors, to obtain payment of their debts; and two of the children of James also filed another bill for the purpose of having the benefit of the marriage articles, and in that suit was declared that they were entitled to have the benefit of the settlement. Under these circumstances,

Mr. Pemberton and Mr. Randell, for parties claiming under the articles, now contended, that they had, as against the general creditors of Richard an equity to have the mortgage for £4200 kept on foot for the purpose of giving them a lien on the second moiety of the estate, to the extent of the amount of the rents of the first moiety, which through the breach of trust of Richard had been received by the widow of James, to the disappointment of the persons entitled thereto under the marriage articles.

Mr. Kindersley, for the creditors of James, *contra*, contended, that the parties claiming under the articles had no lien on the other moiety of the estate, and that they must come in, under the covenant, *pari passu* with the other creditors.

Mr. Tinney, Mr. Busk, Mr. Turner, and Mr. Paton, for other parties.

THE MASTER OF THE ROLLS [Lord Langdale]. There is some complication in the facts of this case, and I have certainly had some difficulty in clearly comprehending the effect of those facts. [After stating the above circumstances his Lordship continued.] It has been declared, that the widow and the children of Richard were entitled to the benefit of the articles, or to the first moiety of the property, the estate of which has now, by the death of the widow of James, become available for the purposes of the settlement. The widow, therefore, of Richard, is now entitled in her life to receive the rents and profits of that moiety, and after her death the children will be entitled in remainder. The legal estate of that moiety is, therefore, not applicable to the purposes of the settlement; but it appears that the mortgage executed by Richard, comprised not only the moiety of Woodmacotes, which was subject to the articles, but also the other moiety of that property which, at a subsequent period, Richard purchased from James; and the widow of Richard now claims to be entitled to a lien upon that other moiety of Woodmacotes for the loss she has sustained. It is said that the mortgage being made for the benefit of Richard, and subsisting as a valid mortgage at the time of the death of James, when it was disposed of by his will, and being afterwards continued for the benefit of the widow of James, it is now to be continued for the benefit of the widow of Richard, who, by the execution of the mortgage, enabled the widow of James to intercept the rents of the widow of Richard under the settlement, and, for a time, wholly to deprive her of the rents of a moiety of the estate, to which under the articles she was entitled.

Now what happened with respect to that moiety? The mortgage debt was a debt of the estate of James. By the effect of the will of James that debt, as regards the interest of Richard, ceased to be a debt. It was given to Richard, who by virtue of the mortgage was [192] a debtor, but by virtue of the bequest, became at the time a creditor. How is that debt to be kept up for the purpose of answering the claim? I apprehend that, if it could be done in any way, it would be, by having the mortgage, in the first instance, in some way distinguished from all the other property as well of Richard as of James. In one sense, and in one sense only, is it distinguished from the property of James, because, if I understand the matter, the other moiety of James has been administered, and by virtue of the mortgage, the property has been heretofore enjoyed by his widow. On the other hand, the mortgage money received by Richard was never kept separate or apart: it constituted a debt due from him, and not a sum of money received by him and distinguished from the other part of the estate, in such a way that a lien could be established upon it for the benefit of the widow.

Under these circumstances, I confess, though I have been a good deal affected by the ingenuity of the argument employed in the discussion of the case, which has very plausible reasons for it, and though I have felt a disposition, which, I think, everybody must feel to establish the claim if it could be affected, I cannot see a mode of getting at a distinct part of the property of James, so as to make it subject to this lien for the benefit of the widow of Richard.

The estate of Richard will be administered according to the ordinary rules.

his and every other part of his property is subject to debts and claims which may be made upon it.

The best opinion I can form upon this is, that I do not think this lien established, and the widow must therefore come in as a specialty creditor only, in re-[193]-spect of the violation of her rights under the marriage articles.

The Court, as I have been informed, decided another point in the second suit, the master of the Rolls holding, that where a creditor's bill was filed by a mortgagee who was also a creditor by simple contract, he was entitled to payment of his mortgage money out of the mortgaged estate, before the payment of any part of the costs of the suit.

Greenwood v. Taylor (1 R. & M. 185), *Mason v. Bogg* (2 My. & Cr. 443), and *White v. The Bishop of Peterborough* (Jacob, 402. And see *Tipping v. Power*, 1 Hare, 405), were referred to.

[193] WILLATS v. BUSBY. Dec. 3, 6, 1841; Jan. 15, 17, 18, May 10, 1842.

[S. C. 12 L. J. Ch. 105.]

decree made in the absence of a material party, but without prejudice to his rights and interests.

B. executed a voluntary settlement of real estate in favour of his wife and children, and afterwards contracted to sell it for valuable consideration. The purchaser filed a bill for specific performance against the vendor, his wife, children, and the trustees in whom the legal estate was vested. One of the children was out of the jurisdiction, and did not appear. The Court decreed a specific performance, and ordered the trustees to convey to the purchaser, saving the rights of the absent party.

In 1812 Edward Selater Busby, being seized of some freehold property at Bethnal Green, conveyed it by a voluntary post-nuptial settlement, to trustees, in trust for his wife Janet Busby, and afterwards for the children of their marriage, of whom there were two, viz., David William Busby and another son.

In 1834 Edward Selater Busby contracted to sell the same property to the Plaintiff *fr. Willats*. The trustees, however, who had the legal estate, refusing to convey the property, the Plaintiff, in consequence, filed [194] this bill for a specific performance of the contract against Edward Selater Busby, and wife, and their two children, and the trustees of the settlement.

David W. Busby was out of the jurisdiction of the Court, and could not be found as to be served with process (3 Beav. 420). The cause was now brought to a hearing without having David W. Busby before the Court.

Mr. Pemberton, Mr. Kindersley, and Mr. James Russell, for the Plaintiff.

Mr. Tinney and Mr. K. Parker, for the wife of the settlor. The suit cannot proceed in the absence of David W. Busby, whose interest is sought to be directly affected by the decree. In *Browne v. Blount* (2 Russ. & Myl. 83) the bill was filed by judgment creditor of Sir Charles Blount, for the purpose of obtaining equitable execution against freehold estates which were vested in trustees, upon certain trusts, under which Sir C. Blount was entitled to the rents during his life. When the cause came on to be heard, Sir C. Blount, who was abroad, had not appeared, but the trustees and the other parties who were interested in the estates, were before the Court, but Mr. J. Leach, M.R., decided that the cause could not proceed in the absence of Sir C. Blount.

In *Lowry v. Fulton* (9 Sim. 104) the Vice-Chancellor would not allow a suit instituted by one of three residuary legatees, for an administration of the estate, and to charge two of the trustees with breaches of trust, to proceed in the absence of one of such residuary legatees.

[195] So, in *Lyde v. Hale* (13th May 1835), Sir C. C. Pepys refused to proceed to hear a cause, because the party principally sought to be affected by the decree was out of the jurisdiction of the Court, and did not appear.

Mr. Bethell and Mr. Bacon, for the brother of David W. Busby, and Mr. Campbell, for the representative of the surviving trustees, supported the objection.

Mr. Pemberton, Mr. Kindersley and Mr. James Russell, *contrâ*. David W. Busby is not an active, but a passive party, and the Court can therefore proceed in his absence. (Redesdale, 164.) Both in *Broune v. Blount* and *Lyde v. Hale* the person interested was not before the Court. Here there are persons similarly interested present, and who, in defending their own right, will protect the interest of the absent party. We admit that the rights of David W. Busby cannot be bound by the proceedings in his absence, and that he may hereafter impeach everything done in this suit. In cases of this description the Court does the best it can; surely it cannot refuse to administer justice between two parties because a third is absent. Take the case of numerous annuities charged on the testator's real estate: could the Court refuse administration for payment of the debts of the testator merely because a party entitled to a £5 annuity was absent? The Court can adjudicate on the rights of an absent person; but that will not prevent a decision on the questions between those who are present.

The 40th General Order of August 1841 (Ord. Can. 176) enables the Court to proceed, saving the rights of the absent parties.

[196] [THE MASTER OF THE ROLLS. The objection is not that David is not a party to the suit, for he has been made a Defendant on the record; but the objection is this, that he is not present to defend his interest.]

Where a class of persons are interested, the Court will determine the question of the absence of some of them; *Caldecott v. Caldecott* (Cr. & Ph. 183. And see 1 M. & C. p. 545, and *Harvey v. Harvey*, 4 Beav. 215).

Mr. Tinney, in reply. The supposition that in *Broune v. Blount* and *Lyde v. Hale* the only person interested was absent, does not reconcile the authorities; for in *Lyde v. Hale* (2 Bro. C. C. 276) the heir of the mortgagor was not the only person interested, as the first mortgagee was before the Court; and even in that case the Court said that it could not consider the heir, who was sought to be foreclosed, a passive party. The Plaintiff seeks directly to affect the interest of the absent party by getting the legal estate from a trustee for David W. Busby. The General Order of August 1841 does not apply; for David W. Busby is a party, and therefore an objection could not be taken by the answer, and also for this reason, that when the decree the Plaintiff has got the legal estate, the rights of the absent parties can be saved.

THE MASTER OF THE ROLLS said, that the objection was of so much importance that he would look at the authorities on the subject; but he should certainly strive to get over the difficulty.

Dec. 6. THE MASTER OF THE ROLLS [Lord Langdale] referred to Mr. Pleading (4th edit. 164), in which it is stated:—"When a person [197] who is to be a party is out of the jurisdiction of the Court, that fact being stated in the bill, and admitted by the Defendants, or proved at the hearing, is, in most cases a sufficient reason for not bringing him before the Court; and the Court will proceed with the bill against the other parties, as far as circumstances will permit."

He also referred to *Smith v. The Hibernian Mine Company* (1 Sch. & Lef. 2) in which Lord Redesdale states as follows:—"The ordinary practice of Courts of Equity in England when one party is out of the jurisdiction and other parties within it is to charge the fact in the bill, that such a person is out of the jurisdiction, and the Court proceeds against the other parties, notwithstanding he is not before the Court; it cannot proceed to compel him to do any act; but it can proceed against the other parties, and, if the disposition of the property is in the power of the other parties, the Court may act upon it;" and also to what is stated by Lord Eldon in *Codrington v. Thompson* (16 Ves. 325). "The strict rule is, that all persons materially interested in the subject of the suit, however numerous, ought to be parties, that there be a complete decree between all parties having material interests. But that, as a general rule, established for the convenient administration of justice, must be adhered to, in cases, to which, consistently with practical convenience, it is an exception of application. Accordingly there are several well-known cases of exception,"

His Lordship also adverted to the case of *Walley v. Walley* (1 Vern. 484), where the report says, that it was upon a motion, ordered that the Plaintiff might proceed against the other Defendants, without prejudice, for not bring[198]-ing his father's executor whose breach of trust made the suit necessary) to a hearing, and the Plaintiff had a decree without bringing his father to a hearing; and to *Rogers v. Bumb* (200), where the Plaintiffs moved the Court, that they might hear the case without Charles (a son of the testator, a freeman of London, and alleged to have been fully advanced) he being beyond sea, and if it appeared he had any right, might come before the deputy on the account; and, though no precedent of such allowance before the Court, C. B. Gilbert and Price, *contra*, Page gave leave to the cause without Charles. He referred also to *The Attorney-General v. Baliol* (9 Mod. 407), where the decree was made in the absence of the College of St. John, and it was made subject to such further alterations and amendments as might be properly required; and this Lord Hardwicke afterwards thought they might have, for the reason that as Glasgow could not be a party by compulsion, that nevertheless it might apply by petition to have any amendments in the decree.

His Lordship concluded that the objection, in this form, was not in the nature of a preliminary objection, and that he must hear the cause and see what, under the circumstances, was right, just and convenient to be done.

The cause was then heard again upon the merits, and was argued by the same counsel.

Jan. 15, 1842. THE MASTER OF THE ROLLS [Lord Langdale], after referring to a decision on the statute of 27 Eliz. c. 4, which had decided that a voluntary settlement was fraudulent within that Act, and stating that he had no authority to consider policy or correctness of this decision, and after disposing of some other grounds of defence, said :—[199] The great difficulty in this case is in respect of the absence of a material party, and I cannot help thinking, that it will be a difficult thing to make any decree at all. One of the parties interested under the settlement is not present, and the Court would be extremely reluctant to proceed in his absence: but finally comes to a matter of convenience.

Should the Court refrain from doing that which appears to be just, or should the Plaintiff be deprived of his rights, merely because a party interested is accidentally absent? On the other hand, can the Court give the Plaintiff his rights without injury to the absent party?

Is the right to a specific performance was to be declared against the settlor alone, would be no difficulty; but on this bill, can there be a decree except as against parties entitled to resist it? Is it according to the practice of the Court to declare against all except one, who is absent? and if the Court had the power to make a conveyance, is it right to introduce into the decree a reservation of a right to absent parties to come in and dispute it? The absent party will not be bound by proceedings; but then the legal estate will be parted with, and might be conveyed to a person taking without notice, but if such person claimed under a decree, making a reservation of the rights of the absent party, the objection would in measure be guarded against. The Plaintiff must consider whether he would make a decree in the form I allude to.

Mr. Pemberton, on the part of the Plaintiff, assented.

The cause stood over for judgment.

Feb. 10. THE MASTER OF THE ROLLS. When this cause was brought on for judgment, an objection was taken that David William Busby, one of the [200] Defendants, was out of the jurisdiction of the Court, and that in his absence no decree could be made against any of the Defendants. The objection being overruled, the case was heard, and it appeared to me that the Plaintiff was entitled to a specific performance of the agreement stated in the bill; but that the decree should be made so as to leave to the absent Defendant a right of claiming any right or interest he might have in the property; and on consideration I am of opinion that the decree ought to contain a clause stating it to be without prejudice to any right or interest in or to the premises comprised in the settlement, which may be claimed by the Defendant David William Busby. The decree will therefore be as follows :—

That the agreement in the pleadings mentioned, dated the 19th day of

March 1834, be specifically performed and carried into execution. And upon the Plaintiff or the Defendants Rushbridge and Harcourt, the legal personal representatives of the late Plaintiff Henry Thomas Willats, paying the sum of £3800, the residue of the purchase-money, it is ordered that the representatives of the surviving trustee of the indenture dated the 12th day of February 1812, and all other necessary parties as the Master shall direct, convey the said premises to the Plaintiff. And it is ordered that the Master do settle the conveyance in case the parties differ. And in case the Master shall find that the said David William Busby is a necessary party to such conveyance, and the said David William Busby shall not come in to execute the same, it is ordered that this decree be without prejudice to any right or interest which may be claimed by the said David William Busby in or to the premises comprised in the said indenture of the 12th day of February 1812. (NOTE.—also *Pawlet v. The Bishop of Lincoln*, 2 Atk. 296, and *Darwent v. Walton*, 3 Atk. 51.)

[201] DAVIES v. FISHER. Feb. 17, 19, 26, 1842.

[S. C. 11 L. J. Ch. 338; 6 Jur. 248. As to remoteness, see *Locke v. Lamb*, 1865 L. R. 4 Eq. 379.]

A testator gave his widow the power of appointing his residuary estate. By her will after reciting the power, she declared that, in pursuance of the power and other powers enabling her, for the purpose of disposing of her husband's and own estate, she made her will as follows:—She then directed her debts to be paid, and gave some legacies; and as to all the rest, &c., “of her personal estate, bequeathed the same to A. and B. upon trust, &c. Held, that the widow (who died in 1832) had thereby appointed the residuary estate of her husband.

A gift of personalty to trustees for A. for life, and after his death in trust for the children of A. “as they severally attained twenty-five years,” the income to be applied during their respective minorities by their guardian for their maintenance, &c., with a gift over in case no child of A. should live to attain twenty-five. Held, that the gift was to be vested, and not too remote.

The testator, James Davies, by his will, dated the 18th day of September 1824, after directing payment of all his debts, and funeral and testamentary expenses, giving divers pecuniary legacies, bequeathed all the residue of his estate, both real and personal, unto his wife, Ann Davies, deceased, her heirs, executors, and administrators absolutely, and he appointed his wife and William Powell his executors.

[202] On the 20th of September 1824 the testator made the following codicil to his will:—“Whereas by my will as aforesaid, bearing date the 18th day of September in the year 1824, I have directed my wife, Ann Davies, to be my residuary legatee in case she the said Ann Davies dies without making a will after my decease, the remainder of all my property, whatsoever it may consist in, whether bank, consolidated funded property, houses, furniture, plate, books, linen, wearing apparel, &c., to be equally divided, share and share alike, among my brother William Davies and his children, as named—William Davies junior, James Davies junior, Martha Ann Davies, and Mary Davies, or to as many of the aforesaid children as may be living at the decease of the said Ann Davies. Likewise I direct and appoint William Davies to be my residuary legatee instead of my wife, Ann Davies, and the forenamed William Powell.”

The will and codicil were unattested.

The testator died in December 1824. His wife, who survived him, made her will dated in April 1832, and thereby, after reciting that the testator, James Davies, her late husband, did by his aforesaid will and codicil appoint her his residuary legatee and direct in case of her death, without making a will after his decease, that her nephew, William Davies the younger, should be his residuary legatee, she the said Ann Davies, in pursuance of the power and authority given and reserved to her and by the will of James Davies the elder, and of all other powers and authorities in anywise enabling her, did, for the purpose of disposing of all the estate of her late husband, James Davies, over which she had any disposing power, and also

her own estate and effects whatsoever and wheresoever, make her last will and testament in manner [203] following (that is to say) :— First, she appointed James Fisher and William Powell executors of her said will ; and after directing payment of her debts, and funeral and testamentary expenses, she bequeathed to James Davies, the younger, a legacy of £2000 three per cent. consolidated Bank annuities, and to James Fisher and William Powell the sum of £4000 three per cent. consolidated Bank annuities upon trusts therein mentioned, for Martha Ann West and her children as therein mentioned ; and after bequeathing several annuities and legacies, and directing the executors to appropriate so much stock out of her residuary estate as would be sufficient, in point of yearly income, to answer the same annuities, and directing that at the decease of the respective annuitants the same should sink into and form part of her residuary estate, she bequeathed to James Fisher and William Powell her three leasehold messuages and premises, situate in Park Street, Islington, for all her estate therein, upon trust to sell the same, and apply the produce upon the same trusts as she thereafter declared concerning her residuary personal estate ; and as to all the residue of her *personal estate* whatsoever, and wheresoever, and of what nature or kind not specifically bequeathed or disposed of by her will, she bequeathed the same to James Fisher and William Powell, upon trust to sell, get in and convert into money the whole of her personal estate, or such part thereof as should not consist of any in the funds or on Government, or real, or leasehold securities, and out of the proceeds thereof to pay her debts, funeral and testamentary expenses, and pecuniary legacies, and make the appropriations necessary for answering the said annuities. Upon trust to invest the clear surplus monies arising from her *residuary estate*, and the proceeds of the said leasehold houses, in manner therein mentioned. She directed her trustees to stand possessed of her residuary estate, including the proceeds of her said leasehold houses, and the investments thereof, upon and during the life of William Davies the younger, to pay the income thereof unto William Davies the younger, and from and after his decease in trust for the children of the said William Davies the younger, as they severally attained the age of twenty-five years, equally to be divided between them if more than one, and if but one, then the whole to such one child, the income to be applied during their respective minorities to the guardian for the time being of the said children or child for their respective support, maintenance, and education. And in case no child of the said William Davies should live to attain the age of twenty-five years, then in trust for the children of the said James Davies the younger, as they severally attained the age of twenty-five years, equally to be divided between them if more than one, and if but one, the whole to such one child, the income to accumulate in the intermediate time, and be paid with the principal. And in case no child of the said James Davies the younger should live to attain the age of twenty-five years, then in trust for the children of Martha Ann West, as they severally attained the age of twenty-five years, equally to be divided between them if more than one, and if but one, the whole to such one child, the income to accumulate in the intermediate time, and be paid with the principal ; with a limitation in case of Martha Ann West having no child who should live to attain the age of twenty-five years.

The testatrix afterwards made a codicil to her will, dated the 6th of May 1832, whereby she gave certain specific parts of her personal estate to the persons therein named, but she did not otherwise revoke or alter her will.

[204] The testatrix died in June 1832, and William Davies the younger having died in 1834, this bill was filed by his children, insisting that they took vested interests in the residuary estate bequeathed by the will of Ann Davies, including the residuary estate of the testator : that they were entitled to the payment of the same at twenty-five, and to have the income applied for their maintenance during minority.

Mr. Pemberton and Mr. Keene, for the Plaintiffs, contended that the gift to them, given "as they severally attained the age of twenty-five years," was never a valid vested interest, the dividends being payable to them in the meantime ; see *Barnes* (3 Mer. 335), *Jones v. Mackilwain* (1 Russ. 221), *Murray v. Addenbrook* (10 M. & Cr. 407), *Bland v. Williams* (3 Myl. & K. 411), *Vivian v. Mills* (1 Beavan, 315), *W. v. Burgh* (2 Beavan, 221), *Saunders v. Vautier* (4 Beavan, 115, and Cr. & Ph. 240).

They argued also, that William Davies the younger was the substituted residuary legatee, and took in preference of the widow.

Mr. Hardy, for the representatives of William Davies the younger. In no case can the representatives of Mrs. Davies be entitled, for the testator appointed William Davies junior "his residuary legatee instead of his wife."

Mr. Chandless and Mr. Hoare, for William Powell, one of the executors of the widow, and the surviving executor of the testator.

The testatrix took an absolute interest, and not a life interest with a power; *Hales v. Margerum* (3 Ves. 299), *Bull v. [206] Kingston* (1 Mer. 315). The limitation over is simply void as inconsistent with the previous absolute estate; *Ross v. Ross* (1 Jac. & W. 154). The power was well executed, it having been referred to *Standen v. Standen* (2 Ves. jun. 589), and the testator's property passes under the widow's will; *Bourn v. Gibbs* (1 R. & M. 614), *Harrison v. Foreman* (5 Ves. 208); and it is subject to her debts. The executor is not interested in the validity of the gift to the children.

Mr. Roupell and Mr. Bilton, for the executors of James Davies, and for his child. The power given to Mrs. Davies was not duly executed; *Jones v. Tucker* (2 Mer. 533), *Roach v. Haynes* (8 Ves. 587), *Lewis v. Lewellyn* (Turn. & R. 104), *Napier v. Napier* (1 Sim. 28, and see *Hughes v. Turner*, 3 Myl. & K. 666). Though she refers to the power, she only disposes of the residue of "her personal estate" and of "her residuary estate." This is insufficient to pass the testator's; *Bradly v. Westcott* (13 Ves. 445).

Mr. Kindersley and Mr. George Turner, for the next of kin of Ann Davies, the widow. The property belonged absolutely to Mrs. Davies, under the will of her husband. There was an absolute gift to her in the first instance, which has not been cut down, for the gift to the children "as they attained twenty-five" is void. This has been settled by a long series of decisions; *Leake v. Robinson* (2 Mer. 363), *Bull v. Pritchard* (1 Russ. 213), *Fawdry v. Geddes* (1 Russ. & M. 203), *Ring v. Hardwick* (2 Beavan, 352), *Newman v. Newman* (10 Sim. 51). The direction for maintenance is insufficient to make it vest; *Batsford v. Kebbell* (3 Ves. 363); the [207] maintenance is given merely during the minorities of the children, so that during the period which might elapse between their attaining twenty-one, and their attaining twenty-five, there is no gift to them of the dividends.

The property has been validly appointed to Mrs. Davies's executors, and the gift to the children being void, the executors are trustees for the next of kin of Mrs. Davies; *Goodere v. Lloyd* (3 Sim. 538).

Again, the contingency has not happened upon which the property was given over by the will of the testator to the children of William Davies the younger, for the widow did not "die without making a will;" *Scott v. Bargeman* (3 R. Williams, 69).

William Davies was substituted, not for Mrs. Davies, but for Mrs. Davies and William Powell who were executors, and the testator could not therefore have intended him to take as residuary legatee.

Mr. Tinney, Mr. Wood, Mr. Spence, Mr. Bacon and Mr. Blower, for other parties. Mr. Pemberton, in reply.

Feb. 26. THE MASTER OF THE ROLLS [Lord Langdale]. In this cause the principal question depends upon the construction which ought to be given to the residuary bequest contained in the will of Ann Davies.

James Davies, by his will dated the 18th September 1824, gave his residuary estate to his wife Ann Davies absolutely for ever; and by a codicil, dated two days [208] afterwards, namely, the 20th September 1824, he directed, that if she died without making a will, the remainder of his property should be equally divided among his brother William Davies's four children.

James Davies died, leaving his wife surviving him, and she was absolutely entitled to dispose, by her own will, of the residuary estate bequeathed to her by her husband's will.

By her will, dated the 4th April 1832, she recited the will of her husband, and declared her purpose to dispose of all his estate, and also all her own estate; and having thus declared her purpose, she proceeded, without making any distinction between his estate and her own, to dispose of the whole, as if it had been her

and I think that she has done it in a manner sufficient to pass both. (See the *Wills*, 1 Vict. c. 26, s. 27, which however did not apply to the present case.) After giving several legacies, she gave the residue and remainder of her personal estate to Fisher and Powell, upon trust, to sell:—to pay her debts and annuity legacies:—to set apart sufficient sums to answer the annuities:—to invest the surplus in their joint names, and stand possessed on the securities on which the same should be invested, in trust, during the life of W. Davies, to pay the interest, dividends, and annual produce of her residuary personal estate to him, and she then bequeathed as follows:—“And from and after the decease of the said W. Davies, in trust for the children of the said W. Davies, as they severally attain the age of twenty-five years, equally to be divided between them if more than one, and if one, then the whole to such one child; the income to be applied during their respective minorities, by the guardian, for the time being, of the said children or for their [209] respective support, maintenance, and education. And in case any child of the said W. Davies shall live to attain the age of twenty-five years, then the same for the children of James Davies,” in manner therein mentioned.

The question is, whether the gift to the children of W. Davies is void for remoteness, and it is necessary to consider:—first, the effect of the direction to apply the income between the children as they severally attained the age of twenty-five years; and, secondly, the effect of the direction to apply the interest during the minorities of the children for their support, maintenance, and education; and, thirdly, the effect of the gift over.

As to the first point, I think that if the directions to divide had stood alone, the gift would have been too remote. In this case, as in *Leake v. Robinson* (2 Mer. 363), only through the medium of the directions given to the trustees, that we can ascertain who were the persons intended to take, and what benefits were intended for them. And the trust is all for the children of W. Davies as they severally attain the age of twenty-five years; none were to be excluded, and none to have the gift till the age of twenty-five years was attained. This would be too remote.

Secondly. Expressions of this kind of themselves, importing a postponement of vesting, may be so controlled by other expressions and circumstances, as to relate to payment or possession only and not the vesting; and it has been held, that a direction to apply the interest for the benefit of the legatee, affords evidence of an intention to vest the capital; and it has not been disputed, that if the testator had bequeathed the whole [210] interest to be applied for the benefit of the legatees, during the whole time between the death of the tenant for life and the time of payment, and there had been no gift over, it must have been held that the capital was vested; but in this case, as the direction does not extend to the whole time, but is limited to the minorities of the children, and as the application is to be by the trustees, for the support, maintenance, and education of the children, it was argued that the interval between the twenty-first and twenty-fifth year of each child, during which there is direction to apply the interest, prevents the direction from being construed as a direction to apply the whole interest, and, therefore, does not afford any presumption that the whole was intended to vest.

In *Hoath v. Hoath* (2 Bro. C. C. 4), *Walcott v. Hall* (Ib. 305), *Murray v. Addenbrook* (Ib. 407), and many other cases, the direction was to apply the whole interest; and the gifts were held to be vested. In *Leake v. Robinson* (2 Mer. 363) and *Bull v. Bull* (1 Russ. 213), the trustees had authority or power to apply the interest, so much as they should think proper, or so much as they might deem necessary for the maintenance of the children, and in *Vandry v. Geddes* (1 Russ. & Myl. 100) the interest was at the discretion of the executors to be applied in the maintenance of the children, or accumulated for their benefit until they should severally attain twenty-two years of age, and in these cases it was held, notwithstanding the absence of any authority, or direction to apply the interest or part of it to the maintenance of the children, that it was the vesting, and not merely the possession or time of payment which was postponed.

[21] But too much reliance must not be placed on the expression “the whole interest,” which has been used in some of the cases. In *Lane v. Goudge* (9 Ves. 229)

£30 a year, part of the interest was given to an annuitant for life. In *Jones v. Mackinnon* (1 Russ. 220) an annuity of £100 was given out of the interest to the father of the children, and in *Bland v. Williams* (3 Myl. & K. 411), there was a direction and a mere power or authority to apply the interest, or a sufficient part thereof for the maintenance of the children, and to transfer the capital, with so much of the interest as should not be applied in maintenance, to the children, when and as they should attain twenty-four years, and in those cases the gifts were held to be vested.

I have found no case precisely like the present, in which payment being postponed beyond minority, the express direction to apply the interest extends only to minority. The case is, that the testatrix, having expressed a trust as to her residuary estate for the children of William Davies, makes no distinct gift of interest, proceeding as if she had already done what was requisite to entitle the children to the interest, she directs the interest to be applied for their support, maintenance and education by the guardian during their minorities. She appears to me to express herself as if she considered the children entitled to the interest by the direction to divide the capital at a future period. She did not consider the interest and capital to be blended together, but on the contrary, so expresses herself, as, by direction, to imply a gift to the children of the benefit or enjoyment of the interest immediately after death of the tenant for life. The inference or implication from the direction to apply the interest, and although the direction is limited to the minorities, it is not necessary, or I think reasonable to limit the inference or the implication in like manner, or to the mere time to which the direction applies. There is a gift payable at a future time, and a direction shewing that the donees to have the benefit of the interest on the death of the tenant for life. This direction expresses that, during the minorities, the interest is to be applied by the guardian for support, maintenance, and education, and there is no express direction as to application of the interest after the minorities have ceased. At that time the enjoyment expressly directed will cease, but I do not think that it is then to be concluded that there is to be no enjoyment, and on this part of the case appears to me, that the second part of the residuary bequest, the direction as to application of the interest, qualifies the first direction for the division of the residue, and that the result of the direction to divide, followed by the direction to apply income, would, without more, be to give vested interests in the residue to the children of William Davies.

Thirdly. But then it is argued that the gift over is wholly inconsistent with that conclusion, and shews that the testatrix could not have intended to give vested interests. The argument rests entirely upon *dicta* of Sir John Leach in the cases of *Vandry v. Geddes* (1 Russ. & Myl. 207) and *Bland v. Williams* (3 Myl. & K. 411).

In *Vandry v. Geddes*, that learned Judge is reported to have expressed himself thus: "if the whole interest had been expressly given to the children until they attained twenty-two, I do not agree that the shares of [213] the children would therefore have vested subject to be divested; the case of *Batsford v. Kebbell*, which is referred to by Sir W. Grant in *Leake v. Robinson*, is an authority directly in opposition to that proposition. Where interim interest is given, it is presumed that the testator meant an immediate gift, because, for the purpose of interest, the part legacy is to be immediately separated from the bulk of the property; but the presumption fails entirely, when the testator has expressly declared that the interest is to go over, in case of the death of the legatee, before a particular period," as in *Bland v. Williams*, he is reported to have said, that "if the gift over, is simply the death under twenty-four, the gift could not vest before that period."

It is to be observed, that in neither of these cases did the facts require any decision upon the points to which the *dicta* related.

In *Vandry v. Geddes*, the gift over to the surviving children of any sister was upon the death of any such children without leaving issue; and the gift over to the surviving sisters and their children or issue, was upon the death of all the children of any sister without issue. The question related to a share of residue, not to a particular legacy, and there was no distinct gift of interest as in *Batsford v. Kebbell*, but a direction to apply or accumulate the interest till the age of twenty-two.

In *Blond v. Williams*, the gift over was upon the death under twenty-four without any issue, and the gift was held to be vested.

The proposition which, in argument, was founded upon these *dicta* of Sir John Leach is, that in a case [214] where there is a gift payable at a future time, in terms which in themselves import contingency, and a subsequent direction to apply the interest, in a manner, which, notwithstanding the contingent form of the gift, would, in the absence of any gift over, vest the legacy, the mere circumstance of a gift over, only on the death before the time of payment, does of itself prevent the vesting.

In ordinary cases, a gift over upon a contingency does not prevent vesting in the first donee, for, although it is reported that in the case of *Scott v. Bargeman* (2 W. 69), Lord Maclefield stated the reason for his decision to be, that the shares the legatees did not vest absolutely in any of them, in regard it was possible all might die under twenty-one or marriage, in which case it was devised over, yet in *Scott v. Barnes* (3 Mer. 340) Sir William Grant observed, that the reason seemed to be a proposition that is untenable in law, viz., that the mere circumstance of all shares being given over on a contingency, does of itself, and without more, prevent any of the shares from vesting in the meantime; and he added, that he took it to be clear, that a devise over upon a contingency had no such effect, provided the residue of bequest were in other respects sufficient to pass a present interest. Such a devise over of the entirety may, indeed, be called in aid of other circumstances, to shew that no present interest was intended to pass; but that it is alone sufficient to prevent vesting, cannot, I think, be maintained.

Now, in the present case, it appears to me that the words of bequest to the children of William Davies are sufficient to pass a present interest. Such appears to be the true construction of the words which the [215] testatrix has used, and as we have once reached the result or meaning of the words under consideration, we apprehend that effect should be given to that meaning, just as if it had been expressed in direct and unambiguous terms. The meaning must, indeed, be collected from the whole will; but the gift over does not, in this case, appear to be accompanied by any other circumstances, tending to shew that no present interest was intended to pass; but, on the contrary, affords some evidence of an intention to vest after a previous vesting. And, on the whole, it appears to me that the residuary bequest to the children of William Davies is valid. (NOTE.—An appeal is pending in this case before the House of Lords.) [A note in the Addenda to 6 Beav. states that the appeal was compromised.]

[215] SCOTT v. MILNE. Feb. 18, 1841.

[S. C. affirmed on appeal, 12 L. J. Ch. 233; 7 Jur. 709.]

The Court refused to open accounts, though of a general and summary nature, not stating the items, and which had been rendered by a surviving partner to the representatives of a deceased partner, and had remained unquestioned for twenty years, but it decreed an account limited to the subsequent receipts of the surviving partner, which, it was admitted, had taken place.

In 1806 James Milne and his son James Milne the younger, entered into partnership as tailors, on the terms stated in a deed made and executed between them.

In 1808 the son died, leaving his wife sole executrix and legatee.

In November 1812 she married the Plaintiff Mr. Scott, and shortly previous thereto, viz., in October 1812, James Milne the elder, furnished Mr. and Mrs. Scott with two accounts, the first headed, "The stated account of the partnership of James Milne," which shewed on one side the gross amount of the sales during [216] the partnership, and of the stock at its conclusion, and on the other, the capital of the partnership, leaving a balance of net profits of £3862, and outstanding debts remaining due to the partnership amounting to £2094. It also stated, that all the debts due to the partnership were satisfied.

The second account was headed, "Mr. James Milne in account with Mrs. Milne

the widow of his late son," and stated, on the one hand, the son's share of the capital and profits, and on the other, payments made on account thereof, and shewing a balance of £167 due from the widow, which was stated to be deducted from the receipt of outstanding debts.

These accounts were of a general or summary nature, and did not comprise items of the account but merely stated the gross result.

James Milne the elder died in October 1834, and two years after, the Plaintiff made an application to the Defendant, the widow and executrix of James Milne the elder, for accounts of the partnership. In August 1836 a Mr. Starling, who acted for the Defendant, furnished the Plaintiffs with an account which was headed as follows, "An account of cash advances to and expenditures on account of the late Mr. James Milne jun., made by the late James Milne sen., being payments on account of the claim of Mr. W. G. Scott, and Mary his wife, under the partnership estate of Messrs. Milne & Son."

It set forth a number of payments alleged to have been made by James Milne the elder to his son and to the Plaintiff Mrs. Scott respectively, from the 1st of May 1806 to the 10th of November 1812, both inclusive, and amounting in the whole to the sum [217] of £2273, 12s. 6d., and at the foot of the account, was the following memorandum in writing, signed by Margaret Milne:—"I hereby claim to be allowed to me all the before-mentioned sums of money, amounting in the whole to the sum of £2273, 12s. 6d., out of and towards satisfaction of the share of capital and profits of my late son, besides his advancement of £500, and also his share of profits under the late partnership estate of Messrs. Milne & Son, to be ascertained by an account I have engaged to furnish you of the same, over and above such other sum and sums I have been enabled to shew has been paid to or advanced on account of my late son's interest in the said partnership. As witness my hand this 13th day of August 1836 Margaret Milne."

The Defendant soon afterwards sent to the Plaintiffs a further account which was headed, "An account of the receipts and expenditures under the partnership estate of Messrs. Milne & Son," furnished by Mrs. Margaret Milne, executrix of the late James Milne the elder, who was the surviving partner. In this account credit was given for monies received by James Milne the elder, both before and after the account was rendered by him in the year 1812.

In 1838 the Plaintiffs filed this bill against the Defendant, praying a general account of the partnership transaction.

The bill alleged that errors existed in the several accounts, which errors were, however, proved.

There was no evidence to shew that the two accounts rendered by the testator in 1812 had not been acquiesced in, from the time they were delivered, down to the death of James Milne the elder in the year 1834; but [218] it was alleged by the Plaintiffs, and admitted by the answer, that sums had been received by James Milne the elder, subsequent to 1812, on account of the outstanding debts, but which the answer also stated had been accounted for.

The Defendant insisted that the accounts were settled and acquiesced in; that she was protected by the Statute of Limitations, and was not bound to account for or at most she was only bound to account for the debts received since 1812. She also imputed improper conduct to Mr. Starling in procuring her to sign and deliver the accounts, and she said that he acted as the agent, and was in the interest of the Plaintiffs.

The cause now came on for hearing.

Mr. Pemberton and Mr. Wood, for the Plaintiffs, contended they were entitled to a general account. That the accounts were still open and subsisting, and that the settled account had been shewn, and that even those of 1812 did not contain particular items, but were general in their nature; and, lastly, that the conduct of the Defendant had been such, as to waive any objection arising from lapse of time and acquiescence.

Mr. Tinney and Mr. Ellison, for the Defendant, contended, that the Plaintiffs, having acquiesced in the account for twenty-one years were barred by the Statute of Limitations and their own laches from unravelling the account, that the Defen-

was not liable at this distance of time to account at all, and at all events, only for the receipt of the outstanding debts.

That the accounts had been rendered by the Defendant merely for her satisfaction, and under the wrong advice of Mr. Starling who was intimately connected with the Plaintiffs, and that she had done so [219] under the impression that her legal rights would not be prejudiced.

Mr. Pemberton, in reply.

The following cases were cited, *Irvine v. Young* (1 Sim. & St. 333), *Willis v. Mason* (2 Atkyns, 251), *Ex parte Randleson* (2 Deac. & Ch. 534), *Lord Clancarty v. McDonche* (1 Ball & B. 420), *Campbell v. Graham* (1 Russ. & M. 453), *Grenfell v. Weston* (2 Y. & Col. (Exch.) 662), *Hercy v. Dinwoody* (2 Ves. jun. 87), *Gray v. Methorpe* (3 Ves. 103).

THE MASTER OF THE ROLLS [Lord Langdale]. The accounts rendered in 1812, in short summary, shew that great care was taken to ascertain what the state of the account between the parties at that time was. The evidence is wholly silent as to whether the accounts were made out, or what access was given to the books, or at what examination of them took place at that time. The accounts were delivered in October 1812, and it is not shewn that they were not acquiesced in without any objection from the time of their delivery to the death of Milne the father. Mr. James Milne, the father, died in October 1834; and two years afterwards an account was made to Mrs. Milne, his legal personal representative, for an account. That account was rendered by Starling, who it is proved was consulted by the Defendant; the books were examined by him, and by a letter it appears that he communicated with her in respect of what he was to do, and an account was sent in consequence of her instructions. This account comprised not only the transactions of the partnership previous to 1812, but those subsequent which related to the outstanding debts. Another account was [220] also rendered of the sums advanced to the son and his widow, being the same sums for which James Milne the elder took an account in the account of 1812. Disputes took place, and in 1838 this bill was filed, asking for a general account. This lady by her answer, after admitting that the account was rendered, states that she did it by bad advice, suggests that Starling acted in collusion with the Plaintiffs, insists she ought not to be bound by the accounts, and that the matter ought to be treated as if the accounts had not been rendered; and she claims to be exempted from accounting, in consequence of the lapse of time. Starling is examined for the Plaintiffs, but he is not cross-examined; a cross-bill is filed; but the Defendant claims what she might possibly have been entitled to if there had been a cross-bill and the facts had been fully proved. I do not however on this record think that the Defendant is entitled to any such relief; there is no ground established in the evidence for imputing misconduct to Starling, and I cannot assume misconduct in him.

The case then is a very short one; the account was delivered in 1812; at that time it might have been thoroughly investigated, and there is no evidence to shew that every opportunity for investigation was not given. It appears to have been acquiesced in, from the time when it was delivered to the time when the demand was made for a general account. If that demand had not been complied with, I could say, without the slightest hesitation, that there had been such an acquiescence as to bind the parties. The question is, whether what took place afterwards is to take away the effect of the acquiescence, and I think it ought not. My opinion is, that I ought not to open the accounts; but the receipt of outstanding debts subsequent to 1812 being admitted, I must direct an account in respect of the outstanding debts.

[1] Seeing that the account of 1812 admits there were outstanding accounts to a considerable amount which it was the duty of the surviving partner to collect, and that by the account subsequently rendered that that collection did take place, and being no reason for believing that any one of the sums were ever divided among the parties entitled, there is no reason for refusing an account of the monies received by the surviving partner after the date of the account of 1812. (Affirmed in *Lyndhurst C.*, 15th February 1843.)

[221] WHITE v. WHITE. Feb. 25, March 1, 8, 1842.

[See *Holder v. Durbin*, 1849, 11 Beav. 596. See now Trustee Act, 1893 (56 & 57 Vict. c. 53) s. 10.]

Trustees appointed by the Court in the place of others whose appointments had failed by their deaths in the lifetime of the testator, authorised to appoint future trustees in the manner and under the circumstances mentioned in the will.

This was a bill for the appointment of two new trustees, in the place of trustees appointed by the testator's will, but who had died in his lifetime. The will contained a power for the surviving or continuing trustees or trustee, or the executors or administrators of the last surviving or continuing trustee, to appoint new trustees in the place of trustees dying, desiring to be discharged, &c.

Mr. R. W. E. Forster asked that the Master might insert a power authorizing the trustees now to be appointed, to appoint future new trustees; he referred to *Joyce v. Joyce* (2 Moll. 276) as an authority. (See *Seton on Decrees*, 131; *Bayley v. Manell*, 4 Mad. 226; *Brown v. Brown*, 3 Y. & Col. 395; *Southwell v. Ward*, Tamlyn, 314).

Mr. W. C. Buller, for the Defendant.

[222] 8th March. THE MASTER OF THE ROLLS [Lord Langdale] said, he would look at the case cited, but he saw no objection to what was proposed to be done.

His Lordship ordered that the Master, in settling the conveyance, should be at liberty, if he should think fit, to insert the power to appoint new trustees. (1)

[222] LANE v. HARDWICKE. Dec. 2 13, 1841.

An infant having been taken out of the jurisdiction to avoid service, the Court refused to appoint the Senior Six Clerk in Court to appear and put in his answer. Substituted service of a *subpoena* to appear, ordered in the case of an infant.

Mr. Hetherington moved, that the senior clerk in Court might appear, and put in an answer forthwith for the infant Defendant St. Andrew Beauchamp St. John, who was out of the jurisdiction. The affidavit in support of the motion stated, that the deponent believed, that the infant had been taken out of the jurisdiction by his parents, for the express purpose of preventing his being served with process to appear to the bill, and thereby cause delay to the Plaintiffs in the prosecution of this suit.

[223] *Hancock v. Eaton* (2) was cited, in which an infant having been taken abroad

(1) EXTRACT FROM DECREE.—The decree, after referring it to the Master to settle a conveyance from the heir at law of the testator to the new trustees, proceeded as follows:—"And it is ordered, that there be inserted therein a power for the persons so to be appointed as aforesaid, and the survivor of them, or the executors or administrators of such survivor, to appoint new trustees in the manner and under the circumstances mentioned and directed in and by the said will and codicil, and also in and by the direction, that the trustees now to be appointed, or hereafter to be appointed as aforesaid, shall have all such other powers and authorities as if they had been named and appointed in and by the said testator's will and codicil."—Reg. Lib. 1841, B. 1. 492.

(2) *Hancock v. Eaton*. L. C. Feb. 11, 1819.

An infant having, after appearance, been taken out of the jurisdiction, the Court appointed the Senior Six Clerk to put in his answer, without the infant being brought into Court.

Upon opening, &c., unto the Lord Chancellor, it was alleged, that by an order of the 14th November last, it was ordered, that the Plaintiff's bill should be taken

by his parents, Lord Eldon assigned the Senior Six Clerk as his guardian, to put in an answer without bringing the infant into Court.

On the following day, THE MASTER OF THE ROLLS [Lord Langdale] said he could not grant this application; but that looking at the affidavits, there might be ground for applying for substituted service on the persons who seemed to act for the parents of the infant.

Dec. 13. Mr. Hetherington applied for an order for substituted service, when, on the facts stated,

[224] THE MASTER OF THE ROLLS ordered that service on the solicitor and Six Clerk of the parents, should be good service on the infant. (See *Kinder v. Forbes*, 2 Swan, 503; *Weymouth v. Lambert*, 3 Beavan, 333; and *Hobhouse v. Courtney*, 12 M. & W. 140.)

[224] THORPE v. OWEN. Jan. 12, 13, 17, 29, 1842.

[S. C. 11 L. J. Ch. 129.]

Testatrix gave her personal estate to B. for the benefit of B.'s daughters. B. invested the produce, together with £1000 of his own monies, in the funds in his own name, and afterwards treated and admitted the aggregate fund as held in trust for his daughters. On the death of B. the fund was found mixed with like funds of his own. Held, that under the circumstances, there was sufficient to constitute a trust of the £1000 in favour of the daughters.

In February 1827 the mother of Henry Owen died, having by her will given her personal estate to the six daughters of Henry Owen; and she appointed him sole executor.

Henry Owen converted the whole personal estate, and invested it with a further £1000, part of his own money, in the purchase of £2550 3½ per cent. Reduced annuities.

In 1830 the eldest daughter came of age, when the testator paid her £455, 15s. 6d., sixth of the whole fund, she giving a receipt for it as one-sixth of the estate of grandmother and of the addition made thereto by Henry Owen the father, amounting in the whole as above."

In 1834 another daughter came of age, when one-fifth of the residue of the aggregate fund was paid to her, on her giving a receipt for it, incorrectly describing one-fifth of the personal estate of the grandmother.

[225] In 1838 a third daughter married Mr. Sadler, when her father covenanted to give the "contingent share" in the legacy given by the grandmother's will, on trusts.

Accounts of the grandmother's estate being required on behalf of Sadler and wife, were furnished by Henry Owen, through his solicitors, on the 20th of July 1840. In the £1000 was included in the following terms:—"1827, March 7th, added £1000;" and one-fourth of the £2550 and dividends were stated to be due to Sadler and wife. Henry Owen also stated, in a letter accompanying the account, that he was ready to assign and pay over the £637, 10s. to Sadler's trustees, and to account for the dividends.

as against William B. and Ann his wife, and William Henry B., and it was sworn by affidavit that W. B. and Ann his wife married in 1811, and had one child, W. H. B., born in 1813, and W. B. and Ann his wife and the infant quitted England, and went to reside in North America, where they were still residing; it was prayed that the order might be set aside, as far as regarded the Defendant W. H. B., the son, and that John Kipling, Esq., the Senior Six Clerk not towards the cause, be assigned his guardian without his being brought into Court; and that the Defendant might answer by such guardian, he, the said Defendant W. H. B., on entering his appearance, having quitted this kingdom; which upon hearing the order and the said affidavit and an affidavit of notice of this motion to the Plaintiff read is ordered accordingly.—Reg. Lib. 1818, A. fol. 497. (See 2d Order of April 1842. Ord. Can. 197).

On the 28th of July 1840 the solicitors of Henry Owen, in answer to the last letter accompanying the account, wrote to him to the following effect:—"Yes mention in yours received this morning, that the £1000 mentioned in your account was your own money. Now if so, *Quære* 1. We think that it should be kept out of the account now to be handed to Quilter & Taylor [the solicitors of Mr. and Mrs. Sadler], though you might, if you pleased, pay over to Mrs. Sadler's trustees a larger sum than that which should appear strictly due from you.

"*Quære* 2. Was the £1000 a voluntary gift on your part without any legal obligation or debt?

"*Quære* 3. If so, we suppose this mode of giving a portion to your daughters was adopted as a convenience to yourself, since you would have the trouble of managing the fund of which you were trustee."

[226] Henry Owen returned this letter to his solicitors, having written opposite the above *queries* as follows:—

"*Quære* 1. As I have hitherto made the £1000 part of the testatrix's property, cannot alter it.

"*Quære* 2. Yes.

"*Quære* 3. Yes."

In November 1840 Henry Owen paid the trustees of Sadler and wife £44, two years' dividends on £637, 10s. stock; and in the letter forwarding it through solicitors, he again stated, that the trustees of Sadler were entitled to one-fourth £2550 stock and of the dividends.

In April 1841 a release was prepared from the instructions of Henry Owen, who was executed by one of the parties, but was not executed by him in consequence of his death. It purported to be a release from one-fourth of the £2550 stock.

Henry Owen died in June 1841, when the fund was found "amalgamated" with other stock of his own, and made together a sum of £6350 3½ per cents. which was still standing in his name. A petition was presented in the cause, for the purpose of determining the question, whether the £1000 voluntarily invested by Henry Owen in his own name, was affected with a trust in favour of his daughters?

Mr. Pemberton and Mr. Josiah W. Smith, for the widow and personal representatives of Henry Owen, stated the facts of the case.

[227] Mr. Kindersley, Mr. Stinton, and Mr. C. Hall, for the daughters and the trustees, contended that the testator had devoted the £1000 to the same trust as those on which he held the personal estate of his mother, and that he had been sufficiently affected with the trust, so as to bind his representatives.

Mr. Tinney, Mr. O. Anderdon, Mr. Collins, and Mr. Trotter contended, that no legal interest in the £1000 had passed from the testator, and as there had been no declaration of trust, this Court would not assist volunteers in perfecting an incomplete trust. That this fund must, therefore, be considered part of the general estate of Henry Owen. The following cases were cited; *Cotteen v. Missing* (1 Ves. 176), *Antrobus v. Smith* (12 Ves. 39), *Ward v. Audland* (8 Sim. 571, C. P. Ct. 146), *Gaskell v. Gaskell* (2 Y. & J. 502), *Edwards v. Jones* (1 Myl. & Cr. 226), *Jones v. Jefferys* (Cr. & Ph. 138), and see *Dillon v. Coppin* (4 Myl. & Cr. 647).

THE MASTER OF THE ROLLS [Lord Langdale] ordered the cause to stand over to see if any further evidence could be produced. On a subsequent day, he held that a trust had been declared of the £1000 in favour of the daughters, and he directed payment thereof accordingly.

[228] STREETEN v. WHITMORE. Feb. 10, 1842.

The first order of May 1839 is not superseded by the eleventh and twelfth General Orders of August 1841, but a party to whom money or costs are ordered to be paid, may still issue a *fi. fa.* or *elegit*.

By the First Order of the 10th of May 1839 (Ord. Can. 138), every person to whom money or costs have been ordered to be paid, may, at the expiration of a month, issue a *fi. facias* or *elegit* of the form there stated.

By the 11th Amended Order of August 1841 (*Jb.* 166), if a party ordered to pay money, &c., does not obey the order, the party prosecuting it may issue an attachment, and may afterwards have a sequestration or serjeant-at-arms, &c.

By the 12th Order of August 1841 (*Ord. Can.* 167) it is ordered, "That every order or decree requiring any party to do an act thereby ordered, shall state the time, or the time after service of the order or decree, within which the act is to be done; and that upon the copy of the order or decree which shall be served upon the party required to obey the same, there shall be endorsed a memorandum in the words to the effect following, viz:—'If you, the within-named A. B., neglect to obey this order [or decree] by the time therein limited, you will be liable to be arrested under writ of attachment issued out of the High Court of Chancery, or by the serjeant-at-arms attending the same Court, and also be liable to have your estate sequestered for the purpose of compelling you to obey the same order [or decree].'"

The Plaintiff, after the latter General Orders came into operation, obtained an order against a purchaser [229] for payment of £80 costs within a fortnight. This order was served, and after the lapse of a month the Plaintiff applied to his Clerk in court for a writ of *fi. fa.*

The Clerk in Court conceived that the latter General Order superseded the former, and that the party prosecuting an order was not now entitled to a *fi. fa.* or *sc. fa.* as the indorsement did not state that the party disobeying the order would be liable to the effect of those writs. He in consequence declined issuing the writ of *fi. fa.*

Mr. Bagshawe stated these circumstances to the Court, and asked that the writ should issue.

THE MASTER OF THE ROLLS [Lord Langdale] said, that the Plaintiff was entitled to the writ of *fi. fa.*, and stated his opinion that the 12th Order of August 1841 was intended to interfere with the 1st Order of the 10th of May 1839.

[229] GORDON v. THE CHELTENHAM AND GREAT WESTERN UNION RAILWAY COMPANY. Feb. 14, 16, 21, 1842.

[S. C. 2 Rail. Cas. 800.]

The Railway Act provided, that it should not be lawful for the railway company to make or establish any public station, yards, wharfs, waiting, loading, or unloading places, warehouses, or other buildings and conveniences for the depositing, receiving, sending or keeping any passengers or cattle, or any goods, articles, matters, or things, upon the estate of R. G. without his consent. Held, on demurrer, that the word "public" did not necessarily override the whole sentence, and that if it did, that from the subsequent clauses, every convenience connected with the railway, must be considered as for the public use.

The distinction between the effect of acquiescence, upon a motion for an injunction and a demurrer. In the former case acquiescence merely prevents the special provision by injunction, but in the latter it must be such as to disentitle the Plaintiff to any relief whatever.

In this case came before the Court upon a general demurrer to the whole bill, and a motion for an injunction.

[30] The bill stated, that in 1836 a bill was brought into the House of Commons requiring the Defendants to make their railway, which it was proposed should pass through the Plaintiff's estate, and that the Plaintiff, apprehending annoyance therefrom, opposed the bill.

An agreement was, however, come to between the parties, by which it was, among other things agreed, "that no public station should be established on the estate without permission."

An Act passed; and by the 15th section, it was enacted as follows:—"That it shall not be lawful for the said company to make or establish any public station, wharfs, waiting, loading, or unloading places, warehouses, or other buildings

and conveniences, for the depositing, receiving, loading, or keeping any passengers or cattle, or any goods, articles, matters, or things, upon the estate of the said Robert Gordon, his heirs or assigns, or within fifty yards of the boundaries thereof, without the previous consent in writing of the said Robert Gordon, his heirs or assigns, for that purpose had and obtained."

The Defendants had, however, lately made a well and tank, and built two wood cottages, and an engine-house and stable on the property, and within the prescribed limits; and they had lately dug the foundations for and commenced the erection of a stone building of a permanent character (and which was intended as a depot for coals, coke, and ashes) on part of the land.

The bill alleged, that the trains stopped at the point in question for the purpose of changing the engines; and after stating the inconveniences resulting to the Plaintiff and his family, it prayed an injunction to re-[231]-strain the Defendants from using the said engine-house, cottages, and other buildings so erected as aforesaid, or any of them, for depositing, receiving, loading, or keeping any passengers or cattle, or any goods, engines, or other articles, matters, or things, and from continuing the erection of the buildings, so commenced, and from making, erecting, or establishing upon the Plaintiff's lands, or within fifty yards of the boundaries thereof, any public station, yards, wharfs, waiting, loading or unloading places, warehouses, or other buildings and conveniences, for the depositing, receiving, loading, or keeping any passengers or cattle, or any goods, articles, matters, or things.

To this bill the Defendants filed a general demurrer, which now came on for argument, together with an application on behalf of the Plaintiff for an injunction.

Mr. G. Turner and Mr. W. P. Wood, in support of the demurrer, and in opposition to the motion for an injunction, contended that the Defendants had not acted in contravention of the Act, and that they had a right to have a depot for their engines; and for such things as were necessary for the purpose of conveniently using the railroad.

On the construction of the Act of Parliament they contended that the word "public" in the 15th section applied to every term in the clause, and did not prohibit the deposit of goods for the private use of the company, but merely "goods, articles, &c., as carriers for the public. That the agreement set out in the bill shewed that the intention of the parties was merely to prevent a "public station." In the *Eton* case it was held that a prohibition against forming a station did not prevent the railway company from taking up and setting down passengers.

[232] The Plaintiff, they said, had acquiesced in such a way as to disentitle him to relief. This Court will only interfere by injunction to prevent an irreparable injury, and not in a case where the thing is completed. *Deere v. Guest* (1 Myl. & Cr. 516).

Mr. Pemberton, Mr. Kindersley, and Mr. Goldsmid, *contra*. By the 15th section the railway company are prohibited making "any public station, &c., or other buildings and conveniences for the depositing, receiving, loading, or keeping any passengers or cattle, or any goods, articles, matters, or things upon the estate of the Plaintiff without his previous consent in writing." By erecting the building in question, and by the deposit of the engines, &c., the Defendants have acted contrary to the terms of the Act. The word "public" does not apply to all the expressions used in this section, but if it did, then, by the terms of the Act, the public have the right of using every convenience belonging to the company. By the interpretative clause (sect. 2), it is enacted that where the word "railway" shall be used, the same shall be understood to include the branch railways, yards, stations, wharfs, and other works thereby authorized to be made, and by a subsequent section (sect. 163) it is enacted "that all persons shall have free liberty to pass along and upon, and to use and employ the said railway, with carriages properly constructed as by the Act directed upon payment only of such rates and tolls as shall be demanded by the said company, not exceeding the respective rates or tolls by the Act authorised." It is therefore, the company make this station for their own accommodation, the public have a right to use it.

[233] As to acquiescence, the Plaintiff has been lulled by the representations of the officers of the Defendants. He protested all along, and being naturally desirous of avoiding coming to this Court, he took no legal proceedings until his rights were

puted; this first happened on the 30th of December, when the Defendants claimed adversely the right to make this erection.

Acquiescence upon an application for an injunction, is different from acquiescence upon demurrer. In the one case, it merely disentitles the Plaintiff to the protection of the Court by special injunction, but in the latter case, it must amount to such a waiver of his rights as to destroy the right altogether.

THE MASTER OF THE ROLLS (upon the argument of the demurrer) said, several grounds have been stated in support of the demurrer, but the only one, which, upon demurrer, it is at all necessary to consider, is the construction of the Act of Parliament.

The argument as to acquiescence is, no doubt, very important upon the consideration of the motion for an injunction. A short acquiescence may properly induce the Court not to interfere *ex parte*. A longer acquiescence may, under the circumstances, create serious doubt upon the right of the Plaintiff, and induce the Court not to interfere by any interlocutory order, even when applied for on notice. But when acquiescence is used as an argument in support of a demurrer, there must, to make it effective, be such an acquiescence as wholly to disentitle the Plaintiff to any relief. I must assume that the Plaintiff originally had a right, but that he has altogether waived himself of it, by his acquiescence. There is clearly no such acquiescence in this case. The Plaintiff seems to [234] have objected all along to the proceedings of the Defendants, and the answers of the Defendants' officers seem to have been such, as to have lulled him until the 30th of December, when, for the first time, they acted, under the Act of Parliament, a right to do the acts here complained of.

On the demurrer, the only question is as to the construction of the Act of Parliament, and which I think one of very considerable doubt, and not very clear either way. The inclination of my opinion is in favour of the Plaintiff, but I must defer deciding the question, until I have heard the motion for an injunction.

The motion for the injunction was then discussed, but it is not necessary to repeat the arguments.

16. THE MASTER OF THE ROLLS [Lord Langdale]. In this cause, the Plaintiff Gordon alleges, that the Defendants, the Cheltenham and Great Western Union Railway Company, have committed a violation of his rights under the Act of Parliament by which the company is constituted. He has filed this bill, stating the Act of Parliament, the contract which gave rise to the provisions in that Act which relate to him, and the acts which he alleges to be a violation of his rights, and he has prayed for an injunction to restrain the company from committing those acts. A motion is made by the Plaintiff for an injunction, and the Defendants have put in a general demurrer, saying that the Plaintiff is entitled to any equity, or that he is entitled to the protection of this Court for his protection. With regard to the demurrer, the Plaintiff has principally turned upon the words of the Act of Parliament, and especially upon the single word "public," which, in [235] the fifteenth section, is said to have a particular meaning, and is alleged to extend to every word which is used in the clause. The clause is as follows. [His Lordship stated it.]

Now it appears that upon the line of railway which constituted a portion of Mr. Gordon's estate, the Defendants have erected a wooden building, which they call an engine-house, for the deposit and placing of engines to be used on the railway. In this building they have made a forge, and have there provided the necessary means for firing engines, so that it is made a place for the deposit of engines, and for the use of engines to be used on the railway. Besides that, they have erected a stable and cottages, and have made a tank of water at a short distance. Mr. Gordon says that these are conveniences for the deposit of goods, articles, matters, and that they are contrary to the intention of the clause.

The Defendants on the other hand, say that the word "public" has reference to the word in the clause—that it means a place, a building, a convenience, to which the public constituting a portion of the public has a right directly to resort: that the place which is made for the deposit of engines is not directly for the use of the public:—that no person, as part of the public, has a right to resort to this engine-house, but that it is meant and placed there, for what is the private use of the company, for keeping those things which are necessary

for preserving the railway, and for keeping it up for the use of the public. Now it is undoubtedly, is very much to be wished that clauses in Acts of Parliament were expressed with more precision than they often are. This being a case of demurrer it ought not to be [236] allowed if there is any relief to be had upon the bill, and could not hold that there was no relief to be had upon the bill, unless I entirely adopted the construction contended for by the Defendants. Upon reading the clause, and reading it with reference to all the other clauses in which there are similar expressions used, I cannot satisfy myself that the word "public" is to be applied to every part of this clause, or if it were so applied, that I could attribute to it the meaning contended for by the Defendants. The words "conveniences for depositing, receiving, loading, or keeping any passengers, or cattle, or any goods, articles, matters, or things," do not appear to me, in the construction of this clause, to be necessarily governed or affected by the word "public." That it is ambiguous I think must be admitted. It is not very easy to give a clear and demonstrable reason one way or the other, but looking to the sentence and giving it the construction I can, I go to this extent—that I am not satisfied that the word "public" does extend to all the words here; and still less am I satisfied, if it does extend to everything here, that it is therefore to be considered as exclusively applicable to those conveniences used by the company, in the discharge of what may be called public duty they have undertaken. By public, I presume the Defendants mean more than their customers, or any persons among the public who may choose to use of this railway. In that sense, no doubt, the public have a right to have the road kept in proper repair, they have a right to have engines duly appointed, kept in proper repair for the purpose of a convenient traffic for the public.

Now why may not the word "public" be properly extended to all such buildings, conveniences, matters, and things as are used by the company, for preparing, keeping, and repairing those machines and things which [237] are necessary to keep the road and the machinery on the road, in a proper state for the use of the public? I apprehend there is nothing they have or have a right to have, which is not for the public use, and that there is nothing there for private use. The use of the erection is to repair and keep in order those things which are necessary for the use of the public, and I apprehend such is the common purport of the word "public" in a great variety of occasions, which may easily suggest themselves to the mind of any man who gives his attention to the subject. Thinking, therefore, that the word public necessarily extends to all parts of this sentence, and if it did, it does not admit of the construction contended for by the Defendants, I cannot say that the Plaintiff is not entitled to the protection of this Court; and for that reason, and without going further into the matter, I must overrule the demurrer.

Then comes the question as to the injunction. The motion is to restrain the Defendants from using the buildings they have already erected, and from erecting other buildings. Various objections have been made to it; the first objection is the same as that used on the argument of the demurrer, viz., the construction of the Act of Parliament. Admitting that the construction is open to some doubt, perhaps considerable doubt, I have already expressed my opinion on this point.

The next objection is, that this gentleman has acquiesced so long, that he is not entitled to the protection of the Court. I cannot help being surprised at the verbiage with which that argument has been urged. I am of opinion that there is no such acquiescence as to deprive the Plaintiff of the protection of the Court. The Plaintiff knew of what was going on, seems to me to be [238] beyond all doubt. I think the knowledge of his agent must be considered as his knowledge; but at every part of the work from its very commencement, it appears to me perfectly clear that he was objecting to the proceedings. The application he made to the directors was the nature of an objection; the conversation he had with Mr. Brunel was in that nature of objection; and in fact it must be assumed, I think, that if there had been any acquiescence which the company thought to be acquiescence, I should have heard of it in a different form from that in which it is suggested to me; I should have had it in a different form. Then it is said there was delay in filing the bill. Was that a delay which deprived the Defendants any right, or deprived the Plaintiff of any? He saw something which he objected to, which he considered to be a violation of his rights and

of Parliament. He was told in the month of September, that it was a temporary action only. Would it then have been correct on his part, or right in him immediately to have commenced litigation on the subject? or rather, was it not a proof of moderation, and desire to accommodate the company, when he acquiesced in what was led to consider a mere temporary violation of his rights, in the expectation it would only last for a short time? The first time, as far as I can understand from the evidence, that the company claimed a right under the Act of Parliament to the acts, was by a letter on the 30th of December, and in a month from that time the Plaintiff filed his bill. I cannot imagine how it is supposed that this is to be considered such an acquiescence as to deprive him of all right whatever, or to give the Defendants any right they would not have had, if such acquiescence had not taken place. They have not given evidence to shew that they have incurred any loss on the faith of the Plaintiff's acquiescence, and I am of opinion, therefore, that there is no acquiescence to deprive the Plaintiff of any right to which he is entitled.

The next point for consideration does certainly appear to me to be a very material one, that is, what are the inconveniences to which the parties would be subject by granting of an injunction? It is, to a certain extent, discretionary with the Court whether it will, on interlocutory application, grant this extraordinary remedy; with regard to that, the length of time that has elapsed is not immaterial. The inconveniences to which the company may be subject, are, I must say, looking at the affidavits, stated in a manner which is extremely unsatisfactory. It has been urged strenuously, that if this injunction be granted, the consequence will be, that the line of railway cannot be safely used:—that the safety of the persons who may be on it will be endangered; and that by stopping the traffic on other parts of the line, the public will be greatly inconvenienced. On this point I wish to state, that if I felt satisfied that there was that great inconvenience, then looking on the other hand to the nature of the inconvenience suffered by Mr. Gordon and his agents to accommodate, and the amount of inconvenience on the other side strongly urged in argument, but in evidence so weakly supported, I ought rather to refrain from granting this injunction until this matter had been further investi-

and this brings me to the last point in this case, which is, whether there ought to be any proceeding at law, either before the injunction is granted, or directed as a condition on which the injunction is granted. The Court has regard to the circumstances of each case. Sometimes it finds it most conducive to the justice of the case to grant the injunction at once, [240] putting the party who has obtained it on terms of bringing an action to support his right which has appeared to a Court of Equity so that it has acted on it, though, at the same time, it wished to have it corroborated by the decision of a Court of law; sometimes from the great inconvenience, at other times from the extreme doubt, it has considered it would be best, on the whole, that the injunction should be suspended till the right at law has been ascertained. These are courses which the Court takes, but I have some little doubt whether I am now in possession of all the evidence that is material for the purpose of determining this case. At any rate before I decide that point, which is the only point I think I ought carefully to read the cases decided by Lord Cottenham. I do not think that I shall be doing any injury to the Plaintiff if I suspend this for a few days. I shall reserve my judgment, and give it on Monday morning. At the same time I think I shall not be doing any wrong by allowing the Defendants to inform the Court more accurately than they have done, what would be the consequences of granting this by injunction.

21. THE MASTER OF THE ROLLS said that he had read the affidavits, which shewed that there were inconveniences on both sides, but that in this, as in all other cases of injunction, to prevent the use of works devoted to the public, it became necessary to consider on which side the inconvenience would press most, until the determination of the question in the cause, either by means of an action at law or by carrying the case to the House of Lords. That he had looked for some time to find if there was any prospect of a limit in time, in regard to the inconvenience complained of by the Plaintiff, but he could find none, and this seemed to

him to be the [241] strongest point against the Defendants, and on the whole he was of opinion that the Plaintiff was entitled to an injunction.

By arrangement between the parties, the operation of the injunction was suspended for a limited period, the Defendants undertaking to appeal from the decision.

[241] GRIFFITHS v. EVAN. March 19, 23, 1842.

[S. C. 11 L. J. Ch. 219.]

A. devised to B. an estate during the life of herself and her husband, and after their deceases to the lawful issue of B.'s body for ever. Held, that B. took the estate tail.

A. devised to B. in tail, and for want of issue of her body "he empowered and authorized" her to settle and dispose of the estate to such persons as she thought fit by her will, "confiding" in her not to alienate or transfer the estate from "nearest family." B. appointed to her husband for life, with remainders over. Held, that B. had a power of appointing to the "nearest family" only, that no other family must be construed "heir," and that consequently the appointment to her husband was void.

The testator in this cause, by his will dated in 1786, devised two freehold estates of which, subject to a mortgage, he was seised, unto his eldest daughter Mary Evan, the wife of Stephen Evan, to hold to her, in terms expressed as follows: i.e., "for the term of her natural life and the life of her husband Stephen Evan, and after their several deceases, to the use and behoof of the lawful issue of the body of the said Mary Evan for ever; and for want of such issue, I do hereby empower and authorize her my said daughter Mary Evan to settle and dispose of my said estate, to such person or persons as she shall [242] think fit, in and by one instrument in writing, being her last will and testament legally executed and attested by credible witnesses, confiding in her my said daughter, that she will not, by the instrument, alienate or transfer my said estate from my nearest family; and nevertheless, and I do hereby charge my said estate to the payment of the mortgage already contracted and entered on by one David William."

The testator then charged the estates with certain sums for his three young daughters, and proceeded in the following terms:—"And I do further recommend my said three daughters, Rachael, Hannah and Heather, to the tender care and protection of my said daughter and devisee Mary Evan, fatherly advising her to make every further and additional provision for them in her power, as far as the circumstances will afford, on account that I have made this distinction, and prefer her to a higher station in the enjoyment of my both real and personal estate."

After the testator's death Stephen Evan paid off the mortgage, and got a commission to a trustee.

Mary Evan made her will in 1814, and thereby she devised the estate in question and all other her real estate to her husband for life, with remainder to David Evan (his son by a former marriage, who was the great-nephew of the testator, being grandson of the testator's sister), to hold to him and his lawful issue for ever, &c. Mary Evan died in 1823, without having had issue, and without having recovered, and her husband entered into possession.

[243] Stephen Evan died in 1838, and David Evan, the sole Defendant, entered into possession.

The bill was filed by the co-heirs of the testator, being the testator's daughter, and the children and a grandchild of the other two daughters, who were dead, against David Evan. It prayed that the Defendant might let the Plaintiff have the estate.

(1) NOTE.—The case came before the Lord Chancellor, on appeal, in November 1842, who directed the opinion of a Court of law to be obtained as to the construction of the Act of Parliament.

into peaceable possession of the property, and deliver up the title-deeds, and for an account of the rents, &c., from the death of Mary Evan, and that what might be found due might be set off against the Defendant's lien, &c.

Mr. Pemberton and Mr. Jenkins, for the Plaintiffs. The gift is to Mary Evan for her joint lives of herself and her husband, with remainder to her lawful issue; consequently, under the rule in Shelley's case the estate to herself and that to her issue coalesced, and on the whole she took an estate tail in the property, and this she has never barred. *Douglas v. Congreve* (1 Beav. 59).

The power either enabled her to appoint to the testator's "nearest relations" alone, or the word "confiding" created an imperative trust on her not to "alienate or transfer" the estate from the testator's "nearest relations." In the former case she has not executed the power, and the property passes, in default of appointment, to the testator's heir. In the latter case there is a trust for the heirs as "nearest relations," *Knight v. Knight* (3 Beav. 148), for the word "family," when applied to real estate, means the heir. *Wright v. Atkins* (17 Ves. 255, 19 Ves. 299, Turn. & Bea. 143, and G. Coop. 111).

[244] Mr. Kindersley and Mr. Evans, for the Defendant, contended, that the estate devised to the issue, and the estate *pur autre vie*, did not coalesce. "Assise per adington, que si home done terre al A. B. pur terme dauter vie, le remaynder al heirs de son corps engendres, oncure il nad que a terme dauter vie, durant le vie d'iceluy que vye, tamen dicitur quod non est lex" (Brooke's Abr. Estates, 296); and that Mary Evan had, therefore, an estate for her own and her husband's life, and a power of devising to her husband for life.

Secondly, that the power limited to her, was to "dispose" of the estate "to such person as she should think fit," which was a general power, and that she had executed it by her will, in favour of her husband and the Defendant.

Thirdly, that the expression "nearest family" rendered the trust, if any, void for uncertainty, *Doe v. Joinville* (3 East, 172), *Harland v. Trigg* (1 Bro. C. C. 142): that the words "empower and authorize" were not sufficient to create a trust, and being authorized to "settle" the estate, she had the power of giving a life-estate to her husband.

They also cited Fearn's Cont. Rem. 341, 345, and 1 Rep. Husb. & W. 10, 357.

THE MASTER OF THE ROLLS [Lord Langdale] held, that Mary Evan took an estate tail, with a power of appointing to the testator's "nearest relations," which expression was, in this case, equivalent to heir. That the appointment was in equity void, and that the Plaintiffs were therefore entitled as from the death of Mary Evan. An inquiry [245] was directed of what was due on the mortgage, on account of the principal and interest, and on the other hand, the usual account of the rents as against mortgagee in possession was ordered; and upon payment of the balance, a conveyance of the estate was directed to be made. No costs were given on either side.

[245] GLENGALL v. BARNARD. March 23, 1842.

Part of a residuary estate, settled on one for life, with remainder to her issue, consisted of life annuities and policies on the lives for securing the principal money. The Court seeing it for the benefit of all parties, refrained from ordering a sale, but directed the policies to be kept up, so as to secure the principal, and that the surplus annuities should be paid to the tenant for life.

This was a suit for the administration of the estate of Mr. Mellish. It appeared that, on the marriage of one of his daughters, he had settled considerable property, and had given a life-estate therein to the husband. (1 Keen, 769, where the estate for life to the husband seems omitted; see p. 771.) The husband had parted with his whole life interest by charging annuities thereon.

The testator bought up the annuities, and kept up policies on the husband's life, whereby the principal money was secured. The annuities and policies formed part of the testator's estate, which he had by his will settled on his daughters and on their issue in remainder.

The trustees, under the circumstances, were of opinion that it would be more beneficial to all parties to retain the annuities and keep up the policies, than to sell and invest the produce.

Mr. Pemberton admitted, that the strict rule would be to sell the annuities and policies, and after investing the produce, to pay the dividends to the tenants for life, but argued that, as those securities would realise much less than would ultimately secured by the policies, it would be for the benefit both of the tenants for life and those in remainder, that they should be retained, and that the amount of annuities, after payment of the premiums, should be paid to the tenants for life.

The will, he said, contained a discretionary clause, enabling the trustees to do what they deemed advisable.

Mr. Kindersley, Mr. Bacon, Mr. Teed, and Mr. Koe, for different parties.

THE MASTER OF THE ROLLS [Lord Langdale] said, that under the circumstances he thought the arrangement beneficial, care being taken to keep up the policies, that the decree must be prefaced with a declaration, that this course appeared to the Court beneficial for all parties.

[246], ROBINSON v. WOOD. March 24, 1842.

An estate was devised to A., subject to a charge of £5000 payable to the executor. In a suit to which A. was a party, the estate was sold, and all proper parties were ordered to join in the conveyance. A., refusing to execute the deed, was declared a trustee for the purchaser, under the 1 W. 4, c. 60, and another person was directed to convey in his stead.

The petition for the above purpose was presented by a Defendant in his character of purchaser, the Court refused to give costs.

This was a petition under the Trustee Act, 1 W. 4, c. 60.

The facts of the case were these:—The testator in this cause devised an estate to Thomas Wood, subject and chargeable with the payment of £5000 to the executor of his will. On the 9th of June 1840, an [247] order was made that the estate should be sold with the approbation of the Master, wherein all proper parties were to be named, and the Master should direct. Pursuant to the order, the estate was sold to Richard Wood. He was reported such purchaser by the Master, the report was confirmed. Richard Wood paid his purchase-money into Court; it was thereupon ordered that the proper parties should join in the conveyance. The Master settled the draft of conveyance, and the engrossment was tendered to Thomas Wood, a Defendant in the suit, for his execution, but he would not execute it. He happened to be in Court on another matter.

A petition was now presented by Richard Wood, under the 1 W. 4, c. 60, eighth section of which provides, in effect, that where a trustee neglects or refuses to convey the trust estate, twenty-eight days after tender of a proper conveyance, the Court of Chancery may direct any other person to convey for him.

The petition prayed that Thomas Wood might be declared a trustee under the Act, and that a proper person might be appointed to convey the estate to the Petitioner, and execute the engrossment approved of by the Master. The Respondent, Thomas Wood, might pay the costs of the petition.

Mr. Pemberton and Mr. Faber, in support of the petition, contended, that the case came within the Act. They cited *Warburton v. Vaughan* (4 Y. & Col. 11), and *Prendergast v. Eyre* (1 Ll. & Go. 11).

That even if the Respondent had an interest in the estate, still the eighth section relieved the case from [248] any difficulty on that ground. They said the costs of the petition rendered necessary by the Respondent's refusal to execute an act already ordered by the Court, and cited *Manners v. Charlesworth* (Jefferies Sugden's Acts, 156, note a.), and *Jones v. Lewis* (1 Cox, 199).

Thomas Wood, in person, opposed the prayer of the petition.

THE MASTER OF THE ROLLS [Lord Langdale]. There are two modes of proceeding which may be adopted in a case of this kind, one is to charge the party with costs

but, and if after the expiration of two months he still refuses or neglects, in that one Act of Parliament provides the means whereby the purchaser may obtain the money for which he has paid the purchase-money (11 G. 4 & 1 W. 4, c. 36, s. 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35). This application is not, however, made in that way, by charging the party with contempt, but it is made, under the other Act of the 1 W. 4, c. 60, by the Respondent, who is a Co-defendant. He says, "I have purchased and paid the purchase-money; the legal estate is in Thomas Wood, my Co-defendant. The estate is in my hands, and therefore he is to be considered a trustee for me." The question to be considered, which is one of some importance, is whether he is such a trustee; and if so, even if the circumstances are such, that the party who has the means of obtaining the money in another mode should be allowed to adopt this.

I think that the Petitioner is entitled to this order, not only on the authority of the cases cited, but because [249] it is the more lenient course to pursue against the Respondent on to do the act. In this case Thomas Wood is in custody on other grounds; but if he had been at liberty, the course proposed would give a right to the Respondent without subjecting the other party to any imprisonment. I am rather inclined to give this construction to the Act of Parliament to prevent that severity; if the Respondent were free, and the Petitioner followed the other remedy, the result would be to bring him into custody, and keep him there two months more than anything could be done. This, therefore, is a more lenient course; and I am inclined to find that in adopting it I have the sanction of the authority of another

I think that the Respondent is not to pay the costs. The Petitioner comes here in the character of purchaser.

[249] LUCENA v. LUCENA. April 26, 1842.

See v. Martin, 1865, 34 Beav. 504; *In re Kirwan's Trusts*, 1883, 25 Ch. D. 379.]

A testator gave his widow a power of appointment amongst his children over a sum of £12,000, which, in default of appointment, was given between them, but the shares of the children to be for their separate use for life, with remainder to their children. The widow, by a will not executed with the formalities required by the power, appointed the fund to the children equally. The Court supplied the formalities.

A testator gave a sum of £24,000 to trustees for his widow for life, with power to her of appointing £12,000, part thereof, amongst his children, by will attested by two witnesses, and in default of appointment to fall into the residue. The residue was between his children, but as to his daughters, for their separate use for life, with remainder to their children.

The widow, by a will which was not attested, appointed the £12,000 between her sons and daughters equally; and the question was, whether this Court would aid the defective execution.

[250] Mr. G. Turner and Mr. Bloxam argued that there was no case in which the Court would aid the defective execution of a power in favour of children, where the power might not be wholly defeated by the non-execution of the power; and that the children would take in default of appointment, with the advantage that the shares of the daughters would be for their separate use.

Kindersley and Mr. Collins contended that the Court would supply the defect in the execution of the power in favour of the children.

Tinney, Mr. Taylor, and Mr. Freeling, in the same interest.

THE MASTER OF THE ROLLS [Lord Langdale] held that the formality was to be supplied, and that the daughters took absolute interests in their shares.

[250] FLEMING v. SNOOK. May 10, 1842.

Injunction to restrain the breach of a farming covenant.

Covenant in a farming lease not to sow with more than two grain crops during four years, Held to apply to *any* four years of the term however taken, and not to successive four years from the commencement.

In October 1835 the Plaintiff granted to the Defendants a lease of a farm ten years, which contained a covenant, "that the said lessees should not, nor would they sow any of the lands thereby demised with wheat more than once in four years with more than two crops of any kind of grain whatsoever during the same period of four years, and should and would, in all other respects, cultivate and manage the lands thereby demised according to the known and established rules of husbandry."

[251] The Plaintiff, on the allegation that the Defendants had violated the covenant, and that they were about to commit a further violation, filed this bill obtained an *ex parte* injunction to restrain the Defendants, in terms, from acting contrary to the covenant. The successive crops taken from one field (which is given as an example) were as follows:—

1836, Vetches.
1837, Wheat.
1838, Turnips.
1839, Barley.
1840, Clover.
1841, Wheat.
1842, Intended for Barley.

It is unnecessary to state the others further than that the covenant had clearly violated as to part, and not as to another portion.

It was now moved, on the part of the Defendants, to dissolve the injunction as to part only of the property.

Mr. Kindersley and Mr. Selwyn, in support of the motion, contended according to the true construction of the covenant, a succession of periods of four years each were to be taken, commencing with the first year of the lease, and all that was forbidden by the covenant was, the taking two grain crops or more in any of such periods of four years; so that, in the example given, barley might be sowed on that field in 1842 without any infraction of the covenant.

They also argued that this was not like the cases of sowing a deleterious or mustard seed (*Pratt v. Brett*, 2 Mad. 62), or of effecting a permanent injury, as by ploughing up meadow land (*Lord Grey de Wilton v. Saxon*, 6 Ves. 328), and that the Plaintiff had therefore an ample remedy at law, and ought not to come into equity.

Mr. Pemberton, *contra*. The Defendants have acquiesced in the greater part of the injunction. The true construction of this covenant is, that the Defendants are not to have two grain crops in any successive four years, however taken. Defendants sow barley, then, in the four years commencing in 1839 they sow one wheat and two barley crops, which is contrary to what was the intention of the covenant.

THE MASTER OF THE ROLLS [Lord Langdale]. It appears to me that the covenant the tenants are restrained from having more than two grain crops in any four years of the term. As to a part of one field, it appears there is no violation of the covenant; and as to that the injunction must be dissolved, so as to allow them to proceed to sow barley.

[253] PINKUS v. PETERS. May 26, 1842.

[Distinguished, *Jackson v. Shanks*, 1866, 12 Jur. (N. S.), 918.]

Suit was instituted to have a bill of exchange delivered up, on the ground of fraud, and to restrain an action at law commenced thereon. Pending the suit, the Plaintiff in the action recovered and obtained payment. Held, on demurrer, that the Plaintiff in equity might file a supplemental bill, stating these facts, and praying a repayment and indemnity. And it being stated in the original bill, though not in the supplemental bill, that the Plaintiff at law was a trustee for A. B. (Defendant to the original bill) and for another Defendant, Held, also, that A. B. was a necessary party to the supplemental bill, and that notwithstanding the 32d General Order of August 1841.

This was a demurrer to a supplemental bill, for want of equity and for want of

The original bill was filed against Peters, Carroll, and Hamburger, and alleged the Plaintiff had accepted two bills of exchange without consideration, and for accommodation of Peters; that Peters had fraudulently indorsed them to Carroll, without consideration, in order to compel the Plaintiff to pay them; that Carroll, knowing that no action could be sustained by them, indorsed them to Hamburger, who paid no consideration for them; and "that they were put in his hands merely as the trustee and agent of the said Defendants Peters and Carroll, or one of them, and that Hamburger was to account to them, or one of them, for what he should receive on the said bills."

The bill stated that an action had been brought against the Plaintiff on his behalf, in the name of Hamburger; and it prayed that the bills might be declared up to be cancelled: that Peters might indemnify the Plaintiff, in case he should be compelled to pay the bills, and for an injunction to restrain proceedings

The Plaintiff afterwards filed a supplemental bill against Hamburger and Peters (and Carroll), thereby stating the filing the original bill against the above-named Defendants, and thereby "stating, among other things, [254] sundry circumstances, by which it appeared that Peters and Carroll, or one of them, had fraudulently obtained from the Plaintiff two bills of exchange therein particularly described; and that Hamburger had become possessed of the said bills, or one of them, with cognizance of the fraud which had been committed upon the Plaintiff; and praying that the Defendants might be decreed to deliver up, and that Peters might be decreed to indemnify the Plaintiff against the same, in the event of the same not being delivered up, or the Plaintiff being compelled to pay the same to any *bona fide* holder, or an injunction; and that all the said Defendants, being served with process, should be decreed to the said bill; and the Defendants Carroll and Hamburger put in their answer thereto, wherefrom it appeared that Hamburger was the holder of one of the said bills of exchange, so fraudulently obtained from the Plaintiff, whereupon he commenced suing the Plaintiff at law, and that the Defendant Peters had not put in an answer. That not being able to obtain any answer to the bill from Peters, and having taken steps to enforce the same, considerable delay occurred before the Plaintiff could apply to this Honourable Court for an injunction to restrain the said action commenced by Hamburger; and that when the Plaintiff did apply for the injunction, the same was refused by the Master of the Rolls, principally because of the delay having occurred. That having failed in obtaining the injunction at law, for by his said bill, upon the statements in the said answers contained, the Defendant Hamburger proceeded with his action against the Plaintiff, on the ground of exchange so in his possession as aforesaid, and recovered a verdict against the Plaintiff therein, on the 28th of May 1841, for the sum of £88, 10s., and the costs, which said sums, amounting together to the sum of £141, 9s., were, on the 15th of [255] June 1841, paid to Messrs. Becke & Flower, as the attorneys for Hamburger, by or on behalf of the Plaintiff. That on the occasion of the

payment of the said sum of £141, 9s. the Plaintiff caused a notice in writing, to be given by his solicitors to Messrs. Becke & Flower (the solicitors of Hamburger), to pay or part with any portion of the said sum of £141, 9s."

The bill charged that communications had taken place between the Defendants, which they had admitted the matters aforesaid to be true, &c.; and it prayed, that Hamburger might be decreed to repay to the Plaintiff the damages and costs recovered by him in the said action as aforesaid, and the costs and expenses of Plaintiff in such action; and that Peters might be decreed fully to indemnify Plaintiff against the same, in case Hamburger should not be able, or should not be held liable, to refund the same, and all costs, charges, and expenses, incurred or to be incurred in consequence or on account of the said two bills of exchange.

To this bill the Defendant Hamburger filed a general demurrer for want of equity and also for want of parties, on the ground that Carroll was a necessary party to a supplemental bill.

Mr. George Turner and Mr. Freeling, in support of the demurrer. This supplemental bill is quite unnecessary, and the Plaintiff might, upon the original bill, have obtained the whole relief prayed by this new bill; at all events, he might have obtained it by a petition in the cause. In *O'Connor v. Spaight* (1 Sch. & Lef. 306), "a preliminary objection was [256] made, on the part of the Defendant, that as the possession had been changed pending the suit, by the execution of the *habere*" (the judgment subsequent to filing the bill), "and it was no part of the prayer of the original bill to have the possession restored, the Plaintiff ought to have filed a supplemental bill to put that matter in issue, and pray that specific relief. But Redesdale said that it was not the practice in England to file a supplemental bill where there was a mere change of possession upon an injunction being dissolved, where there were no accompanying circumstances, and where the only purpose of the bill would be to state that fact, because it was a fact within the view of the Court."

In *Massey v. Davies* (2 Ves. jun. 319) a bill was filed to restrain an action. When the answers came in, the injunction was dissolved, and the money was paid under the judgment; one objection was, that a supplemental bill was necessary to charge the fact that the injunction had been dissolved, and the money paid under the action. The Master of the Rolls however said, this "objection is very important point of precedent. It is insisted that, whatever the right of the Plaintiffs was, they could not obtain it upon this bill, originally an injunction bill, without a supplemental bill charging a fact, that has made, it is said, a material alteration since the original bill was filed. It struck me that, if this is the case, there must always be a supplemental bill in every case where a bill is filed to prevent the payment of money under a law, and the injunction is dissolved, and the money paid. It occurred to me that the practice was not so. If, upon the face of the bill, the equity is merely that the Defendant as agent shall not have profit out of a transaction [257]-tion by himself as agent and his employer as principal, in a particular concern, though the Plaintiffs cannot succeed in an action, yet the equity remains. Therefore, there is no reason to say, that because the Defendants have recovered at law that, which upon the face of the bill, they or one of them at least is not entitled to retain, a supplemental bill is necessary. It is a relief that arises out of the very relief prayed for in the bill. The Plaintiffs prayed more than they could have; they prayed an injunction to prevent the payment of the money. Therefore, there is an end of the objection of form."

Secondly, this bill is defective for want of parties. Hamburger is a true party, Carroll and Peters, and Carroll, therefore, ought to have been made a party to a supplemental bill.

[THE MASTER OF THE ROLLS. That fact does not appear on the supplemental bill. Can I go out of that bill upon the argument of a demurrer?]

Yes; not only must the Court have regard to the original bill, but even to the answer thereto. In *Milner v. Lord Harewood* (17 Ves. 149), which was a demurrer to a supplemental bill, Lord Eldon says, "upon the form of the supplemental bill, and the nature of the reference to the answer to the original bill, look at the original bill and the answer." So in *Ellice v. Goodson* (3 Myl. & C.

upon a demurrer to an amended bill, Lord Cottenham held that the Court was entitled to look to the whole record, viz., the original bill and the answer thereto.

Mr. Pemberton and Mr. Glasse, in support of the bill.

[288] The Plaintiff is right in bringing before the Court, by supplemental bill, facts which have taken place since the institution of the original suit; Redesdale (75 (4th ed.)), such as the recovery of the amount by Hamburger, and the subsequent conversations between the parties, otherwise these facts would not be put in, and evidence could not be entered into to prove them. This could not be done by petition. In *Usborne v. Baker* (2 Mad. 379) a supplemental bill of discovery was, on demurrer, to be good, it inquiring as to material facts which occurred subsequent to the filing of the original bill. In *The Marquis of Waterford v. Knight* (12 & Fin. 270), a Plaintiff filed a bill in the Court of Exchequer for an account of, and for discovery and relief. The Defendant, being an infant, put in his answer by his guardian. The answer set up an immemorial payment in lieu of, but did not make the required discovery. When the Defendant came of age the Plaintiff filed a supplemental bill against him, alleging the existence of new facts, and praying for discovery and relief. It was held that such a bill could be supported.

The 32d Order of August 1841 (Ord. Can. 174) relieves the Plaintiff from the necessity of making Carroll a party, especially as no relief is sought against him.

Mr. Turner, in reply. Unless there is a substantial change in the rights of the parties, no supplemental bill is necessary, and the Plaintiff would be entitled under the prayer for general relief to what he seeks.

[289] The conversations between the parties are not stated to have taken place subsequent to the filing of the original bill.

THE MASTER OF THE ROLLS [Lord Langdale]. This bill was filed by the Plaintiff to have a bill of exchange delivered up, which he says he is not bound to pay, and an injunction in the meantime, and for further relief. The injunction was granted, and it is stated in the present bill that in consequence the action proceeded, judgment was recovered, and that the Plaintiff has paid the principal money and costs of the action; and it alleges that there have been various communications and correspondence between the parties. The Plaintiff, by the present bill, now asks, in substance, that he may have the amount of the money and costs which he has been compelled to pay, paid back to him. To this bill a general demurrer is put. This demurrer has been argued in the only way in which, on the authorities, it can be argued, viz., that such a bill was unnecessary; and it is inferred that if it is not necessary it ought not to have been filed at all, and that a general demurrer should hold. I do not see the force of the inference. A new fact is introduced, and circumstances are stated to have taken place, in consequence of which the Plaintiff cannot have the relief specifically prayed by the original bill; but he is, nevertheless, entitled to relief adapted to the circumstances which have since taken place.

Instead of asking the delivery up of the bill, he now asks for repayment of money and costs. If the original bill went to a hearing, the Court could not grant that relief without introduction, in some way, of the new facts which have taken place. It is said, those facts must not be introduced by supplemental bill, as they might be brought forward by a petition, and affidavits in support of it, or by interrogatories between the parties; and if the parties refused to make the admissions (which is very probable in such a case as this), then that the Court would refer the matter to the Master to inquire into the circumstances. Something would have to be done at the hearing; and if the Court could plainly see the new facts, I have no doubt that relief, adapted to the new circumstances, would be granted. It may be said that a supplemental bill would not be necessary in a case where, the equity being the same, the Court could properly take cognizance of facts whereby relief differing in principle, but different in form from the relief in the original bill, might be granted.

The question is, whether the Plaintiff has not a right to anticipate all the facts, by filing a supplemental bill to bring these new circumstances before the Court in a formal manner. I think he has a right to bring forward these circumstances in the way he has done. If it should turn out to be an unnecessary pro-

ceeding, means will be found for making him answer for the costs he has used or created. This, as a general demurrer, cannot therefore be sustained.

On the question of parties, I think that the allegations in the bill, that Hambro is a trustee for Carroll and Peters, make Carroll a necessary party. I must, therefore, allow the demurrer, as to parties, with liberty to amend by adding parties.

Demurrer allowed for want of parties.

[261] *SIDEBOTHAM v. BARRINGTON. June 8, 1842.*

[S. C. 3 Beav. 524; 4 Beav. 110. See *Fraser v. Wood*, 1845, 8 Beav. 342.]

The owner of an estate took the benefit of the Insolvent Act, and afterwards became bankrupt. The assignees in bankruptcy, without communicating with the assignee of the insolvency, in whom the estate was vested, sold it. Pending a suit instituted by the vendors for a specific performance, the assignees of insolvency affirmed the sale. A specific performance was decreed.

A vendor filed a bill for specific performance, alleging that the Defendant had accepted the title; the Defendant resisted it on the ground that the bankruptcy under which the Plaintiff claimed was invalid. Neither allegation turned out correct, though a good title was first shewn in the Master's office, the decree was made without costs.

This case is reported *ante* (3 Beav. 524, 4 Beav. 110). The Master having reported on the reference, that, with the concurrence of the assignee under the insolvency, the vendors could make a good title, this cause came on for further directions. The principal question discussed was as to the costs of the suit. The circumstances at this point are sufficiently stated in the judgment.

Mr. Pemberton and Mr. Teed, for the Plaintiff.

Mr. Kindersley and Mr. Romilly, for the Defendant.

Townsend v. Champenourne (3 Y. & Col. 505; and see *Scoones v. Morrell*, 1 Y. & Col. 251), and *Sugden's Vendors*, ch. 10, s. 2, were cited.

THE MASTER OF THE ROLLS [Lord Langdale]. The Plaintiff in his bill alleged that the Defendant had accepted his title, and insisted that he was bound to take the title, such as it was. The claim turned out to be unfounded: it appeared that the Defendant had not accepted the title, and that he had a right to have it investigated. The Defendant insisted that the Plaintiff had no title, because the fiat in bankruptcy was altogether invalid. That defence has turned out to be unfounded.

[262] A reference as to the title was made, when it appeared that the Plaintiff could not make a good title without the concurrence of the assignee of the insolvency, and the Master accordingly reported against the title. On the discussion of the exceptions taken by the Plaintiff to the report, it was found that such concurrence was wanting, and the exceptions were therefore overruled. It being alleged that the concurrence of the assignee of the insolvency was the only thing wanting to make a good title, and that the assignee would join, leave was given to present a petition to have a reference back to the Master. On that reference the Master has found that with the concurrence of the assignee of the insolvency, a good title can be made, and the cause now comes on for further directions.

As to the costs of the suit; if the Plaintiff in this bill had proceeded on his first allegation: "I have entered into a contract, and am ready to perform it, and you refuse," and the Defendant had answered, "I admit the contract and am ready to perform it, but you cannot make a good title without the concurrence of the assignee of the insolvency, which you refuse to obtain;" if that had been the only question in litigation, and a good title, *i.e.*, in the case supposed, the concurrence of the assignee had been first shewn in the Master's office, then the Plaintiff would have had the costs of the suit. That is the general rule, but it is not a rule applicable to every case whatever; it is subject to a variety of modifications arising out of the particular circumstances of each case.

Here both parties made erroneous allegations, the Plaintiff alleged that

Defendant had accepted the title; the Defendant that a good title could not be made because the fiat was invalid. The real question never occurred to either party in a very late period in the cause. I think, under the circumstances, I cannot give to either side. There must be a decree for specific performance without costs. The Plaintiff however must pay the costs of the petition.

[263] HILTON V. LORD GRANVILLE. June 9, 1842.

was given to the Plaintiff in equity to bring an action at law. After the action had been commenced the Plaintiff died; his heir revived the suit, and obtained leave, on a motion which was unopposed, to continue the action. The Defendant applied to this Court that the new Plaintiff might give security for the costs of the action. The Court considered that it had no jurisdiction so to order, but it suspended the prosecution of the action until security had been given.

On application being made for an injunction, the motion was ordered to stand over, and liberty was given to the Plaintiff, William Hilton, to bring such action at law as he should be advised. (4 Beav. 130, and Cr. & Ph. 283.)

The Plaintiff accordingly brought an action of trespass in the Court of Queen's Bench, but the Plaintiff died before plea. John Hilton, the son and heir of William Hilton, afterwards revived the suit, and applied to this Court for liberty to prosecute the action of June 1841, either by continuing the action brought in the name of his father, or by commencing a new action.

The application, not being opposed by the Defendant, was granted, and John Hilton was ordered to prosecute the action commenced by his father.

An application was made to a Judge of the Queen's Bench for time to plead, and that the Plaintiff might give security for costs. The Judge gave time to plead, but refused that the application as to costs ought to be made here.

[264] The Defendant now moved, that the Plaintiff might give security for the costs of the action according to the practice of the Queen's Bench, and, in the meantime, that the proceedings might be stayed in the action.

Mr. Pemberton, for the Defendant, in support of the motion. According to the practice of the Common Law Courts, where a Plaintiff is domiciled abroad, or is a foreign Plaintiff, he must give security for costs; Wordsworth's New Rules, p. 104. John Hilton is a mere nominal Plaintiff, and would have been ordered to give security for costs, if the Judge at Common Law had not considered that the action was under the control and direction of this Court. It would be unreasonable to allow him to prosecute the benefit of the action brought in the name of his father, without, at the same time, making him liable to the costs of it, in case of his failing in it.

Mr. Kindersley and Mr. Hardy, *contra*. Where a party takes any proceeding in a Court, he loses his right to security for costs, even if taken under mistake. *Dyott v. Dyott* (187). Here, by the application for time to plead, the Defendant lost his right to security for costs, if he ever had any.

The Court gave the Plaintiff liberty to bring the action merely in order that he might not thereby prejudice his proceedings here; but it has no jurisdiction to make an order as to the costs of an action at law. If the Court had jurisdiction it must be exercised at the hearing, when the whole cause will be disposed of.

[265] Again, the application for security for costs ought to have been made when the Plaintiff moved for leave to prosecute the order, and not at a subsequent period.

THE MASTER OF THE ROLLS [Lord Langdale]. When the facts are simply stated, no reasonable doubt can be entertained as to what ought to be done in this case.

The action was filed by William Hilton against Lord Granville, to restrain him from working certain mines. A motion was made for an injunction, which was neither granted nor refused, but was directed to stand over, with liberty for the Plaintiff to bring an action to try the question of right, which, as far as I recollect it, involved a considerable difficulty and importance.

William Hilton accordingly commenced an action, which was pending at his death. At his death, John Hilton, the present Plaintiff, filed his bill of revivor in this

Court, and the suit being revived on the 22d of April 1842, he asked leave either to continue the action brought in the name of William Hilton or to commence a new one. Notice of that application was given, and an intimation was made on the part of Lord Granville, that he did not intend to oppose it; leave was thereupon given to proceed in either of the two forms. It was never imagined by the Court, or by anybody else, that the action would be exempt from the ordinary incidents of an action at law; one of which incidents being, that where an action is brought in the name of a dead person, security must be given for costs. Is a party to have the benefit of those proceedings free from the risk of costs? Is it not highly important that the Defendant should have some security for the costs which may be awarded, and that there should be some person against whom he may proceed to recover them, if the [266] occasion arises, and if there is no such person, then that he should have the next substitute, viz., a security?

It is said, that the Defendant ought to have seen that the order made on the former application was such as not to exonerate the present Plaintiff from the costs of the action. I am of opinion that it was not the natural or necessary consequence of the order, that John Hilton should be exonerated from the payment of all costs, if he chose to proceed in a form in which the Defendant would have no means of obtaining costs except by having security. I think the Defendant, having no intention to oppose the motion, was perfectly right in not appearing upon it and creating difficulty.

The next objection is that the Judge at Common Law has given the Defendant time to plead. It may possibly be, that at law the Defendant's right to have security for costs is lost by applying for time to plead. But how was it here?—application was made both for time to plead and for security for costs. The Judge gave no opinion that (having regard to the form of this action, and the circumstances under which it was brought) the Defendant was not entitled to security for costs, but he conceived that he was precluded from considering the question, in consequence of the action being prosecuted under the leave of this Court; and, for anything I know to the contrary on the present occasion, he would have ordered security for costs to be given if he had not entertained that opinion. The Defendant then comes here, and informs me, that the action is being prosecuted in a manner highly disadvantageous to him for the action being in a form in which, according to the ordinary rules, the Defendant would be entitled to security for costs, he has been unable to obtain such security because the Judge at Common Law imagined, that as the order giving leave to proceed at law was made here, he ought not to enter into that question. Is it right or equitable that I should permit the Plaintiff to prosecute this action in a manner unjust? I can only act on the order I made; and if the Plaintiff prosecutes the action it will be under the continuation of the leave given him here to do so. Under the circumstances I am not disposed to continue that leave; and if the motion before me had been to discharge that order I would have done it, in order that the parties might proceed on just terms.

I have no authority to make an order as to the Plaintiff's giving security for costs in the Queen's Bench (see *Desprez v. Mitchell*, 5 Mad. 87); but I have authority, upon this motion, to stay the proceedings on the former order, until I can see that it will be prosecuted in a more just and equitable manner. If the Plaintiff wishes to proceed on the order he must then make an application for leave, which can only be granted on proper terms.

By arrangement, the Plaintiff agreed to give security in this Court for the costs of the action.

[268] GAREY v. WHITTINGHAM. June 24, 1842.

[S. C. 11 L. J. Ch. 334; 6 Jur. 545.]

A testator gave his residuary estate to his wife for life, and then to be divided into three shares, and he gave one-third between the children of his brother T. B., living at the death of his wife, one-third to his niece F. G., and the remaining one-third to his nephew and niece, T. B. and S. B.; and in case such, any, or either of them

should die, having left a child or children surviving them, he declared that the expectant's share should go between his or her children. T. B.'s children all died in the lifetime of the widow, but some left children. Held, that the latter were entitled to the first-mentioned one-third.

Husband and wife, entitled in the wife's right to a share of residue, were living apart, and they defended separately. Held, entitled to only one set of costs.

Party entitled to a share of the residue became bankrupt. Held, that he and his creditors were entitled to one set of costs between them.

A testator gave the residue of his real and personal estate in trust for his wife for life, and he directed the whole to be converted at her decease, and divided into three equal shares and proportions amongst the several parties after named, that is to say, one-third part or share thereof unto the child or children of his brother Thomas Baker who should be living at the time of the decease of his said wife, in equal shares and proportions, and if but one child living, then the whole to that one, to and for his, her, and their own absolute use and disposal; and he also gave and bequeathed the third part or share thereof unto Fanny Garey, described as Frances Garey daughter of his brother Aaron Baker, to and for her absolute use and disposal; and he likewise gave and bequeathed the remaining third part or share thereof to Thomas Baker and Sarah Baker, therein described as the son and daughter of his brother John Baker, in equal shares and proportions, to and for his, her, and their absolute use and disposal; and in case such, any, or either of them should die, leaving left a child or children surviving, then he declared that the *expectant's* share should go to and be equally divided between and amongst his or her child or children, in equal shares and proportions, if more than one, and if but one child living, then the whole to that one; and [269] in failure of issue, then to be divided between and amongst the survivor or survivors of his said nephews and nieces as aforesaid, in equal shares and proportions.

Thomas Baker, the brother of the testator, had ten children, all of whom died in the lifetime of the testator's widow, and three only of them left children.

The testator's widow died in 1840; and the question was, whether the children of Thomas Baker were entitled to the first-mentioned one-third of the residue.

Kindersley and Mr. Spurrier contended that the one-third had lapsed, in consequence of there being no child of Thomas Baker living at the decease of the testator. That the latter clause "and in case such, any, or either," &c., was not applicable to the shares of the children of Thomas Baker, who had not *expectant*, but contingent shares. That these words referred to the last antecedent, and were applicable only to the shares of Thomas and Sarah Baker. They cited *Christopherson* (1 Mer. 320), *Towney v. Ward* (1 Beav. 563), *Ward v. Ward* (3 Mer. 706).

Webster and Mr. Greene, for parties in the same interest.

James Campbell and Mr. Addis. The children of the children of Thomas Baker are entitled to one-third of the residue. The words "if any," &c., form part of the whole sentence, and can only be satisfied by applying them to the children of Thomas Baker. The share [270] was not the less an expectancy because it was contingent; and the Court will struggle to avoid an intestacy. They cited *Giles v. Giles* (Sim. 360).

Kindersley, in reply.

MASTER OF THE ROLLS [Lord Langdale] said there was certainly great ambiguity and obscurity in the terms of the will, and that there had been evidently words omitted; that he thought that, in ordinary language, persons whose shares were contingent were equally expectants with those who had vested shares; and on the whole he was of opinion that the grandchildren of Thomas Baker were entitled to the one-third intended for their parents if they had survived the testator.

and Mrs. Copeland, the latter of whom was entitled to a share of the residue, were living apart, and appeared separately.

MASTER OF THE ROLLS held that they were entitled to one set of costs only.

Lordship applied the same rule to William Garey, one of the residuary

legatees, and his assignees, who were made parties to the suit, and appear separately.

[271] AGABEG v. HARTWELL. June 28, 1842.

By the decree the costs of all parties were ordered to be taxed as between solicitor and client. Upon a rehearing the decree was affirmed, and the deposit was ordered to be returned, but nothing was said as to costs. By a subsequent order the costs of all parties were ordered to be taxed, as between solicitor and client, from the last taxation. Held, that this did not include the costs of the rehearing. The costs of rehearings are not carried by the words "costs of suit as between solicitor and client," but they require to be specially mentioned in the order for taxation.

Semble. The same rule applies to the costs of appeals, and exceptions.

This case again came before the Court upon petition under the following circumstances:—

On the 6th of August 1832, upon petition for payment of a sum out of Court order was made by the Vice-Chancellor, *inter alia*, to tax all parties their costs relating to the suit as between solicitor and client.

On the 15th of February 1833, by the decree of the Vice-Chancellor, an order was made, *inter alia*, to tax all parties their costs of this suit, subsequent to the taxation thereof, as between solicitor and client.

On the 22d of May 1834, upon a rehearing before the Lord Chancellor, the decree was affirmed. The deposit was ordered to be returned, but nothing was said as to costs.

On the 12th of May 1835 an order to tax all parties their costs, as between solicitor and client, of and relating to these suits, subject to the last taxation of costs was made by the decree of the Master of the Rolls.

On the 12th of December 1837 an appeal was heard, and a decree made by the House of Lords, whereby the decrees of the Vice-Chancellor and Lord Chancellor were reversed, and the case was referred back to the Court of Chancery.

On the 28th of April 1840 an order was made by the Lord Chancellor, affirming the orders, and proceedings [272] in conformity to the order of the House of Lords, but no variation was made in the order for the taxation of costs.

The question was, whether the decree of the 12th of May 1835 entitled the parties to their costs of the rehearing before the Lord Chancellor in May 1834.

Mr. Tinney and Mr. F. H. Goldsmid, in support of the petition.

Mr. Pemberton and Mr. Blunt, *contra*.

THE MASTER OF THE ROLLS said he should inquire of the sworn clerks what the understood practice in such cases.

The sworn clerks returned the following certificate:—

"Six Clerks' Office, June 25th, 1842.

"We, the undersigned Clerks in Court, beg leave to state that we are of opinion that the Lord Chancellor's Order of the 22d of May 1834, giving back the deposit to the Petitioner, is a disposal of the question of costs of the rehearing; and that the order of the 12th May 1835, though it gives all parties their costs, as between solicitor and client, of and relating to these suits, subsequent to the last taxation, would not authorise the Master to include the costs of the rehearing, because it was not giving the order of the Master of the Rolls, by whom the order of 12th May 1835 was made, the effect of giving costs which the Lord Chancellor, by his order of 22d May 1834, had refused to give.

[273] "It is a general rule that costs of appeals, rehearings, and exceptions are not carried by the words 'Costs of suit as between solicitor and client,' but they require to be specially mentioned in the order for taxation.

"RICHARD MILLS.

"JOHN WAINEWRIGHT.

"JAMES THOMAS HOBBS.

June 28. THE MASTER OF THE ROLLS [Lord Langdale], after referring to the decree, decided in conformity therewith.

[273] WILLIAMS v. KNIPE. June 25, 27, 1842.

testator bequeathed an annuity, to cease in case the legatee, if required, should not execute a release. A release was tendered, which A. refused to execute. It was proved that the legatee knew the contents of the deed, or that any explanation was offered to him; and it appeared to have contained an inaccurate recital. Held, that there was no forfeiture.

Fact that the Plaintiff had filed a bill in this Court being relied on by the Defendant as having worked a forfeiture of his interest: Held, that the mere production of the office copy was not sufficient evidence, there being no proof of identity; and, secondly, that the Defendant was not entitled to an inquiry on the point.

William Williams, by his will, dated the 19th of October 1822, directed his trustees to pay to the Plaintiff an annuity of £30 during his life, and gave the residue of his estate, subject to the trusts of his will, to the Defendant William Williams. And in order to settle any dispute or question which might, by any possibility, arise, he directed that, if thereunto required, the Plaintiff should give to the trustees and executors any release or other discharge, in respect of anything done by the testator under the will of his deceased brother Thomas of and from all claims and demands whatsoever which the Plaintiff had, or could or might have, against the testator, his executors or [274] administrators, under the same. And he declared and directed that the annuity, by the will bequeathed to the Plaintiff, should be contingent thereon; and in case of his refusal so to do, or in case of his making any claim under the same, the annuity should cease and determine to all intents and purposes.

There was no time limited within which the release was to be given, and no condition as to the gift over.

The testator was stated to have died on the 12th of February 1828. The annuity was to commence and be computed from the end of twelve calendar months after his death, that is, in February 1829; and in the course of the year 1829 the trustees paid to the Plaintiff three-quarters of a year's annuity. The payments then ceased, and in August 1841 the Plaintiff filed the present bill for relief; and in the bill alleged that he had never been called upon to give any release or other discharge in respect of anything done under the will of the testator's deceased brother Thomas, or of, or against any claims or demands whatsoever which the Plaintiff might have against the testator, his executors or administrators, under the same; and he stated that he was ready and willing to execute a proper release.

The Defendants, by their answer, stated several objections to the Plaintiff's bill, and, amongst others, that the Plaintiff filed a bill to establish against the Defendant's estate those claims and demands, which, by the condition stated in the will, were to have been released. They also stated that, in February 1830, the Defendants tendered a proper deed of release to be tendered to the Plaintiff for his execution, and that he refused to execute the same. The only evidence on the subject was, that the Plaintiff required the Plaintiff to execute a deed [275] which he produced to him, and which he now produced, and that the Plaintiff then refused to execute the same. The bill purported to bear date the 13th of February 1830. It recited that the testator died on the 12th of February 1828, and that the several annuities had been paid according to the directions of the will.

Pemberton and Mr. G. L. Russell, for the Plaintiff.

Kindersley, for the Defendants, contended that the Plaintiff had forfeited his right to the annuity, first, by filing his bill against the testator's executors, and, secondly, by his refusal to execute a proper release. *Vernon v. Bethell* (2 Eden, 110). He proposed to give in evidence an office copy of the bill alleged to have been filed against the testator's representatives; but there was no evidence to identify the bill in that case with the Plaintiff in the present case.

Mr. Pemberton objected to this evidence, as there was no proof of identity.

Mr. Kindersley. The Defendants are, at all events, entitled to an inquiry as to that fact.

Mr. Pemberton. Where a fact is the foundation of a decree or defence, and the party by his own neglect fails in proving it, the Court never grants an inquiry. The late Lord Chancellor acted on that principle in *Marten v. Whitchelo* (Cr. & Ph. 257).

[276] THE MASTER OF THE ROLLS. The Defendants have not proved enough. They have shewn that a bill was filed in this Court by a person of the name of Williams. The office copy shews this; but it does not prove that the Plaintiff filed the bill or has incurred the forfeiture. I do not think the Defendants entitled to an inquiry.

Mr. Pemberton, in reply. It does not appear that the release was ever submitted for the Plaintiff's perusal before he was called upon to execute it. He was not compellable to execute it without having an opportunity of investigating it. It recites too that the annuity had been duly paid, which was not the fact, as on the 12th of February 1830, the day before the date of the deed, a further quarter's annuity became due.

THE MASTER OF THE ROLLS said he would look at the papers in order to satisfy himself whether the Plaintiff had refused to execute a proper release.

June 27. THE MASTER OF THE ROLLS [Lord Langdale]. The Defendants have stated that the Plaintiff actually filed a bill to establish, against the testator's estate, those claims and demands which, by the condition stated in the will, he ought to have released. I think that the fact of this claim, though probably true, is not established by evidence.

I reserved for consideration the part of the defence which stated the tender of the release, and the refusal of the Plaintiff to execute it. The Defendants have adduced any evidence to shew that the Plaintiff knew the contents of the deed which he refused to execute, or [277] that any explanation of it was offered to him. If the facts were as stated, that is, if the testator died on the 12th of February 1829, then, on the 13th of February 1830, four quarters of the annuity had become due and had been paid, if all the annuities had been, as recited, duly paid according to the directions of the will; but in the pleadings of this cause it is admitted that only three quarters of the annuity had been paid; and consequently the Plaintiff would be entitled to recover the one-quarter's payment which accrued due before his refusal. I can well suppose that the payment of the fourth quarter was withheld only because the Plaintiff refused to execute the deed; but there is no evidence of that, and no proof of the truth of the recital.

It is very much to be regretted that the facts of this case have been so imperfectly established, but having considered the provisions of the will, and the fact which is proved, I am of opinion that it is now competent to the Plaintiff to execute a proper release, so as to entitle himself to the annuity. I must refer it to the Master to settle a proper release, to be executed according to the testator's will, and order the Plaintiff to execute such deed in a month after the Master shall have approved thereof. And if the Plaintiff shall not execute the same within such time, let the bill be dismissed with costs to be paid by the Plaintiff; but if the Plaintiff shall so execute the same, let the Master take an account of the arrears of the annuity due to the Plaintiff, and order the Defendant William Williams to pay the same, and also to pay to the Plaintiff all sums of money hereafter to become due in respect of the annuity; and if the Plaintiff shall execute such deed within such time as aforesaid, no costs on either side.

NOTE.—The decision was appealed from, but was afterwards, as I am informed, compromised.

[278] ARMITAGE AND MILTON v. BALDWIN. March 15, 17, 1842.

A creditor sued his principal debtor, and recovered a judgment against him and the bail in the action. The surety thereupon "paid and satisfied" to the creditor the amount of the judgments, &c., and took an assignment thereof. Held, that the judgment was discharged, and that the surety could not recover on the judgment against the bail.

This case came before the Court on general demurrer.

According to the statements in the bill, Hamer, in the year 1829, borrowed a sum of money from Armitage, which was secured by a bill of exchange, in which Milton joined as surety. The bill not having been paid, Armitage, in 1830, commenced an action against Hamer for the recovery thereof. Hamer was arrested, and thereupon Rigbye became his bail, and entered into the usual recognizance. Judgment was recovered against Hamer, who neither surrendered in discharge of his bail nor paid the debt, whereupon judgment was, in 1832, entered up by Armitage against Rigbye as bail.

In 1834 Armitage ultimately insisted on Milton paying the amount, and as was stated in the bill, he accordingly "duly paid and satisfied to Armitage the full amount of the said judgment, with interest, and all costs incurred by him in relation hereto; and by a deed-poll, bearing date the 23d day of April 1834, Armitage duly assigned and transferred unto Milton the two judgments for the sum of £688, 10s., and also all benefit, profit, and advantage whatsoever that might thereafter be obtained by reason of the same."

The bill alleged, "that under the circumstances aforesaid the Plaintiff Milton became absolutely entitled, in equity, to the benefit of the said judgments, but the same still remained vested at law in the Plaintiff Armitage, as trustee for the Plaintiff Milton." It also stated that in 1841 a writ of *scire facias* was issued by Armitage against [279] Rigbye upon the judgment. The writ was delivered to the sheriff, who returned that Rigbye had nothing in his bailiwick whereby he could give notice, nor was the said Rigbye found within the same; and afterwards, in December 1841, Armitage, by leave of the Court, duly signed and entered up final judgment against Rigbye upon the said writ of *scire facias*.

The judgment was registered and an *elegit* issued. The bill charged, that in Easter term 1836 Rigbye obtained a rule in His Majesty's Court of King's Bench, compelling on the Plaintiff Joseph Armitage to shew cause why the said judgment should not be set aside; and cause was afterwards shewn accordingly by the said Plaintiff; and, after argument, the said rule was discharged by the Court of King's Bench, with costs (see the case in 5 A. & E. 76); and it stated that various other proceedings had been taken, by or on behalf of Rigbye, to defeat the Plaintiff's said judgment.

This bill was filed by Armitage and Milton seeking to establish, by virtue of the judgment (1 & 2 Vict. c. 110, s. 13), a charge on the estate of Rigbye, the bail, and which he had vested in trustees.

The Defendants demurred for want of equity and want of parties.

Mr. G. Turner and Mr. J. V. Prior, in support of the demurrer. The Plaintiffs proceed on two grounds, first on the rights of the Plaintiffs under the statute of 1 & 2 Vict. c. 110, s. 13, and, secondly, on their general rights as judgment creditors; but the whole equity in reality depends on Armitage being a trustee for Milton of a valid subsisting judgment. The creditor having obtained a judgment against the principal debtor and his bail, the bail then became, equally with Milton, liable for Hamer; and this is a mere attempt by one surety to make his co-surety pay the whole debt. It is clear, that on payment of the debt by Milton, the debt was discharged, and the right of Armitage to prosecute the bail was gone. A Court of law would not afterwards have allowed Armitage to proceed. *Copis v. Middleton* (Turn. & Russ. 224), *Doubbiggen v. Bourne* (2 You. & C. 462), *Hodgson v. Shaw* (3 Myl. & K. 183).

The Plaintiffs are not entitled in respect of the judgment in 1841, because the

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judgment of 1832, on which it was founded, was then already satisfied. They argued also that the bill was defective for want of parties.

Mr. Pemberton and Mr. Rolt, in support of the bill, contended that it was a mere fallacy to say that Milton was a co-surety in respect of the judgment debt against Rigbye. That the judgment of 1832, or at all events that of 1841, was still subsisting at law, and that the Plaintiffs were entitled to the benefit of it. That in every case a surety was entitled to all the remedies of the creditor. In *Wright v. Marley* (11 Ves. 22) Lord Eldon says, "I conceive that, as the creditor is entitled to the benefit of all the securities the principal debtor has given to his surety, the surety has full as good an equity to the benefit of all the securities the principal gives to the creditor. There is a very strong instance of the application of that equity in *Parsons v. Bridgock* (2 Vern. 608). The [281] principal had given bail in an action. Judgment was recovered against the bail. Afterwards the surety was called upon and paid, and it was held, that he was entitled to an assignment of the judgment against the bail; so that though the bail were themselves but sureties, as between them and the principal debtor, yet coming in the room of the principal debtor, as to the creditor, it was held, that they likewise came in the room of the principal debtor as to the surety. Consequently, that decision established, that the surety had precisely the same right that the creditor had, and was to stand in his place. The surety had no direct contract or engagement by which the bail were bound to him, but only a claim against them through the medium of the creditor, and was entitled only to all his rights. There are other cases establishing the same principle, though not quite so strong as that."

The Plaintiffs are, therefore, entitled to equitable relief in respect of the judgment debt. Their rights as against the estate of Rigbye being interfered with by the prior mortgages, and the voluntary deed executed by Rigbye, it is necessary for them to come into equity for relief; *Neale v. The Duke of Marlborough* (3 Myl. & Cr. 407).

The following cases were also cited; *Powell v. Eason* (8 Bing. 23), *Hocken v. Browne* (4 Bing. N. C. 400), *Abbott v. Bruere* (5 Bing. N. C. 598), *Ex parte Wyldman* (2 Ves. sen. 113).

THE MASTER OF THE ROLLS [Lord Langdale]. The real question which I have to decide here is, whether upon the allegations contained in this bill there [282] is a valid existing judgment, which can be made available at law against the estate of Rigbye, for that is the whole object of the suit. Having carefully read through the bill, I do not think it improbable that the Plaintiffs may by a proper proceeding ultimately succeed in establishing a right against the Defendant. But the question is, whether the allegations in this bill intitle them to relief. The bill alleges that at this time there is a valid judgment at law which can be made available against the party against whom it is entered up, and also alleges that the Plaintiff Milton "did paid and satisfied to Armitage the full amount of the said judgment with interest and all costs," &c. How can I conclude, that notwithstanding the judgment, and the interest and costs incurred in relation thereto, have been fully paid and satisfied, the judgment can now be made available at law?

It is said I ought to do so, because there is an allegation, that, in 1836 (which was after the judgment had been "paid and satisfied") some proceedings took place in relation to it. The bill states that in 1836 Rigbye obtained a rule in the King's Bench, calling upon the Plaintiff Armitage to shew cause why the judgment should not be set aside, &c., &c. It is obvious that at the time these proceedings took place there might have been something to be done upon the judgment for the purpose of recovering costs which might have been then due, though not due at the time the bill was filed; but the allegation in this bill is distinct: that the full amount of the judgment, with interest and all costs, has been paid and satisfied. Under the circumstances I cannot come to the conclusion that there is at this time an existing judgment which can be made available at law; and if so; the very foundation of the equity sought to be established by this bill fails. I must, [283] therefore, allow the demurrer, giving to the Plaintiffs the opportunity of amending their bill if they think fit to do so.

My present impression is, that the mortgagees, the purchasers, and Hamer are not necessary parties. I throw out this opinion because it may assist the parties.

might, however, alter my opinion in that respect upon hearing a reply on the point, which I have not done. I thought it unnecessary, as I had come to a conclusion on the other ground of demurrer.

[283] GRIEVESON v. KIRSOPP. *June 27, 28, 1842.*

An estate directed to be sold was limited to A. for life, and (as was then supposed) a moiety thereof was, as real estate, limited to B. in remainder. A. conveyed, and B. confirmed B.'s moiety and all their estate, &c., therein by way of mortgage, and they further assured it by fine. It turned out that B. had one-fifth only in remainder as personalty. Held, that A.'s interest in one-fifth only was affected by the mortgage.

Under the will of the testator, dated in 1795, his widow, Mrs. Carr, was entitled for life to a freehold property called Staley, as to which, the testator had given certain directions respecting the sale for the benefit of his six children. The interests of the parties in remainder had not, in the year 1819, been ascertained, but it was supposed, that subject to the life interest of Mrs. Carr, the property belonged, as real estate, to Mary Kirsopp and Sarah Carr Grieveson (the child of a deceased child of the testator), in coparcenary.

At this time (1819), Sarah Carr, the widow, Mary Kirsopp (the wife of John Kirsopp), John Grieveson, and Sarah Carr the younger, were indebted to Michael Dodd, on bond, in the sum of £200; and John Kirsopp was indebted to Sarah Carr, the widow, in the sum of [284] £1000 and upwards. Under these circumstances a deed was executed, dated in December 1819, which was made between Sarah Carr, widow, of the first part, John Kirsopp and Mary his wife of the second part, a trustee of the third part, and Dodd and wife of the fourth part, reciting the death of four out of the six of the testator's children without issue, and either intestate or infants; and reciting the death of Mrs. Grieveson (another of the six children), leaving Sarah Carr Grieveson an infant, "in whom, together with Mary Kirsopp, the real estate of the said testator was then vested in coparcenary," subject to a mortgage and to such interest as Sarah Carr had therein; and also reciting that Dodd and Mabel his wife had, at the request of the said Sarah Carr, the widow, and the said John Kirsopp and Mary his wife, agreed to lend them the sum of £1000 to pay off the debt due from John Kirsopp to Sarah Carr, upon having that sum and the £200 due on bond secured on mortgage of the undivided moieties, hereditaments, and premises as hereinafter mentioned; it was witnessed, that, in consideration of £1000 paid to Sarah Carr by Dodd and wife, and the £200 due, Sarah Carr did grant, &c., and convey, and John Kirsopp and wife did grant, &c., and confirm unto the trustee and his heirs, that *one undivided moiety or half part of them the said John Kirsopp and Mary his wife, in right of the said Mary, and of and in the said estate and premises called Staley therein particularly described, and the allotments thereto, and also of and in all other messuages, lands, tenements, and hereditaments whatsoever, late of him the said John Carr the testator in the parish of Staley aforesaid, and all the estate, right, title, interest, possession, property, claim, and demand whatsoever of them the said Sarah Carr and John Kirsopp and Mary his wife, or any or either of them, of, in, or by the said undivided moieties, hereditaments, and premises, and [285] every part and parcel thereof, in trust for Dodd and his wife, subject to redemption.* There was a covenant to levy fines, which were to enure to the use of the trustee for Dodd and his wife, and a proviso for redemption on payment of £1200 and interest to Dodd and his wife, by Kirsopp and his wife; and on payment there was to be a reconveyance to Kirsopp and his wife, or as they appointed, subject to the mortgage, and subject to the interest of Sarah Carr; and Kirsopp personally covenanted to pay the mortgage money.

In 1824 a fine was levied pursuant to the covenant.

Long after the date of the deed, it was ascertained (2 Keen, 653) that the property belonged to the widow for life, with remainder (as personal estate) in fifth shares

between Mrs. Kirsopp the surviving child, and the representatives of the four deceased children.

Mrs. Carr the widow, as representing her deceased children, became entitled to one-sixth part of the produce of the estate. She died in 1829.

Under these circumstances a question arose, as to the extent to which the interest of Mrs. Carr, the widow, was affected by the deed of 1819.

Mr. Purvis contended, that the deed and fine operated on the whole of the widow's interest in a moiety of the property.

Mr. Pemberton, *contra*, contended that the effect of the deed and fine was, to make merely the widow's interest [286] in the share which Kirsopp and wife actually conveyed, viz., one-fifth, liable to the mortgage.

June 28. THE MASTER OF THE ROLLS [Lord Langdale]. At the date of the deed in question, viz., on the 31st of December 1819, Mrs. Carr was entitled to the premises therein comprised for her life, and subject to her life interest, the property, as personal estate, belonged in fifth shares to her surviving child, and the personal representatives of her four deceased children. The rights of the children had not then been ascertained, and it was supposed, that, subject to the life interest of Mrs. Carr, the property belonged, as real estate, to Mrs. Kirsopp and the child of a deceased child, in coparcenary.

At the same time, a debt of £200 was owing to Michael Dodd, as executor of Paul Vaillant, which was secured by the bond of Sarah Carr, Mary Kirsopp, John Grieverson, and Sarah Carr the younger; a debt of £1000 was also due from John Kirsopp to Sarah Carr, and the deed was executed, in consideration of the bond debt, and of £1000 paid to Sarah Carr. The conveyance was made to a trustee by Sarah Carr, and by John Kirsopp and Mary his wife, and the property, purported to be conveyed, was, all that undivided moiety of Kirsopp and his wife, in right of the wife, in the several premises therein described, and all the estate of Sarah Carr, and Kirsopp and his wife in the same moiety, in trust for Dodd and his wife, subject to redemption. There was a covenant to levy fines, which were to enure to the use of the trustee for Dodd and his wife, and a proviso for redemption, on payment of £1200, and interest to Dodd and his wife, by Kirsopp [287] and his wife; and on payment, there was to be a reconveyance to Kirsopp and his wife, or as they appointed, subject to the mortgage and subject to the interest of Sarah Carr; and Kirsopp, personally, covenanted to pay the mortgage money.

Long after the date of the deed, it was ascertained that Mary Kirsopp, instead of being entitled, as heir, to a moiety of the estate, was entitled in her own right to only one-fifth, as personal estate; and the question is, what, upon the construction and effect of the deed, is the effect of the conveyance executed by Mrs. Carr.

The estate being treated as personalty, Mrs. Carr became entitled to portions of the shares of her deceased children, who died intestate; and it is contended, that although Kirsopp and his wife, in her right, were only entitled to one-fifth, subject to the life interest of Mrs. Carr, the conveyance by Mrs. Carr ought to extend to her own interest in an equal moiety of the whole. But, on perusal of the deed, I am of opinion that Mrs. Carr did not intend to convey, and that Dodd and his wife did not intend to receive from her, more than her interest in the share of the estate which was conveyed by Kirsopp and his wife; and I think, that the effect of the deed is not to pass more than her interest under the will, in so much of the estate as was conveyed by Kirsopp and his wife.

It being doubtful, upon the proceedings, whether Mrs. Carr the widow had joined in the fine, inquiry was made on the point, when it was ascertained that she was a party to it, and the case was then argued as to its operation.

[288] Mr. Purvis contended that, as Mrs. Carr covenanted for herself and her heirs, her covenant was to be made good out of the lands. (Co. Lit. 365 a.) That a fine was a feoffment on record (Shep. Touch. 5), and was conclusive evidence on production; and that Mrs. Carr was estopped from saying that the moiety did not pass. (Shep. Touch. 20.)

Mr. Pemberton, *contra*. The property is mere personalty, and the fine had no operation upon it. The security cannot extend beyond the intention of the parties to the deed; they were only dealing with the interests of Kirsopp and wife, and

merely with such interest of the widow, as she had in that portion of the property which belonged to Kirsopp and wife.

THE MASTER OF THE ROLLS. I stated my opinion, that the intention of the parties was to convey the widow's interest in so much of the estate as was conveyed by Kirsopp and wife. I do not think that the fine operates beyond the deed, and the intention of the parties appearing on the deed.

[289] BRISTOW v. BRISTOW. June 28, 29, 1842.

[See *Lee v. Pain*, 1844, 4 Hare, 240.]

testatrix appointed a legacy out of a particular fund. By a codicil she revoked it, and gave a legacy of half the amount only, but without referring to the particular fund. Held, that the latter was a mere substitution for the former; and the particular fund failing, that the legatee was not entitled to be paid out of the general assets.

quest of a specific sum in the funds, to be paid within twelve months. The sum was not transferred within the twelve months, and the executors received the dividends accruing during that period. Held, that they belonged to the legatee.

quest of £800 to the four eldest children of the testatrix's cousin A. B., and £200 to the three remaining children of her uncle A. B. The testatrix had a cousin and an uncle of that name. The cousin had seven children, and the uncle one, but he had three remaining grandchildren, one other having died. Held, that the three younger children of the cousin were entitled to the £200.

quest "to the poor on the testatrix's little estate in Suffolk." The testatrix in 1784 had an estate in Suffolk, but which was settled in that year, and the testatrix had merely a rent charge issuing thereout. Held, that there was a valid charitable gift to the poor on the estate.

costs of a suit for administration held, there being no other assets, to be payable out of the specific legacies *pari passu*.

Several questions arose in this case, which came on upon exceptions and for further actions. It will be convenient however to separate them.

Under the marriage settlement of Lady Bristow, a power was limited to her of appointing £5000. By her will she appointed a sum of £800, part of the £5000, to be equally divided between Mrs. Booth, her cousin, Mrs. Slater, and two other persons.

By a codicil she revoked the legacies given to Mrs. Booth, Mrs. Slater, and the other persons, and proceeded thus: "I bequeath to each only £100."

It was decided in the case of *Bristow v. Boothby* (2 Sim. & St. 465) that the power appointing the £5000 was void for remoteness; so that legacies given thereout failed. The Master to whom this cause was referred to take an account of the assets, &c., reported the two of £100 each given by the codicil to Mrs. Booth and [290] Slater amongst the general legacies; and to this part of his report, an objection was taken, on the ground that the legacies of £100 each, given by the will, were substituted for the legacies of £200 each given by the will, and were more payable out of the same fund, viz., the £5000, and that, consequently, they failed by the invalidity of the power. *Cooper v. Day* (3 Mer. 154; and see *Day v. Day*, 4 Beav. 561, and the cases there cited) was cited to shew that the substituted legacies were subject to the same incidents as the original legacies.

THE MASTER OF THE ROLLS held that the legacies of £100 each were substituted for those of £200 each, and were payable out of the same fund. He consequently refused the exception.

The testatrix gave to a charity, called the Refuge for the Destitute, a sum of £1700 per annua, standing in the name of two trustees, which she directed "to be paid in twelve calendar months after her decease."

The stock had not been transferred, and two half-yearly dividends on the stock,

amounting together to £68, had been received by the executors during the twelve months which elapsed after the testatrix's decease. These sums were claimed as part of the testatrix's general estate, on the ground that the executors were not, under the terms of the will, bound to transfer the stock until twelve months after her decease; and this point formed the subject of another exception to the Master's report.

THE MASTER OF THE ROLLS, after hearing counsel in support of the exception, and without hearing the other [291] side, overruled the exception, holding that the £68 belonged to the legatees of the stock.

The testatrix, also, by a codicil bequeathed as follows:—"I give and bequeath £800 to the four eldest children of my cousin George Bristow, Esq., Georgiana, Catherine, Henry, and William Bristow, to be equally divided between the four. I give and bequeath as much of the money vested in the stocks in the names of Sir Corbett Corbett, Bart., and Ralph Dunn, Esq., as being sold out will produce £200, to the three remaining children of my uncle George Bristow, Esq.

The testatrix had both a cousin and an uncle of the name of George Bristow. The cousin had seven children only known to the testatrix—viz., the four children named in the codicil, and three others.

The uncle had but one child, Mrs. Slater, who was called cousin by the testatrix in her will, and at the time of making the codicil she had three children only, a fourth having died before that period, so that, in one sense, she had three remaining children.

It was contended, on the one hand, that the £200 belonged to the three younger children of the cousin: and on the other, that it belonged to the three remaining grandchildren of the uncle (one being dead).

THE MASTER OF THE ROLLS said, that it was not very clear; but by the terms of the bequest, £800 was given to the four eldest children of the cousin, and £200 to the three remaining children of the uncle. He thought that the word remaining had reference to what preceded, and that the testatrix had therefore, inadvertently, used [292] the word "uncle" instead of "cousin" in the latter part of the sentence. He thought therefore that the younger children of the cousin were entitled.

The testatrix also gave as follows:—"I give and bequeath all the Bank post bills to be found with the picture of my beloved child, in trust to William Deane, Esq., to be properly vested in the stocks; the interest arising from such sums I direct to be, every year, given for the relief of the poor on my little estate in Suffolk."

Previous to 1784 the testatrix had two farms in Suffolk. They were settled upon the occasion of her marriage that year, and by the settlement a rent charge of £300 was secured to her for life, and subject thereto, and to certain limitations which failed, the property was settled on her husband in fee. In 1798 he sold the property, subject to the rent charge.

It was contended that this gift of the Bank post bills was void for uncertainty; but THE MASTER OF THE ROLLS held that they were well bequeathed to charitable purposes for the relief of the poor on the two farms.

The general personal estate not specifically bequeathed being exhausted, a question arose out of what fund the costs of the suit, which was for the administration of the estate, should be paid; and THE MASTER OF THE ROLLS [Lord Langdale] held, that the costs ought in the first place to be paid out of the general personal [293] estate not specifically bequeathed, but that being insufficient, they must be borne by the specific legatees *pari passu*, rateably according to the respective values of their legacies.

[293] PERRY v. KNOTT. June 30, 1842.

[Accuracy of report doubted, *Lenaghan v. Smith*, 1847, 2 Ph. 302; 41 E. R. 358. See *Kellaway v. Johnson*, 1842, 4 Beav. 319; 49 E. R. 601. Cf. *In re Harrison* [1891], 2 Ch. 349, and cases there cited.]

The 32d Order of August 1841 applies to a case of a breach of trust committed by several executors; and a *cetui que trust* may, therefore, proceed against one in the absence of the others.

The same order applies to a suit in which the case was heard and ordered to stand over for want of parties, previous to Michaelmas term 1841, where the order, though drawn up, had not passed.

A suit may be maintained for a breach of trust in respect of an ascertained fund, by a party entitled to a moiety thereof, without making the person entitled to the other moiety a party.

The testator, George Aldridge, gave and bequeathed unto his son Joseph Aldridge, his executors and administrators, the sum of £1000, in trust for the separate use of Elizabeth, the wife of William Howell for life, and after her decease, equally amongst her children living at her decease. He appointed Deborah Aldridge, John Pricklow, Joseph Aldridge, and Edward Aldridge, his executors.

The testator died soon after, and his will was proved by his executrix and executors, who (according to the statement in the Defendants' answer), shortly after the testator's death, transferred (out of the stock standing in the bank in the names of the executors and executrix), a sum of 3 per cent. consolidated Bank annuities, which, at the current price of such stock, at the date of such transfer, was worth £1000 sterling, *into the joint names of Joseph Aldridge and Elizabeth Howell*.

Joseph Aldridge died in 1823, and Elizabeth Howell, who survived him, transferred the fund into her own name, and afterwards sold it out and applied it to her own use. Elizabeth Howell died in 1839, leaving two children, viz., the Plaintiff Mrs. Perry, and William Howell.

[294] The bill was filed by Mr. and Mrs. Perry, against Mr. and Mrs. Knott (the latter being the legal personal representative of Joseph Aldridge), seeking to charge his estate with a breach of trust, in consequence of the loss of the £1000 which had improperly been placed under the control of Mrs. Howell.

The Defendants, by their answer, insisted, "that if any breach of trust was committed, touching the said stock, the same was committed by Edward Aldridge, Deborah Aldridge, and John Pricklow; and that they, or their personal representatives, as well as the said William Howell and the personal representatives of Elizabeth Howell, were necessary parties to the suit.

When the cause came on for hearing, on the 25th of June 1841, the Master of the Rolls held, that the other executors of the testator, and the representatives of Mrs. Howell, were necessary parties (4 Beav. 179); but no decision was made as to the necessity of making the representatives of William Howell parties. The cause was ordered to stand over for want of parties, with liberty to amend. The order had been drawn up, but had not been passed by the registrar. In the meantime the General Orders of August 1841 came into operation.

The 32d Order directs, "that in all cases in which the Plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the Court, as parties to a suit concerning such demand, all the persons liable thereto; but the Plaintiff may proceed against one or more of the persons severally liable. (Ord. Can. 174.)" The 51st Order directs, "that the foregoing orders shall take effect as to all suits, whether now depending or [295] hereafter commenced, on the last day of Michaelmas term 1841." (Ord. Can. 178.)

These orders having come into operation, the Plaintiffs procured this cause to be set down to be reheard.

Mr. Pemberton and Mr. Wood, for the Plaintiffs, contended, that by the 32d Order of August 1841, it was unnecessary to make the other persons guilty of the breach of trust, parties to this suit; and that the order was applicable to the present case; for, by the 51st Order, the orders of August 1841 were to take effect as to all suits *then depending*, and that this cause was so circumstanced.

That the object of the 32d Order was to relieve a party, having an independent claim against several persons, from the necessity of making them all parties to a suit.

As to the representatives of William Howell, who was entitled to the other moiety of the fund, being a necessary party, they again relied on *Smith v. Snow* (3 Mad. 10) and *Hutchinson v. Townsend* (2 Keen, 675).

Mr. George Turner and Mr. Craig, *contra*, for Mr. and Mrs. Knott, the personal representatives of Joseph Aldridge.

The orders of August 1841 were never intended to apply to a cause which had been heard and disposed of; and the 32d Order only applies to cases, where, by contract, a joint and several liability is created. Here the liability is not joint and several; a demand cannot be made against one of several executors: they must all be [296] made parties, in order that the accounts, in which they are all interested, may be taken in their presence, and that they may have the benefit of a contribution, if the decree be ultimately worked out against one. How otherwise could accounts be finally taken in a creditor's or a legatee's suit? The suit is therefore still defective for want of parties, first, because the other executors of the testator who joined in the alleged breach of trust, or their representatives, are not before the Court; secondly, because the representative of Mrs. Howell, the person who really committed the breach of trust and received the money, is not a party; and, thirdly, because William Howell, or his representative, is not a party.

The case of *Smith v. Snow* has not been approved of; and it has always been admitted, that the principle of the decision in that case is not to be extended.

They also cited an unreported case of *Attorney-General v. Hughes*, before Vice-Chancellor K. Bruce, in which the Attorney-General had filed an information against the surviving executor and the representatives of a deceased executor to obtain payment of legacy duty, without making the representatives of two deceased executor parties; and the Court (they stated) held that the latter were necessary parties if any account were to be taken.

THE MASTER OF THE ROLLS [Lord Langdale]. I think that the 32d General Order applies to so much of this case as relates to the persons who are alleged to have jointly committed the breach of trust; in the case cited (see *Kellaway v. Johnson*, 5 Beav. 319), there may have been peculiar circumstances to require the decision stated to have been there made.

[297] As to the next point, I conceive this to be a distinct demand for a distinct aliquot part of a distinct sum, and upon the authority of *Smith v. Snow* I think that the representative of William Howell is not a necessary party to the suit.

As to the third objection, I think the executor of Mrs Howell is a necessary party, because she reaped the benefit of the second breach of trust.

It was ultimately referred to the Master to inquire when, and by whom, and under what circumstances, the £1350, was sold out, and whether or not with the privity and assent of the Plaintiff, and whether any part was applied for the benefit of the Plaintiff with liberty to state special circumstances.

[297] HENDERSON v. CONSTABLE. June 30, 1842.

[S. C. 11 L. J. Ch. 332.]

Bequest, after the death of A., of £2500, as A. should appoint, with a gift over "of the same" in default, and to be paid with interest from A.'s death. A. appointed a part to B., and £1630, to other persons, and directed the said sums to be paid at the decease of B., except the one left to himself, which was to be payable at A.'s decease. Held, that the interest on the £1630, accruing between the death of A. and B. neither passed to the appointees of that sum, nor to B. by implication, but went over, as in default of appointment.

The testator, John Henderson, bequeathed his personal estate to his executors, on trust to pay his wife an annuity of £100 a year for life; and after her decease, to pay £2500, "to and among his children or to the children of such of them as should be then dead," as his wife should appoint; and for want of such appointment, or as to such parts whereof no such appointment should be made, upon trust to pay "the same" equally among his six children (naming them), "or to the survivors, or to the children of such of them as should be then dead leaving issue, such issue being [298] entitled to their parent's share thereof, and to be paid at the end of two

alendar months after her decease, with interest for the same from the time of his life's decease."

The widow, by her will, after reciting her power, proceeded thus:—Now "I Sarah Henderson, in pursuance of the said power, &c., do appoint the said sum of £2500 as follows:" she then appointed £1630 only amongst certain objects of the power, and a further sum of £670 to her son William Henderson, and she proceeded in the following words:—The said legacies or sums to be paid at the decease of my son William, except the one left to himself, to be payable at my decease."

The widow died in October 1834, and William Henderson was still living.

The only question arose as to the interest which might accrue on the £1630 between the death of the widow and the death of her son William; the widow having made the sum payable with interest from the death of her son William.

It was contended, first, that the interest must go to the parties entitled in default of appointment, "for what is not appointed, or is ill-appointed, goes as in default of appointment;" and where a fund was given, by the instrument creating the power, to objects in default of appointment the dying without any appointment as to a part is considered equal to an actual appointment; *Wilson v. Piggott* (2 Ves. jun. 351).

[299] Secondly, it was contended by the appointees of the £1630, that the whole fund passed to them with the principal money as an incident thereto.

Thirdly, it was contended on behalf of William Henderson, that there was an implied gift to him of the intermediate interest, *Roe v. Summerset* (5 Burr. 2608); in that case, there was a gift to A. after the death of B., and it was held that B. took the estate by implication.

Lastly, it was contended, on behalf of the residuary legatee, that as there was no appointment of the interest in question, and as the gift over in the testator's will was "the same," viz., the capital, and not of the interest, the residuary legatee was entitled to the benefit of its non-appointment.

Mr. Kindersley and Mr. Elderton, for the Plaintiff.

Mr. Faber, Mr. S. Atkinson, Mr. C. Barber, Mr. Wray, and Mr. Phillips, for the other parties.

Mr. Kindersley, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. From the terms of the testator's will, it appears that the subject of the appointment, and of the gift in default of appointment, is the same; namely, the principal sum of £2500, with interest from the wife's death. The widow has appointed £2300 only, and the interest on the part of it, viz., on £670 from the death of her son William. I think that those who take under the power can only take the sums appointed by her. William, therefore, takes £670 immediately; and the other appointees have the time for payment of these legacies postponed until the death of William, and are entitled to interest only from that date.

I cannot follow the argument that there is a gift to William Henderson by implication; I see no foundation for any such inference: there is a gift to persons in default of appointment, and there must be a distinct appointment in order to defeat the gift.

The interest, which is part of the subject of appointment and of the gift over not appointed, must go as in default of appointment; and the parties taking in default of appointment are therefore entitled to the interest accruing between the death of the widow and the death of her son William.

[300] KENDALL v. GRANGER. July 2, 1842.

[S. C. 11 L. J. Ch. 405; 6 Jur. 919. See *Nightingale v. Goulburn*, 1847, 5 Hare, 490; *In re Macduff* [1896], 2 Ch. 456.]

Gift of personality to trustees, to be "applied for the relief of domestic distress, among indigent but deserving individuals, or encouraging undertakings of general utility." Held, void as a charitable bequest.

The question in this cause was as to the validity of a charitable bequest.

The testator William Kendall, after giving certain legacies, proceeded as follows:—"All the rest and residue of my goods, chattels, testamentary estate, and effects and property real and personal (according to their respective natures and quality, including trust estates), I give, devise and bequeath to the above-named Frederic Granger and John Squance, their heirs, executors, administrators, and assigns, upon trust, with all reasonable expedition, to sell and dispose thereof, as [301] follows:—After converting the whole into money, to divide the produce, and pay to each of the daughters, of my brother lately deceased, who have arrived at the age of twenty-one years, and those now minors when they attain that age, £400. The remaining surplus monies, I will and direct, shall be at the disposal of the said Frederic Granger and John Squance, to be by them applied for the relief of domestic distress, assisting indigent but deserving individuals, or encouraging undertakings of general utility, in such mode and proportions as their own discretion may suggest, irresponsible to any person or persons whomsoever. Provided only, that should any difference or difference of opinion occur as to the application or distribution of any part of such surplus; that I direct, that such differences, as they may arise, shall be submitted by my trustees to the judgment of the above-named Edmund Pollexfen Bastard, and that his decision shall be binding and conclusive on the subject in controversy. It is farther my express wish and intention, that, if practicable, the whole of such surplus monies be distributed and disposed of within three years after my decease."

He appointed Granger and Squance his executors.

The testator died in 1832, leaving both real estate and pure personality of considerable value.

This bill was filed by his heir at law and next of kin, against the trustees, to have it declared that the alleged gift of the residue to charity was void.

The case came on for further directions, and the only question was, whether this was a valid charitable gift as regarded the pure personality.

[302] Mr. Kindersley, Mr. Flather, and Mr. Terrell, for the Plaintiffs.

Mr. Pemberton and Mr. Swinburne, for the Defendants.

Mr. Wray, for the Attorney-General.

They cited *Morice v. The Bishop of Durham* (9 Ves. 399, and 10 Ves. 522), *Williams v. Kershaw* (1 Keen, 227, 232 n., and 5 Cl. & Fin. 111, n.), *Ellis v. Sol* (7 Sim. 352, and 1 Myl. & Cr. 286), *James v. Allen* (3 Mer. 17), *Vezey v. Janssen* (Sim. & St. 69), *Mitford v. Reynolds* (1 Phil. 185. And see *Nash v. Morley*, 5 Beav. 177).

THE MASTER OF THE ROLLS [Lord Langdale]. The question arising upon the will is, whether the trustees are bound to apply the fund wholly to a charitable purpose, for, to make it valid, it must, according to the decisions, be obligatory on them. It is not a question whether the trustees may apply it to a charitable purpose, but whether, by the words of the will, they are bound to do so. The decisions go to this further extent, that they must have no option between a charitable and any other purpose.

This Court has adopted a very narrow construction in deciding what is to be deemed a charitable purpose. It must be either one of those purposes denominated charitable in the Statute of Elizabeth, or one of such purposes as the Court construes to be charitable, by analogy to those mentioned in that statute. The difficulties always arise from the vagueness of the language used by testators. There is a charitable purpose which is not a benevolent [303] purpose, and yet, a trust to apply funds to a benevolent purpose has been held not to be a charitable trust, on the ground that there are benevolent purposes which the Court cannot construe to be charitable purposes; and the trustees, being directed to apply it to benevolent purposes, may apply it to benevolent purposes which are not charitable, according to that narrow construction. So it is also with the word "liberality," which is particularly more vague, for persons may take very different views of what is or is not liberal. In this case the direction is to apply this fund "for the relief of domestic distress, assisting indigent but deserving individuals." I confess, in my view, that if the sentence had ended here, I should have said that this was a good charitable purpose, for its object is to relieve distress by assisting indigent but deserving individuals, and that would be a valid charitable purpose because of the word "indigent;" but the testator goes on to say "or encouraging undertakings of general utility, in a"

ends and proportions as their own discretion may suggest, irresponsible to any person or persons whatsoever." Now a charitable purpose may very well, I conceive, be a purpose of general utility; but the question, which seems to me to arise in this case, as in the case of a gift to benevolent purposes, is, are all purposes of general utility necessarily such purposes as this Court deems to be charitable? I think, that in my opinion, according to the decisions which have taken place in this Court, they are not. The words "general utility" are so large, that they comprehend purposes which are not charitable, and, comprising purposes which are not charitable, trustees have an option to apply them to purposes which are not charitable, and consequently to divert the trust fund from those purposes which this Court is in the habit of considering charitable.

[304] I do not venture to say that I am well satisfied with all the decisions that have taken place on this subject. I think that there are older cases, shewing perhaps that the Court would, in a case where charitable purposes were mentioned, have decreed that the application should have been made to those purposes; but I do not feel myself at liberty to depart from the decisions which have been made on that point. Conceiving myself bound by authority, I must declare that this is not a purpose which can be carried into effect as a charitable purpose.

[304] RICHARDS v. COOPER. July 22, 1842.

Second mortgagee can sustain a bill of foreclosure against the mortgagor and subsequent mortgagees, without making the *eigné* mortgagee a party.

The Plaintiff, who was the second mortgagee of some property, filed his bill of foreclosure against the assignees of the mortgagor, and the mortgagees subsequent to himself, but without making the first mortgagee a party.

Mr. Pemberton and Mr. W. James, for the Plaintiff.

Mr. Bagshawe, for Wood, the fourth mortgagee, objected, that the first mortgagee ought to have been made a party to the suit, for his client was desirous of redeeming, and ought to have the opportunity of redeeming all parties without the necessity of bringing another suit against the first mortgagee.

THE MASTER OF THE ROLLS [Lord Langdale] overruled the objection, and made an ordinary decree for foreclosure. (NOTE.—See *The Bishop of Winchester v. Beavor*, 314; *Rose v. Page*, 2 Sim. 471; *Farmer v. Curtis*, *Id.* 466.)

[305] LOCKHART v. HARDY. July 28, 1842.

In an administration suit, it is referred to the Master to take an account of debts, &c., and claims are made against the estate of such a nature that the Master cannot conveniently dispose of them, application must be made to the Court, which will either give special directions to the Master to proceed, or direct the action, or such other proceeding as the exigency of the case may require.

This was a creditor's suit, and by the decree in the cause the usual accounts of debts, &c., had been directed to be taken by the Master.

The testator had been tenant for life of some property, with power to cut timber and housebote. The Petitioner, who was the party entitled to the estate under, carried a claim into the Master's office, alleging that the tenant for life had sold timber off the estate to the value of several thousand pounds, and claimed the amount as a debt due from the testator's estate.

The Master was of opinion that he was not authorised to take an account of this claim, the claim being for waste and not for a debt, and no such question being raised by the bill.

The remainder-man now presented a petition, asking that the necessary directions should be given to the Master.

Mr. Pemberton and Mr. Lloyd, in support of the petition, contended, that in this case there was no necessity to file a bill to substantiate the claim of the Petitioner, which was as much a debt due from the testator's estate as any other debt. That the Petitioner could not bring an action at law, and that the Master ought therefore to investigate this claim. That as all demands on the estate must be disposed of before there could be an administration, the intention of the reference was to [307] determine all claims on the estate, and that the Master's jurisdiction must therefore be commensurate.

Mr. G. Turner and Mr. Shapter, *contra*. This is not a proper case for the determination of the Master upon affidavit. The course of proceeding in the Master's office is not adapted to such inquiry, where the defence is that the Plaintiff acquiesces and also a claim of set-off. The Master, too, has no jurisdiction to award the costs of the investigation in case the Petitioner should fail.

Paynter v. Houston (3 Mer. 297), and *Baker v. Martin* (5 Sim. 380), were cited.

THE MASTER OF THE ROLLS [Lord Langdale]. It has been referred to the Master in this case, to take the necessary accounts of the estate and of the debts, in order to make a clear fund for distribution; for that purpose it is necessary that all claims against the estate must first be disposed of. It may happen that claims may be brought forward of such a nature that the Master has no authority under the decree to dispose of them; and it may be impossible for him to come to a satisfactory conclusion on them. Lord Eldon said, "That it was the Master's duty to go on with the accounts until he found a difficulty arising from the want of sufficient powers, and that then an application must be made to the Court, either by the Master or the parties, to do that which is necessary, in order to supply the defect of his authority."

I think that where such difficulties arise in the Master's office, they must be brought before the consideration of the Court, and the Court will either give special directions to the Master to proceed, or, if it sees that the Master cannot conveniently determine the matter, it will direct a bill to be filed, an action to be brought, or such other proceedings to be taken, as may be deemed proper, according to the exigency of the case. In this case it may be that the best mode of determining the question will be by filing a bill.

It was ultimately arranged that the Petitioner should file a bill, the Defendants consenting not to set up the Statute of Limitations, otherwise than they would have been entitled to do, if the claim had been investigated in the Master's office.

[307] THE ATTORNEY-GENERAL, Informant, and THE MASTER, &C., OF THE HOSPITAL OF THE HOLY JESUS IN NEWCASTLE, Plaintiffs; and THE CORPORATION OF NEWCASTLE, Defendants. July 14, 21, Nov. 15, 1842.

[S. C. 6 Jur. 789; 12 Cl. & Fin. 402; 8 E. R. 1464 (with note). On the point as to voluntary conveyance, see *Trye v. Corporation of Gloucester*, 1851, 14 Beav. 182. On point as to alienation by founders, distinguished, *In re Patten*, 1883, 52 L. J. Ch. 789. See also *Wiles v. Gresham*, 1854, 2 Drew. 258; *Lander v. Weston*, 1855, 2 Drew. 389; *St. Mary Magdalene, Oxford v. Attorney-General*, 1857, 6 H. L. C. 260; 10 E. R. 1272.]

The 39 Eliz. c. 5, enables "all and every person and persons" to found hospitals, and to create them bodies corporate. Held, that a corporation may exercise the powers given by the Act to "person and persons."

A corporation voluntarily founded a hospital under the 39 Eliz. c. 5, and procured real estates to be conveyed to it, which, however, were subsequently managed by the founders. The founders afterwards sold the hospital property, and conveyed it for valuable consideration to the purchasers, giving them an indemnity; and they applied the purchase-money, together with other monies of their own, in the purchase of the W. estate. The founders accounted to the hospital yearly for more than the rental of the estate sold. Held, that the hospital was entitled to such a proportion

of the W. estate, as the purchase-money of the charity estate contributed towards the purchase of the W. estate.

By the 39 Eliz. c. 5, made perpetual by the 21 Jac. 1, c. 1, it is enacted, "That every person and persons seised of an estate in fee-simple, their heirs, [308] tutors, or assigns, at his or their wills and pleasures, shall have full power, strength, and lawful authority, at any time during the space of twenty years next ensuing, by deed inrolled in the High Court of Chancery, to erect, found, and establish one or more hospitals, Maisons de Dieu, abiding-places, or houses of correction, at his or their will and pleasure, as well for the finding, sustentation, and relief of the aged, poor, needy, or impotent people, as to set the poor to work, to have continuance for ever, and from time to time to place therein such head and members, such number of poor, as to him, his heirs and assigns shall seem convenient: and the same hospitals or houses so founded shall be incorporated and have perpetual sessions for ever;" and that such hospital, &c., shall be a body corporate and sole, and have power to sue and be sued in the corporate name, and have a common seal.

Under the provisions of this Act, the Corporation of Newcastle, in the year 1683, did an hospital, called "The Master, Brethren, and Sisters of the Hospital of the Holy Jesus," for the relief of poor freemen of Newcastle and their families; and for endowment, they purchased and caused to be conveyed to the hospital, two estates called Ederley and Whittle.

The estates, nevertheless, continued to be managed by the Corporation of Newcastle, as if they had been part of the corporate property; the revenues were applied by them for the purposes of the hospital, and the vacancies in the master, brethren, and sisters of the hospital, from time to time, filled up by them as the founders and governors.

In 1715 it became desirable for the Corporation of Newcastle to purchase an estate, called the Walker estate, [309] for the sum of £12,220, and not having sufficient money for that purpose, they determined on selling one of their own real estates, called the East Heddon estate, and the two estates called Ederley and Whittle, with which they had endowed the charity. They accordingly sold their own estate for £10,000, and the Ederley and Whittle estates for £3815, and they carried the money into the corporate chest, and applied it in the purchase of the Walker estate.

In 1716 and afterwards, they applied to Parliament to sanction the transaction, proposed to secure to the charity, out of the Walker estate, a substitute for the property sold: but failing in obtaining the sanction of Parliament, they took upon themselves to convey the two charity estates to the purchasers, and covenanted with them that they should enjoy them as against the hospital, and to use their best endeavours to obtain the sanction of Parliament confirming the title. They gave bonds of indemnity to the purchasers for performing the covenants in the deed, and conveyed a part of the Walker estate to trustees, upon condition that their estate should cease, if they should not obtain the sanction of Parliament for vesting the estates in the purchasers free from the claims of the hospital, and if the purchasers should quietly enjoy the estate, without interruption from the hospital.

The Corporation continued to apply for the use of the hospital, a sum exceeding the value of the two estates sold. The Municipal Corporation Act (5 & 6 W. 4, c. 76) passed in 1835, and an important change was made in the constitution of the Corporation of Newcastle. The members and title of the corporation were varied, and the property of the corporate property was carried to the account of [310] "The Borough of Newcastle," which was made applicable to the payment of the debts of the corporation and borough expenses; in case of a deficiency, it was to be raised by the borough rate. (Sect. 92.)

As the above transactions having been investigated, a suit in the nature of an information and bill was instituted in 1836, by the Attorney-General and the hospital of the Corporation of Newcastle, which prayed a declaration that the hospital was entitled to such a proportion of the Walker estate, as the sum of £3815 bore to the sum of £12,220, and for a conveyance thereof; for an account of the rents from the year 1838, and for a partition if necessary.

The Walker estate had latterly produced about £4000 a year, and the expenditure on the hospital amounted latterly to about £600 a year.

Mr. Pemberton, Mr. Purvis, and Mr. Blunt, in support of the bill and information. The Defendants improperly sold the estates of the charity, and received the purchase money which they have invested in the Walker estate: the charity is therefore entitled to its share of the property purchased with the produce of its estates. I said that the hospital is bound to follow the land, and to recover it back from the hands of the present owners; but a *cestui que trust* has his option of which remedy will pursue, and he may adopt that which he thinks most beneficial. If the Plaintiffs proceeded against the present owners, the latter would have their remedy over against the Walker estate under the indemnity deed.

[311] Mr. Kindersley, Mr. Koe, and Mr. Bates, for the Defendants, contend first, that the Plaintiffs were bound to seek relief against the estates, by following them into the hands of the representatives of the purchasers.

Secondly, that the conveyance to the hospital was voluntary, and was avoided by the subsequent conveyance for valuable consideration to the purchasers. (27 Eliz. c. 2.)

Thirdly, that the hospital had not, under the Act of Elizabeth, been created a corporation; for, by that statute, only "person or persons" were authorized to be corporations for the purposes of the Act; that the Act did not give that power to corporations; that consequently the hospital had no power to sue in a corporate character, and no relief could therefore be granted on this record.

Fourthly, that as the Defendants held the Walker estate under a licence in fee simple from the Crown, and as the hospital had no such licence, it could only recover for the benefit of the Crown.

And, lastly, that the new Corporation of Newcastle were not liable for any loss of trust committed by the old one, otherwise the effect would be to throw upon the present ratepayers the burthen of answering for the *torits* of the old corporation.

Mr. Purvis, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. From the course which this case has taken on the part of the Defendants, I find it necessary to read the [312] pleadings in this case, in order to ascertain the questions there raised, and the points really in controversy. If, on reading those pleadings, I find it necessary to refer to the question which has been urged, I will mention it again, in order that it may be further considered, but subject to that question, there is nothing to hinder me from now delivering my opinion upon the case. I will assume, for the present, that this hospital was founded and endowed. If that be so, what then is the case? There were several estates conveyed to the hospital, by the direction of the Corporation of Newcastle, for the use of the hospital, and by different persons; and supposing the hospital to have been well founded and endowed, the corporation could not, after it had been done, by any means, alter the rights of the charity. This position I apprehend, in conformity with the doctrine of the Court, at all times acted upon, though the endowment was voluntary, and though the person who made it, might have abstained from doing so, yet, after he has made the endowment and founded the charity, he could not, of his own authority, alter that endowment. (See *Att. General v. Dulwich College*, 4 Beav. 255.) The conveyance was made to the hospital, but the estates seem to have been managed by the Corporation of Newcastle. The revenue derived from the estates, and, if I correctly understand the statement, is made, probably more than the revenue derived from the estate, was benevolently applied by the town for the purposes of the hospital, and this continued for a number of years.

In the year 1715 it became desirable, for the corporation of the town to purchase the Walker estate. It appears, from entries in their books, that they had no pecuniary means for that purpose; nor had they means, through the unincorporated property in their [313] own hands, to raise the money for that purpose. What they proposed to do was, to raise money for the purpose, by selling the estate called Heddon, which was their own, and by selling two of the estates with which they had several years before endowed the charity. They had no right to do that, no right to sell those estates not vested in them; and so far as they had any rights as trustees and visitors, those rights could only be exercised in conformity with the trust.

and treated. The whole sum they had to raise amounted to £12,220. They needed to make the sale, and sold their own estate, the East Heddon, for £5300. They sold the charity estate at Whittle for £2200, and sold the charity estate at Berley for £1615, and by these means they brought money into their own coffers the amount of about £9000. As the estate of Walker was conveyed to them, and does not appear that there was any charge on it, I assume that they obtained the remaining sum by other means. All this was done in a manner which they knew to be invalid. They applied to Parliament for its assent. What they proposed was, that Parliament should sanction the alienation of the charity estates, and sanction a substitute being given to the charity out of the Walker estate. After long consideration it appears they failed in obtaining the sanction of Parliament, on the ground, I assume, that they did not shew that what they proposed was beneficial to the charity. Not being able to obtain the authority of Parliament, they proceeded in the best way they could to satisfy the purchasers; they took upon themselves to give conveyances to the purchasers, and gave bonds of indemnity; they procured advances to be made to trustees for the further indemnity of the purchasers, and the purchasers had therefore a good notice of this transaction as the vendors.

[14] The matter has gone on from that time to this; and it appears, from the account made in the corporation books, which is in no way disputed, to be a thing fully manifest, that the purchase-money arising from the charity estates was paid with funds belonging to the corporation, and applied in the purchase of the Walker estate. The counsel for the Defendants properly abstained from endeavouring to draw from the figures that it must not have been so. After a long lapse of time persons who advise the hospital have thought fit to have this transaction investigated, and the question is, what are the rights of the parties under the circumstances as stated, which I state without prejudice to the question I adverted to in the

It has been singularly put at the Bar, that if there are two remedies, if the charity either follow the estate, or sue for the substitute obtained by the trustee for the breach—if it has an option, then that that course ought to be adopted which is most beneficial to the person who committed the breach of trust. That proposition is a new one; I have always understood that if the *cestui que trust* suffers from a breach of trust, he is entitled to that remedy which is most beneficial to himself; and I find every day that with respect to the restitution of property, in cases where property has been laid out on an improper security, the *cestui que trust* chooses that which is most beneficial to himself. And that is the law of this Court.

But it is said that this is a new corporation. I have had on more than one occasion to consider the effect of the Municipal Corporation Act on this point, and I considered that it is not a new corporation, but a newly-constituted government corporation; that what is called the new corporation remains subject [315] to the liabilities of the old corporation, and which are to be satisfied in the same manner as if no alteration had taken place. (*Attorney-General v. Kerr*, 2 Beav. 429.)

But some hardship occurs where liabilities are fixed on the ratepayers in a town which they were not subject to before the Act; but the liabilities of the old corporation are transferred with their corporate property to the new corporation, which is a continuation of the old corporation, with a change of government. There are many very great political changes effected by the Act, but in other respects the corporation is not legally

It comes, therefore, to this position, that the corporation, having the possession and power over the charity property, sold it, and received into their own coffers the purchase-money, and laid it out as their money with other money which was their own, in the purchase of another estate. As this was a breach of duty in persons who had the control of the property, the *cestuis que trust* have a right to such relief they will have, and they claim relief against the estate that was sold. What they say to the Defendants is this: "You purchased the estate for £12,220; we desire to have such a proportion of the estate as our purchase-money bore to the whole; we ask to have so much of the estate as will correspond in the proportion which our part of the purchase-money bore to the whole purchase-money laid out."

I cannot think there can be a reasonable doubt of their right to that, provided they have the right to sue. I think the result of this case must depend upon that question :—raised probably by surprise, but if it is properly raised by the pleadings, the Defendants have a right to have the benefit of it.

[316] I will read the pleadings, and see whether the question as to the constitution of the charity, is raised on these pleadings, for if it is not, I think it is too much to say that the Defendants are entitled to advance it by surprise on the other parties at the hearing.

July 21. THE MASTER OF THE ROLLS [Lord Langdale]. In this case an objection was raised during the argument for the Defendants, with respect to the constitution of the charity and the right of the hospital to sue in a corporate character. It was doubtful whether that question had been raised by the pleadings, and on looking at the pleadings it certainly is very doubtful whether the question is properly raised or not ; for although, on one or two occasions it is submitted to the Court, whether there was a due constitution of the corporation, it is more than once admitted, in the same answer, that there was a corporation ; it becomes however quite immaterial, because on looking into the Commentaries of Sir Edward Coke on this very statute, he has fully provided for and fully answered all the objections raised on that point. (1) The decree must be, that the Corporation of Newcastle are to be considered as trustees of such a proportion of the purchased estate as the purchase-money derived from the charity estate bears to the whole purchase-money ; and it must be referred to the Master to inquire what that is, if it be necessary to make any inquiry. It was alleged on the hearing, [317] that it would appear that the whole of those sums were not really derived from the sale of the charity estate, as part of those sums had been applied in purchasing up leasehold interests granted by the hospital and existing at the time. No detail was entered into upon the subject, and I am unable to form an opinion upon it ; but if necessary it must be referred to the Master to inquire what proportion of the whole purchase-money was paid with the purchase-money derived from the charity estates.

I think the whole £3815 being the amount of the monies arising from the sale of the Whittle and Ederley estates, must be taken to have been so applied, unless the Defendants can shew that they could not have obtained such a price except by putting themselves in a situation to give possession, which could not have been done without buying up the leases ; the real purchase-money obtained will then be the whole purchase-money received, less the sum given for surrendering up the leases. If the Defendants can prove those sums, I should certainly be disposed to say they ought to be deducted. What I take to be established is, that £12,220 was the whole purchase-money of the Walker estate ; and the amount of those several sums of £2200 and £1615, must, *prima facie*, be taken as having been applied in the purchase. But if this was really not the value of the charity estates, but the value of the estates and the existing leases, then you would have to deduct the value of the existing leases provided the state of the account between the charity and the corporation is ascertained, for there is not the means of doing it otherwise. The purchase-money after the deductions, will be the amount of the charity estate applied to the purchase of the Walker estate.

[318] I do not think the expenses ought to be deducted at all. The arrangement was merely for the advantage and benefit of the corporation, and they, therefore, must pay the costs of it.

Declare the hospital entitled to such part of the Walker estate as is commensurate with the amount of the purchase-money contributed by the charity estate, and that the whole amount of the produce of the charity estates must be deemed to have been contributed, unless it shall appear that some portion of it was applied in the purchase of existing leasehold interests granted by the hospital ; and refer it to the Master.

(1) 2 Co. Inst. 722, n. 1.—“These words” [i.e., all and every person and person] “regularly doe extend to any body politick or corporate, but not to such as are restrained by any Act of Parliament to alien, &c., but doth extend to such bodies politick and corporate as may alien : as maiors and comminalties, bayliffs and burgesses, &c., and the like, and to all other persons whatsoever.”

quire whether any and what sums were so applied in the purchase of such leasehold interest. (NOTE.—An appeal is pending in the House of Lords [12 CL & F. 402].)

[319] KELLAWAY v. JOHNSON. July 22, 1842.

[S. C. 6 Jur. 751. Cf. *Perry v. Knott*, 5 Beav. 293; 49 E. R. 590.]

consols were settled to the separate use of the wife for life, with a power to appoint it by will, and the settlement contained a power for the trustees, with the consent in writing of the wife, to alter the securities. The trustees, without such consent, sold the consols, and invested the produce in long annuities, which they afterwards sold and lent the money on bond, which was afterwards received by the husband, who invested it in leaseholds. The wife received the long annuities until sold, and afterwards joined her husband in executing a deed, reciting that the sale of the long annuities and the subsequent investments had been with her consent. Held, that the appointees of the fund under her will were entitled, as against the husband and trustees, to have the consols replaced, and that the interest over which the wife had a general power of appointment was not liable to make good the breach of trust.

Since the orders of August 1841, it is not necessary to make all the persons committing a breach of trust parties to a suit for its restitution.

By the settlement, made on the marriage of Mr. and Mrs. Letts in 1797, a sum of £3000 consols was vested in trustees, upon trust for Mrs. Letts for her separate use for life, with remainder to her husband for life, with remainder to the children of the marriage, and if there should be none (which event happened), in trust, as to one-half for such persons as Mrs. Letts should by will appoint, and in default for her next kin.

The settlement contained a power for the trustees, with the consent of Mr. and Mrs. Letts, and the survivor, testified in writing under their hands or hand, to sell the consols, and invest the produce "upon any other public, or on real security or securities of the interest, or in the public stocks or funds, or in the purchase of freehold or copyhold hereditaments; and from time to time, with such consent and approbation, to alter and transmute the same, and to sell and dispose of the hereditaments so to be purchased; and such hereditaments were to be considered as money, and personal estate.

In 1799 the four trustees sold out the consols, and the produce, amounting to the sum of £2040, was invested in the purchase of £102 long annuities.

[320] In February 1801 the long annuities were sold by the trustees, and the produce, amounting to £1760, 15s., was lent on bond. The bond was afterwards paid, and the amount was received by Mr. Letts.

The dividends on the £3000 and the long annuities, until sold, were received by Mrs. Letts; but no other part of the income, so far as appeared by the evidence, had been received by her.

By an indenture, dated in September 1801, and executed by and made between Thomas Letts and Esther his wife of the one part, and two of the trustees of the other part, after reciting the sale by the four trustees of the said long annuities, at the request and by the consent and approbation of Mr. and Mrs. Letts (testified by their signing and executing that deed), and the placing out the produce thereof, with the consent and approbation on such bond as aforesaid, and that the said Thomas Letts had received nearly the whole of the monies thereby received, and was desirous of placing out the same in the purchase of leasehold premises, or other personal security to the best advantage he could, and after reciting that he had, with £1250, purchased certain leaseholds, Mr. Letts thereby acknowledged the £1250 was the produce of the trust monies, and that he would, at the request of his wife or the trustees, assign the leaseholds to the trustees; and he covenanted with the trustees that it should be lawful for his wife to receive the rents for her life.

Mrs. Letts died in 1818, without having had any child, having, by her will,

Letts a settlement was made of a sum of £3000 consols, the dividends of which were to be paid to the wife for life for her separate use, with remainder to Mr. Letts, and remainder to the children of the marriage, and if no children, one-half of the principal was to go to the husband, and the other half to such persons as the wife should appoint by will, and there was a gift over in default of appointment. There was a power for the trustees, with the consent in writing of the husband and wife, to sell the stock, and invest the produce on public or real securities, or securities of interest, or in the public [324] stocks or funds, or in the purchase of freehold or leasehold hereditaments. The stock was sold out, not for any of the purposes mentioned in the settlement, but for the purpose of applying it in the purchase of long annuities. In February 1801 these long annuities were sold for £1760, 15s. The money, instead of being invested in any of the securities pointed out, was lent on bond; and the bond was afterwards paid off, and Mr. Letts, who received the money, applied it in the purchase of a leasehold estate.

A more clear breach of trust was never committed. The wife afterwards executed a deed of 1801, which did not bind her, because she was induced by the husband, to take the benefit of the breach of trust, to execute this deed. The wife by her deed executed the power, and the Plaintiffs are entitled under the will. She died in 1801, having had no children and she left her husband surviving. He died on the 1st of February 1834, and his executors are the first-named Defendants on this bill. The question is, if the representatives of Mr. Letts and the trustees who were named are not answerable; and it is clear that the trustees are answerable, as well as the representatives of Mr. Letts, who had the benefit of the breach of trust.

If the stock had not been improperly sold out for an improper purpose, there would have been no loss or diminution of the trust fund. All the trustees were liable to it; all the trustees concurred in selling the long annuities; and each and every one of them is answerable for any future loss, the root and cause of such loss being the original selling out of the stock. The estates of the trustees, therefore, are all liable; the stock must be replaced with the dividends since the death of Letts. The leasehold estate, in the purchase of which the trust fund was invested, still exists, and the Plaintiffs have a right to make it available to satisfy the breach of trust.

[35] I think it is not necessary to have all the persons liable before the Court; under the New Orders, if one trustee only was present, I should make a decree against him, leaving him to seek contribution from the other trustees.

It was declared that the estates of Letts and of the trustees were liable to pay one moiety of the £3000 consols, and to make good the dividends accrued since the death of Mr. Letts, and to pay the costs of the suit; and it was declared that the leasehold estate and the rents received since the death of Mr. Letts, were jointly liable to the claim of the appointees of Mrs. Letts.

[325] WILLIAMS v. WENTWORTH. July 20, 21, August 1, 1842.

Taylor v. Taylor, 1851, 3 Mac. & G. 429; 42 E. R. 327; *In re Meares*, 1879, 10 Ch. D. 553; *In re Rhodes*, 1890, 44 Ch. D. 99.]

A will will raise an implied contract, and give a valid demand or debt against the testator or his estate, for monies expended for the necessary protection of his person and estate.

On a commission of lunacy, A. B. was, upon inquisition, found lunatic, and the finding was confirmed upon the trial of a traverse. Before the costs had been paid to be raised A. B. died. Held, that under the 3 & 4 W. 4, c. 104, the estate of the lunatic was liable for the costs of the proceedings.

In this case, the Plaintiff, representing himself to be a creditor of Charles Henry [name obscured], filed his bill, on behalf of himself and all other the creditors of the [name obscured] person, to obtain payment of his and the other debts out of the real and

personal estate of the debtor. The heir at law put in a demurrer to the bill, and alleged that upon the bill it did not appear that the Plaintiff was a creditor.

The case was this:—Charles Henry Tubb was a lunatic; the Plaintiff petitioned for a commission of lunacy, which was duly issued. Upon the inquisition, a verdict of lunacy was obtained, and upon the trial of a traverse, [326] was confirmed. By an order of the Lord Chancellor, it was referred to the Master to tax the costs: to inquire what fund there was for payment, and if no fund, whether it would be proper to raise the amount by sale or mortgage of the real estate. Pending the proceedings before the Master, the lunatic died; and the Lord Chancellor acting under his jurisdiction in lunacy, had no longer power to raise the costs by sale or mortgage of the lunatic's estate, but under an order afterwards made, the costs were taxed at the sum of £1168, 16s. 8d. The Master's report was confirmed, and by an order, made by the Lord Chancellor "in the matter of the lunacy," it was declared that the costs had been properly incurred for the benefit of the lunatic, and the bill also alleged, that they were necessary for the protection of the person and estate of the lunatic.

Mr. Kindersley and Mr. Dixon, for the heir at law, in support of the demurrer. The Plaintiff has no valid demand as against the real estate of the lunatic. He must rest his claim on the 3 & 4 W. 4, c. 104, which makes the real estate of persons "assets to be administered in Courts of Equity for the payment of the just debts of such person, as well debts due on simple contract as on specialty." This is not a debt on specialty: if it were, it would be plainly invalid, being created by a lunatic; is it then a debt on simple contract? Now this claim is not in the ordinary use of the term a "debt" at all; nor is it possible that any contract could be entered into between the lunatic and the Plaintiff. It would be extraordinary indeed, if a stranger by his voluntary interference could charge the heir. In *Carter v. Beard* (10 Sim. 7) a person who was a lunatic, [327] but had not been found to be so by inquisition, died, seized of a small freehold estate, but not possessed of any personal property. His step-father had received the rents of the estate, and had expended more than the amount of them in maintaining the lunatic; he had also paid the lunatic's funeral expenses. It was held that he was not entitled, under 3 & 4 W. 4, c. 104, to be paid either the surplus expenditure, or the amount of the funeral expenses out of the lunatic's freehold estate.

Under the 1 W. 4, c. 65 (sect. 28), the Lord Chancellor has power to sell or charge the real estates of a lunatic, for the payment of his debts or engagements, or the costs of obtaining the commission of lunacy; but the powers are expressly limited. (Sect. 30.) That power has not been exercised, and upon the death of the lunatic, the Lord Chancellor had no longer the power to charge the estate, which then became the estate of the heir, and was not the estate of the lunatic.

Mr. Pemberton, Mr. G. Turner, and Mr. Willcock, in support of the bill. In the case of a lunatic the law raises a contract, by implication, for necessities, in the same way as it does in the case of an infant, and, as against a husband, for necessities supplied to his wife. *Manby v. Scott* (1 Sid. 112), *Baxter v. Lord Portsmouth* (5 B. & C. 170), *Wentworth v. Tubb* (1 Y. & C. (Ch. Ca.) 171; affirmed by the Lord Chancellor, Nov. 11, 1842). In *Howard v. Lord Digby* (2 Cl. & Fin. 634), Lord Brougham considered a lunatic was as liable for money paid to his use for necessities, &c., as a person of sound mind, for otherwise he might be left destitute; and his Lordship [328] ship, after stating the facts of Lord Portsmouth's case, said, "The practice is the same in Chancery on matters of lunacy. Nothing is more common than for the Chancellor to confirm a Master's report making allowances to A. B. for monies paid for the use of the lunatic—to C. D. for having maintained the lunatic; to E. F. for having clothed the lunatic. Upon what ground are all these allowances made? Not from kindness, not from charity, not for the convenience of the parties, but because they are debts; because, in the eye of that Court, be it a Court of law or a Court of Equity, or the Chancellor sitting in Lunacy, they are valid debts incurred by the insane person, and are discharged by the justice of the Court."

In *Carter v. Beard*, the Vice-Chancellor of England conceived that the expenditure by the lunatic's step-father beyond the rents, for the maintenance of the lunatic, was an act of bounty," and that the funeral expenses were "not a debt contracted by the

matic;" in fact, that they could not constitute a debt of the deceased party, as they are not due at his death.

The words "simple contract" comprise an implied contract as well as any other. The personal estate of the lunatic would formerly have been liable to this demand, and now, by the statute, the real estate is equally liable.

They also cited *Brown v. Joddrell* (3 Car. & P. 30), *Dane v. Lady Kirkwall* (8 Car. & 679), *The Earl of Bath v. The Earl of Bradford* (2 Ves. sen. 587).

[329] Mr. Kindersley, in reply.

THE MASTER OF THE ROLLS. I will consider this case.

August 1. THE MASTER OF THE ROLLS [Lord Langdale]. It was argued in this case that however beneficial to the lunatic, the expenditure may have been, yet, as the lunatic was incapable of contracting, no debt could be constituted; but I am of opinion, that in the case of money expended for the necessary protection of the person and estate of the lunatic, the law will raise an implied contract, and give a demand or debt, against the lunatic or his estate, and that under the circumstances of this case, a debt was constituted, and that payment of it may be obtained out of the real estate, if the personal estate be insufficient. Any other conclusion, as it appears to me, be extremely dangerous, as well as contrary to the principles upon which several cases have been decided. That which is necessary for the protection of the person and estate of the lunatic, may well be subject to demand and consideration; but when a demand is made in respect of a necessary of that kind, I do not see how it is to be distinguished, in principle, from a demand in respect of the supply of food and clothing. A debt is constituted by the law of a contract, which, in such cases, the law will supply, and it rests, as I conceive, upon a far better foundation than the rule which has sometimes been laid down—that a man shall not be allowed to stultify himself. Overrule the objection.

[330] BAMPTON v. BIRCHALL. July 22, August 1, 1842.

[S. C. affirmed on appeal, 1 Ph. 568; 41 E. R. 749.]

A suit abates after a demurrer has been filed, but before it has been heard, the Plaintiff and those representing him may file a bill of revivor and supplement the purpose of having the demurrer disposed of; but the equity of the original bill being challenged by the demurrer, the Plaintiff in the second bill is not at liberty to claim the same or additional relief by adding supplemental matter in corroboration of the original claim, and not required for the purpose of shewing against whom an order to revive may be properly obtained.

The 10th of the General Orders of August 1841 does not apply to a cause which has abated before those orders came into operation.

A demurrer to the Plaintiff's previous bill having been allowed (5 Beav. p. 67), the Plaintiff, in June 1842, filed a new bill. It stated that on the 14th of May 1832 a bill was filed by William Blackburn, as the assignee, under an Act for the relief of Insolvent Debtors, of Thomas Standish otherwise Stanley, and representing Sir Frank Standish, on the 12th of May 1812, died seised of real estates with and without issue, leaving Thomas Standish or Stanley his heir at law, and on the death of Sir Frank Standish, Frank Hall Standish took possession of the estates without having any title thereto, and that the Plaintiff had commenced a writ of ejectment to recover possession of the estates, but that there were various terms and incumbrances, which Frank Hall Standish intended to set up in bar to the action; and that the bill prayed, that he might be restrained from doing so, and that all impediments to the fair trial of the action might be removed, and that the Plaintiff might have such further relief.

To this bill a general demurrer for want of equity had been put in, but had been disposed of.

That eight years after the bill was filed, namely, in December 1840, Frank Hall Standish died, and that the Defendants by virtue of some pretended will of the said F. H. Standish, "by which they pretended they had become the devisees in fee, or legal [331] personal representatives of the said F. H. Standish" entered into possession of the estates without having any title thereto. That the insolvent died in July 1836, leaving, as this bill alleged, James Standish his heir and the heir of Sir Frank Standish. That the Plaintiff Blackburn died in March 1841, and soon after his death the present Plaintiff was appointed assignee of the insolvent's estates: and that in this way all the rights and interests of the Plaintiff in the original bill had devolved upon the Plaintiff to the present bill; and that all the rights and interests of Frank Hall Standish, the Defendant to the original bill, had devolved upon the Defendants to this bill, who were entitled under the will of Frank Hall Standish.

The present bill also alleged the continued existence of outstanding terms of years and that certain mortgages and leases were subsisting:—that some satisfied terms had become vested in the Defendants, and that some of the mortgages or incumbrances were vested in Frank Hall Standish at the time of his death, and had since become vested in the Defendants, and that others were vested in other persons; that the action brought against Frank Hall Standish by the original Plaintiff had become wholly abated, and that the Plaintiff had commenced a new action against the Defendants or their tenants, and that the Defendants threatened and intended to set up the outstanding terms, mortgages, &c., as a defence; that the Plaintiff was under the circumstances unable to recover at law; that very little was due on the mortgage, and that it had been paid out of the rents. It charged that the original bill became abated by the death of Frank Hall, otherwise Frank Hall Standish, and that the Plaintiff as such assignee as aforesaid was entitled to have the same revived, and charged that Frank Hall Standish and the Defendants [332] since his death had verbally and in writing, admitted the several matters and things in the original bill and in the present bill stated and charged to be true.

The bill prayed that the original suit might be revived, and for a declaration that the Plaintiff was entitled to the full benefit of the proceedings in the original suit, and of the supplemental matter against the new Defendants, and if necessary that the demurrer might be set down to be argued; it then prayed a declaration that the Plaintiff was entitled to the estate, or that an issue might be directed for trying the right, or that the Plaintiff might be at liberty to try his title by ejectment; and if it should appear that the Defendants were entitled to any mortgage, that the necessary accounts might be taken of the rents received, and that the Defendants might be decreed to pay to the Plaintiff what should be found due from them; that the legal estate and the title-deeds might be conveyed to the Plaintiff, and that the Defendants might be restrained from setting up the outstanding terms on the trial of any action commenced or to be commenced against the Defendants.

To this bill a demurrer was filed for want of equity and for want of parties.

Mr. George Turner and Mr. Elmsley, in support of the demurrer. First as to the want of equity. There is no authority for a bill framed like the present, it is neither a bill of revivor and supplement, nor an original bill, but is a mixture of both.

A demurrer having been filed to the original bill, the present Plaintiff has no right to call for any answer from the representatives of the original Defendants. He is [333] not entitled to revive the suit merely for the purpose of availing himself of the previous proceedings, so as to prevent the Statute of Limitations running; but if he be entitled to do so, he can only state by way of supplement, such matters as may be necessary for the purpose of reviving the abated suit.

The original bill was to restrain the setting up of certain outstanding terms upon the trial of an action at law then commenced. That action is wholly abated, and cannot, by the rules and principles of the Common Law Courts, be revived; it is therefore useless to revive a suit in equity in aid of an action which has wholly determined. The Statute of Limitations (3 & 4 W. 4, c. 27) is applicable to the action which has since been brought, and there is no sufficient acknowledgment in writing stated upon this bill to avoid its operation. It is not stated that the acknowledgment was signed by the Defendants, nor that it was delivered to the

erson entitled. (Sect. 14.) It is therefore insufficient to prevent the operation of the ecent statute, which not only bars the remedy, but extinguishes the right. (Sect. 34.)

If the Plaintiff claims as representing the deceased Plaintiff, he must be bound by ll the proceedings in the former cause. He must come forward upon the strength of he title of the party he represents, and of him alone; here the Plaintiff claims under new title, upon subsequent acknowledgment, and he seeks assistance in respect of a ew action at law commenced by himself.

Again, as the Plaintiff has not set down the original demurrer, it must be held efficient. 34th General Order of August 1841. (Ord. Can. 174.)

[334] Secondly, the personal representative of Frank Hall Standish is a necessary arty to this suit, in order that he may account for the receipt of the rents by his ator. The allegation is, that the Defendants "are the devisees in fee, or the legal eonal representatives of Frank Hall Standish." This allegation is to be taken ainst the pleader, and the Defendants must be therefore considered to be the vices, and not the legal personal representatives of Frank Hall Standish; *Balls v. larygrave* (3 Beav. 284).

Mr. Pemberton and Mr. Bilton, *contra*. The question on this demurrer is not hether the Plaintiff is entitled to an answer, or whether he is not entitled to all the ief prayed, but whether he is entitled to none. The Plaintiff, on whom the rights e original Plaintiff have devolved, has a clear right to have the bill revived for e purpose of having the pending demurrer disposed of. This part of the relief not be denied him, and it was the fault of the Defendants, who had the power of tting down the demurrer, that it was not done: *Anonymous* (2 Ves. jun. 287). It es not appear that in fictitious proceeding, like an action of ejectment, the death of e nominal parties would prevent its being ever continued.

Under the prayer for further relief contained in the original bill, an issue might directed. All the authorities were examined in the case of *Strickland v. Strickland* eav. 242, but not reported on this point), and the result was, that in these cases e Plaintiff might either have an issue, or an injunction to restrain the setting up of estanding terms. If he succeeded in the issue, he would be entitled to the mesne [35] profits from the filing of the bill. The Statute of Limitations, therefore, would t affect the pending suit. The Plaintiff is right in stating the new facts by way of pplement. The practice is, that if facts arise after the filing of the original bill, the intiff has a right to bring them forward and put them in issue by a supple- mental bill.

The acknowledgment in writing is sufficiently stated, and it will be for the intiff to prove all the requisites at the hearing. A demurrer would not hold to a ll for specific performance which stated the contract to be in writing without stating to be signed, nor to a bill to establish a will which was alleged to be in writing and ly executed, but omitting the statement as to attestation.

The present Plaintiff has, at all events, a right to relief in respect of his alleged mortgage title.

The 32d New Order of August 1841 (Ord. Can. 174), renders it unnecessary to ke the personal representative of Frank Hall Standish a party, and it applies to rt only of the relief, which might be waived at the hearing. The 34th General der does not apply to an abated suit.

Mr. G. Turner, in reply. The first action at law became wholly abated by the th of the parties before judgment, and it could not, therefore, be revived by *scire ias*. (2 Saunders, 72 k. (5th edit.) Where the Plaintiff in a suit dies, his repre- entative cannot file a bill of revivor as representing the original Plaintiff, and in an ependent right of his own. In *Cholmondeley v. Clinton* (2 Mer. 171) an alternative e was not permitted.

[336] *Russell v. Sharp* (1 Ves. & B. 500), *Perry v. Jenkins* (1 Myl. & Cr. 118), *Wren v. Kymmersley* (cited 1 Myl. & Cr. 122, and *Redesdale*, 68), were cited.

THE MASTER OF THE ROLLS [Lord Langdale] (after referring to the statements as e original bill, and after stating the deaths of the parties, and that the rights of e Plaintiffs and Defendants respectively to the original bill, had devolved on the intiff and Defendants to the present bill respectively), proceeded thus:—

This is, *prima facie*, a proper state of things for a bill of revivor and supplement.

Revivor is necessary in consequence of the deaths of the parties. The facts shew the devolution of title are proper to be stated by way of supplement. I think that the circumstance of a demurrer being pending, does not, of itself, make any difference. As either party might set down a demurrer to be argued, neither under the old rule of the Court, complain, or take advantage of the delay if he had himself acquiesced; and if an abatement took place whilst the demurrer was pending, there seems no reason why the Plaintiff might not revive for the purpose of having the demurrer disposed of. The new rules make it the duty of the Plaintiff to set down the demurrer, and give to the Defendant the allowance of the costs if that duty be neglected, and the rule is applicable to all pending cases, and I apprehend, to all cases so circumstanced that the proceeding can be taken. I think that it can be applied to a case in which, from the abatement, no proceeding could be taken.

I think that in a case like this, the Plaintiff might be at liberty to revive the suit for the purpose of having [337] the demurrer disposed of. The purpose of revivor and supplement proceeds further than merely for the purpose of having the demurrer disposed of. It alleges the continued existence of outstanding terms of years, and that the mortgages and leases are subsisting; that some satisfied terms have become due in the Defendants, and that some of the mortgages were vested in F. Standish at the time of his death; that the action brought against F. Standish by the original Plaintiff had become wholly abated, and that the Plaintiff had commenced a new action against the Defendants, or their tenants; and that it is intended to set up the outstanding terms, as a defence; and it charges, that F. Standish and the Defendants have, verbally and in writing, admitted the Plaintiff's title; and it not only prays that the original suit may be revived, but also a declaration that the Plaintiff is entitled to the full benefit of the proceeds of the original suit, and of the supplemental matter, against the new Defendants, if necessary, that the demurrer may be set down to be argued; and it prays for relief, not inconsistent with the relief asked for by the original bill, but of an extensive character, and founded on the supplemental matter.

It appears to me that whilst the equity of the original bill is challenged by the demurrer undisposed of, a party claiming in the same right as the original Plaintiff (supposing him to be at liberty to file a bill of revivor and supplement, and to add supplemental matter as may be necessary to shew by and against whom a revivor may properly be obtained) is not at liberty to claim the same, or to ask for relief, by adding supplemental matter, in corroboration of the original claim. I think that relief required for the purpose of shewing by and against whom an order to set down the demurrer may properly be obtained. This bill attempts to do that, and on that ground I am of opinion, that the demurrer must be allowed, and I think that it is proper that I should give leave to amend. [NOTE.—An appeal in this case was argued before the Lord Chancellor, and stands for judgment.]

[338] THE ATTORNEY-GENERAL v. THE MERCHANTS VENTURERS' SOCIETY
May 28, 30, August 1, 1842.

[S. C. 11 L. J. Ch. 355; 6 Jur. 772; affirmed on appeal, 17 L. J. Ch. 100.]

A. B. entered into an arrangement with a body corporate for the endowment of a school, and conveyed real estates to them of a computed definite value, and stipulated to maintain the charity for certain fixed sums of rents of a computed definite amount, to which they agreed to abide. The corporation was bound to maintain it, though the rents should fall, and certain persons were bound to the corporation. There was a clause of forfeiture on their non-performance. Held, nevertheless, upon the context of the foundation deed, that the corporation were bound to maintain the charity, even if the rents should fail, so that the charity was entitled to the benefit of any increase in the rents.

This was an information filed by the Attorney-General, and the

for the Defendants, who, it was admitted, were bound to keep up a charity for maintenance and education of 100 boys, even in case of a deficiency of the charity estates for that purpose, were entitled to the surplus of the rents, exceeded the necessary amount. There was a second question, which is stated 336. The first question arose under the following circumstances:—

About the year 1706 Mr. Edward Colston, a native of Bristol, was desirous of building a hospital or charity there, for maintaining and educating fifty poor boys, putting them out as apprentices, and that such charity should be conducted by a society there, called the Society of Merchants Venturers of the City of Bristol, of which Mr. Colston was a member. It [339] was proposed that the charity should be supported by a sufficient revenue arising from land, which, as to the greater part, was to be purchased for the purpose, and after a correspondence between Mr. Colston and the society, as to the expense of maintaining the charity, the society, with a view to the endowment of the charity, and acting on the behalf of Mr. Colston, and at his expense, procured to be conveyed to him a mansion-house in St. Augustine's parish, Bristol, and the manor of Beere, and lands in Somersetshire. These hereditaments, together with the manor and rectory of Locking, and certain lands there which belonged to Mr. Colston, were computed to be of the annual value of £720, subject to the payment of taxes and outgoings; and the society having reckoned on maintaining the charity of fifty boys at £634, 5s. per annum, it was concluded that if independent provision were made for the payment of taxes and some of the revenue arising from the estates would be more than sufficient to pay the outgoings, and the charges for fifty boys. But before the arrangement was made, Mr. Colston desired to extend the benefit of the charity to fifty more boys, making the whole 100 boys, and for that purpose to appropriate fee farm rents to the amount of £558, 16s. per annum, and the society, considering that the charge of educating fifty boys would be £553, 5s., agreed to accept the trust.

Accordingly, by an indenture bearing date the 25th of November 1708, and made between Edward Colston of the first part, Sir John Duddleston and several other persons named as feoffees of the second part, and the Society of Merchants Venturers of the third part, it was witnessed, that Colston conveyed to the feoffees and their assigns a mansion-house at St. Augustine's Back, the manor of Beere, with divers tenements there (some [340] of which were held by tenants on leases for lives), the rectory and advowson of the vicarage of Locking, and the tithes and profits of the manor and rectory of Locking, the advowson of the vicarage of Locking, and the tithes and profits of the manor and rectory of Locking, to hold to the feoffees in fee, with a proviso, that the feoffees were to permit the society to hold the manors and premises with the appurtenances, to grant, renew, and fill up leases, and copyholds, and receive the fines, and likewise the rents, issues, and profits of the manors and premises, upon the trusts, confidences, and for the only ends and purposes following. The trust was to permit the mansion-house to be used for the habitation of fifty boys and schoolmasters, to maintain the boys and put them out apprentices, and to maintain the house.

And then proceeded as follows:—"And forasmuch as the said master, assistants, and commonalty of the Merchants Adventurers have computed the costs and charges of the maintenance of the said fifty poor boys, in manner and form of a good schoolmaster to teach them to read, write, and learn arithmetic, and the church catechism, and the charges of the reparation of the said house, with the allowance of £10 for placing each boy apprentice, will amount to the sum of £634, 5s. per annum, he, the said master, assistants, and commonalty of Merchants Adventurers, do consent to accept of the said £634, 5s. per annum, and which shall be in the first place taken out of the rents and profits of the said manors and premises, as a sufficient allowance for the purposes aforesaid, and that the surplus of the rents and profits of the said manors and premises shall be [341] disposed and applied towards the payment of the said charges, wherewith the said manors and premises are, and shall be chargeable unto. And for preventing and avoiding of all disputes and controversies touching the yearly value of the said manors, lands, and premises; and to the end the

fund and provision hereby made shall not, on any pretence, be deemed or taken to be deficient, it is agreed, by and between the said parties to these presents, and hereunto so declared, that the said manor and lands above mentioned to have been purchased of the said Edmund Bowyer, are of the yearly value of £450, and the said manor and lands of Locking are of the yearly value of £250, and eight cellars and lofts, being a parcel of and belonging to the said great house on St. Augustine's Back, are estimated to be of the yearly value of £20. All which rents, amount in the whole to the sum of £720 per annum, out of which the said sum of £634, 5s. per annum being deducted there will remain the yearly sum of £85, 15s.; out of which said £85, 15s., all the outgoings wherewith the said manors and premises are, or shall be subject or liable unto, are to be paid and discharged.

"And whereas the taxes payable out of the said premises are computed to amount unto the yearly sum of £62, 14s. 8d., as by the first schedule hereunto annexed appears, which taxes are to be paid by the said Edward Colston in manner herein expressed.

"And whereas the outgoings necessarily incident thereto are by the first schedule computed to amount to the yearly sum of £66, 15s., and the same being taken out of the said £85, 15s., there will then remain the yearly sum of £19, which said sum of £19 shall, and ought to be, applied for the uses and purposes after mentioned.

[342] "And it is hereby farther agreed, that true accounts shall be taken yearly for two years now next coming, as well of the taxes as of the outgoings, whereunto may appear how much the same may yearly amount unto; that in case the said £66, 15s. for outgoings shall not be sufficient to make good the same, that then the said £19 shall be wanting may be supplied by the said Edward Colston and his executors. And in case, either by the ceasing or decrease of taxes or otherwise, the same shall be more than sufficient, that then *the surplus thereof shall be applied to the advance of the house*, either by increase of the number of boys, or making good contingencies after mentioned.

"And forasmuch as the monies to be raised by fines, or granting and releasing leases and copies, and other casual profits are, in the said calculation of £720 per annum, valued and computed to be yearly £100: it is therefore agreed, that a particular account shall be taken and kept of such fines or other casual profits once within ten years such accounts shall be made up; and in case the same shall amount to more than sufficient to make good the said £100 per annum, with interest of such monies as shall be in the meantime advanced to make up the said £100 per annum, that then such surplus (if any) shall remain as a stock, to be used and make good any contingencies that may happen to the prejudice or damage of the manors and lands hereby conveyed, or any deficiency in the outgoings or otherwise."

The deed afterwards contained a provision for the appointment of the boys by the said Edward Colston and the society, and it provided as follows:—"Provided always that in case the said master, wardens, assistants, and commonalty of the said Merchants Adventurers shall sink or [343] lessen the number of fifty boys, and shall not bring them up again to the number of fifty within one year, or refuse to admit the said foreigners, or any of them, unless for the cause or reason after mentioned; that in such case, it shall and may be lawful for the said Edward Colston, during his life, or for his executors after his death, and afterwards for his said nominees, or survivors or survivor of them, or the greater number of such survivors, and in their several neglects or failure, for the Governors of Christ's Hospital in London, to enter into and upon the said manors and premises, and to apply the rents, issues, and profits thereof, for the sole use and benefit of the said Christ's Hospital; and the said trustees, their heirs and assigns shall, from thenceforth, stand seised of the said manors and premises accordingly."

The deed afterwards contained a proviso, that upon the deaths or removal of the fifty boys, no successors should be admitted till one full quarter of a year had expired from such death or removal of a predecessor, to the intent that a certain allowance might, from time to time, remain and be for the benefit of the boys. It was also provided, that if by fire, floods, hurricane, famine, wars, or any other inevitable accidents, either on the manors and lands, or the tenants thereof, or

by should be disabled to pay the rents, or by reason whereof the rents should be lessened, or the expenses of reparation augmented, then, and in that case, the number of poor boys might be lessened, so long only and no longer, than until the charges and expenses thereby occasioned should be raised, and the loss made good. The society then covenanted with Colston, his heirs and assigns, that they would, for ever, observe, perform, and keep all and every the trusts thereby in them reposed, in such order, method, and [344] manner, as the same were therein agreed, appointed, and declared."

The deed then recited, that the society had been put into possession at Lady Day 1709, and that no boys could be admitted till Lady Day 1709; and the society covenanted, that they would be accountable for the said manors, lands, and premises so mentioned to be conveyed, according to the valuation and certainty of rents and profits before agreed, deducting out of the same all such outgoings as were mentioned in the first schedule, and would pay and apply the clear rents and profits thereof (after deductions being made as aforesaid), in such manner as the said Edward Colston should appoint, and should and would, at the end of every ten years, not only account for all fines for renewal of estates, and what should be saved by the not taking in till after the determination of thirteen weeks from the going out or removal of the predecessor, to the intent that if any surplus might happen, over and above what the said master, wardens, assistants, and commonalty of Merchants Adventurers should have expended in supporting and maintaining the said charity and school, that the same might be applied for the advantage of the said house; and Colston covenanted to pay the taxes mentioned in the schedule, or make sufficient provision therefor.

The deed, then reciting that Colston had resolved to add fifty boys more to the first fifty, whereby to increase the number to one hundred, witnessed, that he had and confirmed to the same feoffees, and their heirs divers fee-farm rents, amounting in the whole to £558, 16s.; to hold the same to the feoffees, in trust, after the death of March 1710, to permit the Society of Merchants Venturers, for ever, to receive, and enjoy [345] the same, upon the trusts, confidences, ends, and uses following:—namely, to provide for, take care of, and maintain fifty other, more boys over and besides the first fifty boys, and in the same manner.

It was then recited that the society had computed that the yearly costs and charges of maintaining the charity for the additional fifty boys would amount to the sum of £553, 5s., which Colston agreed to, and that the society consented to accept of the sum of £5a. as a sufficient allowance for the purpose, and that, after making all the charges, there would remain the sum of £5, 11s. of the fee-farm rents. It was then recited that £15, 11s. would be required for a receiver to collect the rents, and that the net rents would be sunk £10, and it provided that this sum of £10 should be paid out of the £19 surplus of the revenue appointed for the first fifty boys, and that the remainder of that surplus should be paid to a clergyman to teach the boys their grammar. The society covenanted that they would, at all times thereafter for ever, observe, perform, and keep the trusts thereby in them reposed, for the said last fifty boys in such order, method, and manner as they were thereby agreed and intended; and Colston covenanted to pay the taxes charged on the fee-farm rents, or make sufficient provision for payment of them, so that the fee-farm rents thereby granted should not be burthened or chargeable with any of them, nor the charity thereby granted for the said last fifty boys thereby lessened.

Edward Colston, by his will, after reciting his covenants to pay and discharge all the taxes on the lands and fee-farm rents settled on them for his hospital, directed his executors to pay and discharge them, till his personal estate should be laid out in and then to charge the lands with such taxes; and he gave to the [346] society an annual rent of £39, 17s. 6d., which he charged with payments to charities unconnected with the school, amounting to £28. And reciting the settlement of the manors of Beere and Locking upon the hospital, and the covenants of the merchants, he declared, that in case they should have duly performed the same, and it should appear that the said two manors had not let for or produced the yearly sums they had been let for, and that by reason thereof the society had been *bond fide* losers in their income by their agreement, that then they should appropriate to themselves,

out of the remaining part of the fee-farm rents of £39, 17s. 6d. thereby devise (being £11, 17s. 6d.) so much thereof as should be found to be wanting and necessary to enable them to comply with the said trust, so as they might not be losers thereby; but if the same should not be wanted, then the overplus was to be applied for cloth for his almsmen.

After the death of Colston his representatives made provision for the future outgoings.

The present information also sought relief in respect of the following transaction which took place after the execution of the trust deed:—Some of the lands which the society purchased for Colston from Bowyer, remained after the purchase, and was, at the date of the trust deed, in the occupation of Bowyer, at the yearly rent of £2500, and Bowyer proposed to pay £2500 as a fine for a lease of the same lands, to be granted to him for the lives of himself and his wife, and the survivor of them, at the yearly rent of £5. The proposal was complied with by the society, and carried into effect, and by indenture dated the 26th of March 1709, and made between the feoffees of the first part, the society of the second part, [347] and Bowyer and wife of the third part; the manor of Beere and the lands therein referred to were demised to Bowyer and his wife: To hold to them, their heirs, and assigns, for their lives, and the life of the survivor of them, at the yearly rent of £315. On the 28th day of the month, by an indenture made between the same parties, after reciting that Bowyer had proposed to buy £310 per annum, part of the rent of £315 and make his wife's part per annum during the lives of himself and his wife, and the survivor of them, it was witnessed, that in consideration of £2500 paid by Bowyer and wife to the trustees of the society, Bowyer and his wife were released from the payment of £310, and the annual rent of £315 reserved by the lease; and the society covenanted to pay the £310 per annum to the use of the charitable trust, and according to the intent and meaning of the settlement. It appeared that only £500, part of the £2500, was actually paid in money; payment of the remaining sum of £2000 accepted by the assignment of a mortgage debt of £2000 from one John Hobbs secured on a lease for years of the manor of Stogursey, granted to Hobbs by Eton College; and after a lapse of some years, and by the neglect of Hobbs to pay the debt, the society became the owners of the manor of Stogursey, and have ever since continued the owners thereof under the leases granted by Eton College.

The information prayed that the charity founded by Edward Colston in the year 1708 might be established, and that it might be ascertained of what the property belonging to the charity consisted, and whether the Defendants were indebted to the charity in any sum of money; and that in taking the accounts which were asked of the Defendants might be charged with the sum [348] of £500; and that it might be declared, either that the manor and lands of Stogursey were held by the Defendants in trust for the charity, or otherwise that the charity was entitled to the £2000, to be charged in account against the Defendants, and that various questions might be taken; and, if necessary, that a scheme for the application of the income of the charity might be settled.

The Defendants, by their answer, insisted that the society had entered into a contract with Colston, by the terms of which they were bound to maintain boys, &c., whatever might be the amount of the rents of the property, and that they were, by their contract, entitled to the surplus, if any.

The property, it appeared, produced about £3000 a year; but the answer stated that payments, on the whole since the date of the deed, exceeded the receipts, so that the sum of £3409. The Defendants also stated, that, from the establishment of the charity, the society, in their accounts rendered to Colston, gave credit merely for the rents at the estimated and agreed amount, and debited him with the agreed amount of charges. They also relied on certain proceedings in this Court relating to the charity which took place in 1760, in a cause of *The Attorney-General v. Merchants Venturers' Society*, binding the rights of the parties.

Mr. Pemberton and Mr. Blunt, in support of the information.

Mr. Kindersley and Mr. Osborne, *contra*.

Mr. Pemberton, in reply.

[349] *The Attorney-General v. The Corporation of Bristol* (3 Mad. 319, and 1 W. 294).

August 1. THE MASTER OF THE ROLLS [Lord Langdale]. This information prays that a charity founded by Edward Colston in the year 1708 may be established, and that it may be ascertained of what the property belonging to the charity consists, and whether the Defendants are indebted to the charity in any sum of money; and that, in taking the accounts which are asked, the Defendants may be charged with the sum of £500; and that it may be declared either that the manor and lands of Stogursey are held by the Defendants in trust for the charity, or otherwise that the charity is entitled to the sum of £2000, to be charged in account against the Defendants; and that various accounts may be taken, and, if necessary, that a scheme or the application of the surplus income of the charity may be settled.

It appears that in and before the year 1706 Mr. Edward Colston, a native of Bristol, was desirous of establishing an hospital or charity there, for maintaining and educating fifty poor boys and placing them out as apprentices, and that such charity should be conducted by the Society of Merchants Venturers of the City of Bristol, of which Mr. Colston was a member. It was proposed that the charity should be maintained by a sufficient revenue arising from land, which, as to the greater part thereof, was to be purchased for the purpose. And after a correspondence between Mr. Colston and the society as to the expense of maintaining the charity, the society, with a view to the endowment of the charity, and acting on the behalf of Mr. Colston [360] and at his expense, procured to be conveyed to them a mansion-house in St. Augustine's Back in Bristol, and the manor of Beere and lands in Somersetshire. These hereditaments, together with the manor and rectory of Locking, and certain lands there, which belonged to Mr. Colston, were computed to be of the annual value of £720, subject to reduction for payment of taxes and outgoings; and the society having reckoned the cost of maintaining the charity for fifty boys at £634, 5s. per annum, it was considered, that if independent provision were made for the payment of taxes and some outgoings, the revenue arising from the estates would be more than sufficient to pay the other outgoings and the charges of fifty boys. But before the arrangement was completed, Mr. Colston desired to extend the benefit of the charity to fifty more boys, making in the whole 100 boys, and for that purpose to appropriate fee-farm rents to the amount of £558, 16s. per annum, and the society, considering that the charge of the additional fifty boys would be £553, 5s., agreed to accept the trust.

The trusts might have been very simple, if the computed revenue of £720 had consisted merely of annual rents, and if the taxes and outgoings could have been ascertained sums; but in the computation which was agreed to, the fines paid on leases, and the renewal of leases on which some of the lands were held, were computed at the annual sum of £100, and might, in fact, turn out to be greater or less in any year, and the taxes and other outgoings, which were computed, the taxes at £2, 14s. 8d. and the other outgoings at £66, 15s., making together £129, 9s. 8d. per annum, were variable, and would, if deducted from the computed rent of £720, leave it to £590, 10s. 4d., and make it less than the computed sum of £634, 5s., the computed charge for the first fifty boys; and moreover, the surplus of the [361] £68, 16s., the amount of the fee-farm rents after paying £553, 5s., the computed annual charge for the additional fifty boys, would leave only a surplus of £5, 11s., which would not be sufficient to pay a receiver of the rents. These circumstances were to be provided for, and the provisions gave rise to some peculiarities and to the complication in the foundation deed. There is a combination of contract or covenant and trust, which has given rise to the question which is to be determined in the Court.

The Attorney-General contends, that the Society of Merchants Venturers took the estates which were conveyed to them, as trustees only, and for the benefit of the charity; and that they took the trust accompanied by an obligation to maintain the charity for 100 boys, even if the revenue of the charity estate should be insufficient, unless such insufficiency were occasioned by fire, hurricane, or other inevitable accident.

The Defendants contend, that the estates were conveyed to them absolutely, for their own use, subject only to the condition of their maintaining the charity for 100 boys according to the directions of the founder.

After considering the accounts and other documents produced, I think that the question depends on the construction of the deed of the 25th of November 1708, which requires great attention and consideration. It clearly purports to be a contract on the part of the society to accept and perform a trust; and from the argument on both sides, it would seem to be admitted, that if the rents were to fall, the society would nevertheless be bound to perform the trusts, and thence the Defendants deduce an argument, that they were entitled to any profit which might arise from an increase of rent.

[352] The deed was made between Edward Colston of the first part, Sir John Duddleston and several other persons named as feoffees of the second part, and the Society of Merchants Venturers of the third part, and it was thereby witnessed, that Colston conveyed to the feoffees and their heirs, the mansion-house at St. Augustine Back, the manor of Beere, with divers hereditaments there, some of which were held by tenants on leases for lives, the manor and rectory of Locking, the advowson of the vicarage of Locking, and divers hereditaments there: to hold to the feoffees and their heirs, with a proviso, that the conveyance was upon the trusts only, and to the intents and purposes following; that is to say, that the feoffees should permit the society to hold the manors and hereditaments with the appurtenances, to grant, renew, and fill up leases and copyhold estates, and receive the fines, and likewise the rents, issues, and profits of the premises, upon the trusts, confidences, and for the only ends and purposes following: and the trust was to permit the mansion-house to be used for the habitation of fifty poor boys and schoolmasters, to maintain the boys, and put them out apprentices, and repair the house. So that we have merely trust; but the deed then recites, that the society have computed the yearly costs and charges of the trust at £634, 5s. per annum, and that Mr. Colston agreed thereto, and that the society consented to take the £634, 5s., which should be in the first place, taken out of the rents, as a sufficient allowance for the purposes aforesaid, and that the surplus of the rents and profits should be applied towards the payment of such outgoings wherewith the manors and premises should be chargeable. No suggestion here that any part of the surplus should be applied to their own use; the surplus was, in this place only, made applicable to the payment of outgoings; but the deed proceeds:—And for preventing and avoiding all disputes and controversies about the yearly value of the manors, lands, and premises, and to the end the fund and the provision thereby made should not, on any pretence, be deemed or taken to be deficient, it was agreed and declared, that the manor and lands purchased from Bowyer were of the yearly value of £400, the manor and lands of Locking were of the yearly value of £250, and that the cellars and lofts of the house were esteemed of the yearly value of £20, in the year 1708, from which being deducted £634, 5s. for the society to answer the purposes of the charity, there remained a surplus of £85, 15s., out of which all the outgoings, wherewith the manors and premises were or should be subject or liable unto, were to be paid and discharged. It is to be observed, that the sum of £85, 15s. was known to be insufficient for the payment of the taxes and other outgoings; and the society, having stipulated for their own protection that the sum required for the costs and charges of the charity should be first taken out of the rents, appear to have been willing to rely on the means provided to answer the outgoings. The taxes were computed to amount to £62, 14s. 8d., and were to be paid by Mr. Colston. The remaining outgoings were computed at £66, 15s., and were to be paid out of the £85, 15s., of which a yearly sum of £19 would be required, and care was taken that the sum of £19 should not go for the benefit of the society, by providing a specific application of it, for the benefit of the charity. The taxes and outgoings might increase or decrease. All the taxes and any increase of outgoings, beyond the £66, 15s., were to be paid by Colston; but if by ceasing or decrease of taxes the same should be more than sufficient, the surplus thereof was to be applied to the advantage of the house, either by increase of boys or making provision for contingencies. It appears, therefore, that an increase of sums applicable to the charity was in the contemplation of the parties, in the event of taxes and outgoings becoming less. An increase by improvement of rent is not specifically provided for; but on the computed rent of £720, it was provided that £634, 5s., should

a first taken for the charity, and that £19, part of the residue, should be appropriated to other purposes: and these applications, allowing of £66, 15s. being applied for outgoings, it is agreed, that if the whole sum of £66, 15s. should not be wanted for outgoings, any surplus should be applied to the benefit of the house. To greater sum than £66, 15s. was to be applied for outgoings, because Colston was to supply any deficiency. Another instance of regard to the interest of the charity immediately follows. The deed recites, that as the monies to be raised by fines on granting or renewing leases and copies and other casual profits were, in the calculation £720 per annum, valued and computed at £100 per year; it was agreed, that a particular account should be taken and kept of the fines and casual profits, and that such accounts should be made up once in ten years; and if the same amounted to more than sufficient to make up £100 per annum, with interest of any monies advanced in the meantime to make up the £100 per annum, then that such surplus should remain as a stock to supply any contingencies that might happen to the prejudice of the manors and lands, or any deficiencies in the outgoings, or otherwise. Thus any surplus of the computed income, which arose from fines and casual profits, was to be applied for the benefit of the charity, and it does not seem likely that a surplus of rents, of which fines are in a sort the anticipation, was intended to be applied in a different manner. The clause shews that it was anticipated, that in some years the society might be required to advance money, to make up the computed annual sum of £100, and these advances were to be paid with interest, before a surplus applicable to the purposes of the charity was to be declared. The deed afterwards contained a provision that upon the death or removal of any of the fifty boys, no successor should be admitted till one full quarter of a year had expired from such death or removal of a predecessor, to the intent that a quarter's allowance might, from time to time, remain and be for the benefit of the house. We have, therefore, express provision for the charity being benefited, first, by any diminution of outgoings; secondly, by any excess of fines and casual profits beyond the average annual sum of £100; and, thirdly, by delaying admissions for a full quarter of a year after vacancies occurred; and on the other hand, it was provided, that if by fire, floods, hurricane, famine, wars, or such like calamitous accidents, either on the manors and lands, or the tenants thereof, whereby any should be disabled to pay the rents, or by reason whereof the rents should be lessened, or the expenses of reparation augmented, then, and in that case, the number of poor boys might be lessened, so long only, and no longer than until the charges and expenses thereby occasioned should be raised, and the loss made good. The society then covenanted that they would, for ever observe, perform, and keep all and every the trusts thereby in them reposed, in such order, method, and manner as the same are therein agreed, declared, and appointed. The deed then, reciting that Colston had resolved to add fifty boys more to the other fifty, whereby to increase the number to 100, witnessed, that he granted and confirmed to the same feoffees and their heirs, divers fee-farm rents, amounting in the whole to £558, 16s.; to hold the same to the feoffees, in trust after the 25th of March 1710, to permit the Society of Merchants Venturers for ever to take, receive, and enjoy the same, upon the trusts, confidences, ends, and purposes following: namely, to provide for, take care of, and maintain fifty other and more boys, over and [356] besides the first fifty boys, and in the same manner. It was then recited that the society had computed that the yearly costs and charges of maintaining the charity for the additional fifty boys would amount to the sum of £553, 5s., which Colston agreed to; and that the society consented to accept £553, 5s. as a sufficient allowance for the purpose; and that, after deducting all the allowance, there would remain the sum of £5, 11s. of the fee-farm rents. It was then recited that £15, 11s. would be required for a receiver to collect the rents, and that thereby the rents would be sunk £10; and it provides that this sum of £10 should be paid out of the £19 surplus of the revenue appointed for the fifty boys, and that the remainder of that surplus should be paid to a clergyman to teach the boys their catechism.

Such is the purport of the deeds, so far as relates to the application of the revenue to the charity. The indications in favour of the case of the Defendants are, first, that the society stipulated to maintain the charity for certain fixed sums payable out of

rents of a computed definite amount, to which they agreed to abide, and consequently might have the same number of boys to maintain at the same costs, although the rents in particular years should fall to any amount, provided the fall did not arise from fire, hurricane, or other inevitable accident. Having to bear the risk of loss, they argue that they ought to have the benefit of profit. Secondly, there is a clause of forfeiture (*Attorney-General v. The Cordwainers' Company*, 3 Myl. & K. 534; and *Attorney-General v. The Coopers' Company*, 3 Beav. 29), which would be idle if it were not contemplated that they had something valuable to lose. It does not appear that any defalcation of rent was contemplated, except from two causes, first inevitable acci-[357]-dent, in which case the costs and charges were to be reduced till the loss was made good; and, secondly, the amount of fines and casual profits being less than the computed annual sum of £100, in which case it seems to have been intended, that the society should advance money to make good the deficiency, and that such money should be afterwards repaid with interest. Colston undertook heavy burthens, and it is said that the society undertook a risk of loss. In these circumstances, if an increase of ordinary rent had been contemplated, Colston, if he had not desired the surplus to be applied for the benefit of the charity, would probably have desired relief from his own burthens, and the society, if they had not intended to treat the whole as subject to the trust, would probably have desired to secure the profit by express stipulation. But it does not appear that any increase of rents was contemplated otherwise than as there might be more money received from fines and casual profits than would be sufficient to make up the average annual sum of £100, and in this case the surplus is appropriated to the benefit of the charity. Add to these circumstances the general words by which it appears that all the property was conveyed for the purposes of the trust thereby established, the care taken to provide for the application to the purposes of the trust of the full amount of the computed revenue, the care taken to secure for the benefit of the charity any saving from the diminution of outgoings, and the burthen assumed by Colston of providing for the payment of taxes and outgoings, beyond the computed amount, in order that the charity might have the full benefit intended, it appears to me that the object was to establish a trust for the benefit of the charity alone.

The deed, though founded in contract, appears to me to result in trust. The purpose of Colston was [358] charity; he conveyed valuable estates, and besides that entered into very burthensome covenants. The society may also have had a charitable purpose; but whether they had or not, they obtained the patronage of the vicarage of Locking, the nomination of the schoolmasters, and of one-half of the boys who were to have the benefit of the charity. It may have been well worth their while to enter into the covenants, which by this deed they bound themselves to perform. The advantages they acquired might well be such, that the fear of forfeiting them would operate as a motive to induce them to execute the trust faithfully. I have, under these circumstances, come to the conclusion, that all the rents arising from the manor and lands comprised in the deeds, ought to be applied for the purposes of charity.

The particular transactions which the information complains of, though carried into effect after the execution of the trust deed, were the result of a negotiation previously entered into. It is said that the consent of Colston was asked, but there is no proof that it was given; and the terms of his trust deed appear to me inconsistent with the supposition that he did consent. The case is. [His Lordship recapitulated the circumstances of the transaction with Bowyer in the terms before stated, and then proceeded.] In respect of this transaction the information prays that the Defendants may be charged with the sum of £500 which they received, and that it may be declared that the Defendants hold the manor of Stogursey in trust for the charity, or that they ought to be charged with the sum of £2000 which was secured by an assignment of the mortgage of Hobbs.

I am of opinion that the society had no right thus to deal with the trust property for their own benefit, and [359] that they are chargeable with any profit which arises from the transaction, and that in making the inquiry as to the profit they ought to be charged in account with the sum of £2500, and to have credit for the sum of £310 which they paid or accounted for during the lives of Bowyer and his wife, and I think that the Defendants should be charged with the amount of the

rust as the Master shall find to have been made by the transaction, and interest thereon.

The terms of the decree were afterwards discussed, and it was ultimately arranged to the effect following :—

EXTRACT FROM DECREE.—“Declare the lands, &c., are held on charitable trusts, and that the Defendants are not entitled to appropriate any part of the rents to their own use; and declare that, under the circumstances, the Manor of Stogursey is vested in the Defendants, in trust for the same charitable purposes. Let the Master inquire what the property consists; take an account of the rents, &c., from the filing of the information, and approve of a scheme.”

[360] HOTHAM v. SOMERVILLE. *July 9, August 4, 1842.*

[S. C. 6 Jur. 861.]

F. & W., as solicitors for the tenant for life, held the title-deeds which afterwards passed into the possession of W. & C., their successors. The tenant for life died, and the estate then stood limited, first, to F. & W. for 500 years to secure a sum of £2000, with remainder to trustees for 600 years to secure a jointure and portions, with remainder to A. B. in tail.

A. B. being an infant, a suit was instituted on his behalf, in which the £2000 was raised on the security of the term. Upon that occasion, F. & W. covenanted with the mortgagees to produce the title-deeds from time to time, and not to part with them; but they were relievable from the covenant on certain terms. A receiver was appointed in the suit, and the Court directed the costs of the solicitors of the suit to remain charges upon the estate at interest. W. & C. were solicitors in the suit for A. B.

A. B., upon coming of age, presented a petition for the delivery of the title-deeds. Held, that (independently of the covenant) W. & C. held the deeds for A. B., and not for the termors, but the covenant having been entered into for the benefit of the infant, F. & W. were not bound to part with the deeds, until released from their covenant. Held also, that W. was not entitled to hold the deeds for the trustees of the term of 600 years, or for any costs other than those of seeing himself properly released from the covenant, and that he had no right to require them to be delivered to the receiver in the cause.

The circumstances of this case are fully detailed in the judgment of the Court.

Mr. Pemberton and Mr. Glasse, for the Petitioner William B. Hotham.

Mr. Kindersley and Mr. Faber, for other parties supported the petition.

Mr. Bigg, for Mr. Fulwer Craven.

Mr. Tinney and Mr. Hallett, for Mr. White, in opposition.

Mr. Pemberton, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. This petition prays that the respondent may deliver up certain deeds and documents to the solicitor of the petitioner.

In the year 1808 the estate to which the Petitioner is entitled, was, under the authority of an Act of Parliament, purchased and conveyed to William Hotham of Bognor, William Hotham of York, and Jane Cowan, in [361] fee, in trust for the subsisting uses of the will of Sir Richard Hotham: viz., to the use of William Hotham of Bognor for life, with remainder to the use of the first son of the same William Hotham in tail, with other remainders over, and there was power, enabling the tenant for life to secure a jointure for his widow, and portions for his younger children.

On the occasion of this purchase, the title-deeds of the estate were delivered to Messrs. White & Fownes, as the solicitors of William Hotham of Bognor, the tenant for life.

In the year 1809 William Hotham of Bognor, in pursuance of arrangements made

on his marriage in 1807, executed deeds, whereby he granted an annuity, by way of jointure, to his wife, and charged the estate with portions for his younger children; but the wife having died in October 1810, leaving a daughter Jane Marianne, the only issue of the marriage, that deed ceased to have any operation.

Jane Cowan, one of the trustees named in the Act of Parliament, having died before the year 1819, Mr. Fownes, one of the solicitors of William Hotham of Bognor, was appointed a trustee in her place, and deeds were executed in the month of February 1819, whereby the estate, formerly vested in William Hotham of Bognor, William Hotham of York, and Jane Cowan was conveyed to William Hotham of Bognor, William Hotham of York, and James Somerville Fownes. (NOTE—afterwards took the name of Somerville.)

The deeds had passed from the possession of White & Fownes into the possession of Fownes & White, [362] who had succeeded to their business, and were held by Fownes & White as the solicitors of William Hotham of Bognor.

William Hotham of Bognor was about to marry again; previously to his doing so, and in order to make provision for his daughter and only child of his first marriage, and to provide a jointure for his intended wife, and portions for the younger children of his second marriage, he, by an indenture dated the 26th day of February 1819, charged the estate with the sum of £2000, as the portion of his daughter Jane Marianne; and pursuant to his power, and for better securing the payment of the £2000, he demised the estate to James Somerville Fownes, and Richard Samuel White, for the term of 500 years, on trust to raise the £2000, with a proviso for the cesser of the term when the trusts should be performed.

By this deed Messrs. Fownes & White, who were the solicitors of William Hotham of Bognor, and who held the deeds for him, became the trustees of the term of 500 years, for securing payment of the daughter's portion; but the acceptance of the trust did not vary the custody, which remained, as before, in the hands of Fownes & White, as the solicitors of William Hotham of Bognor.

In pursuance of arrangements made on the second marriage of William Hotham of Bognor, a deed, dated the 20th of March 1819, was prepared. It was not executed till some years afterwards, when circumstances had in some respects changed. The effect ultimately was to secure a jointure of £60 a year to the second wife, and portions for the younger children of the second marriage; and for these purposes a term of 600 years was vested in Henry Osborne and Fulwer Craven, [363] in trust to secure the jointure and the portions subject to prior charges.

Of the second marriage there were three children, the Petitioner William Beaumont Hotham, Richard Henry a younger son, and Georgiana an only daughter; and, under these circumstances, the estate, subject to a fee-farm rent, stood limited to William Hotham of Bognor for life, remainder to William Hotham of Bognor, William Hotham of York, and James Somerville Fownes, as trustees to preserve contingent remainders in remainder to Somerville and White for the term of 500 years, in trust to raise the portion of £2000 for Jane Marianne, the only child of the first marriage; remainder to Osborne and Craven for the term of 600 years, in trust to secure the jointure and to raise the sum of £2500 for the portions of the younger children of the second marriage; remainder to the Petitioner in tail. In the year 1835 the title-deeds were in the possession of White & Carew, the successors of Fownes & White and solicitors of William Hotham of Bognor.

On the 17th of January 1835 William Hotham of Bognor died. The trusts to preserve contingent remainders ceased, and the Petitioner, then an infant, became tenant in tail in possession, subject to the charges and the terms of 500 years and 600 years, vested in trustees for the purposes before mentioned.

Mr. White contends, that, at this time, Messrs. Fownes & White, the trustees of the term of 500 years, became entitled to the custody of the deeds, and that White & Carew held them, as solicitors for Fownes & White; but from the time when the deeds of February 1819 were executed, up to the death of William Hotham of Bognor in January 1835, the deeds were in the possession first of Fownes & White, and afterwards of White & Carew, as the solicitors of William Hotham of Bognor, and I am of opinion that, after the death of William Hotham of Bognor, it was the duty of White & Carew to hold them for the owner of the inheritance.

If the trustees of the terms had been wholly independent of White & Carew, White & Carew would not have been justified in giving up the deeds to them; and the circumstance that White was one of the trustees, and also one of the solicitors, does not, as it appears to me, make any difference. Those who had a right to the services of Mr. White, as solicitor, were not to be prejudiced in any way by the fact of his having under the circumstances of this case become a trustee of the term.

The tenant in tail in possession, being an infant, could not authorise the trustees of the 500 years' term to possess themselves or retain possession of the deeds; and Messrs. White & Carew, who, upon the death of the tenant for life, became the solicitors of the infant and his next friend, had towards him a duty to preserve the deeds for his use.

The Petitioner, the tenant in tail in possession, being an infant, Messrs. Fownes & White entered into possession of the estate. They were trustees of the term; but I think that they must be deemed to have taken possession for the benefit and protection of the infant, and not adversely to him. Messrs. White & Carew, who had possession of the deeds, acted as solicitors for the infant or his next friend, and in that character filed a bill, to have the rights and interests of the persons having claims on the estate declared, and to have the proper accounts taken.

[365] A decree declaring the rights was made on the 12th December 1836, and it was ordered, that Fownes & White should, with the approbation of the Master, raise a sum of £2000, the portion of Jane Marianne, the costs of the suit, and the costs of raising the money. By subsequent proceedings it was ultimately ascertained, that a sum of £3037, 13s. 11d. was proper to be raised; and Lady Charles Somerset having advanced that sum, a deed, dated the 9th day of June 1838, was executed by Somerville and White of the first part, James Reeves of the second part, Jane Marianne of the third part, and the mortgagees of the fourth part; and by this deed it was witnessed, that Fownes & White assigned the residue of the term of 500 years, except the last day thereof, to the mortgagees, to secure the repayment of the debt, and they covenanted that they had done no act to incumber, and took from the mortgagees a covenant that the person entitled to the inheritance should continue in possession of the estate, until default should be made in payment of the mortgage or interest thereof.

It appears to me, that in the treaty for the mortgage White & Carew were acting not only as solicitors for Fownes & White, the trustees of the term of 500 years, but also as solicitors for the infant tenant in tail, and with a proper regard for his interest. It was assumed indeed, as I think without sufficient reason, that White & Carew held the deeds for Fownes & White; or, in other words, that Fownes & White, as trustees of the term, had possession of the deeds; but they seem to have been aware, that they, as trustees of the term, had not a right to part with the deeds, even to the mortgagees who advanced the money; and it was therefore announced, at an early period of the treaty for the mortgage, that the deeds would not be parted [366] with; and this proper resolution was adhered to, after a requisition for them had been made by the solicitor of the mortgagees. Messrs. White & Carew appear to me to have been well aware of their duty to the infant tenant in tail, for whom or for whose next friend they were acting as solicitors; and they seem, likewise, to have contemplated the time when it would be their duty to deliver up the deeds to him; and Messrs. Fownes & White, supposing that they had the deeds, or perhaps, not very accurately considering in what character, or for whom they were held by White & Carew, but recollecting that their character of trustees of the term arose out of their character of solicitors for the tenant for life, were very properly willing, for the benefit of their client, the infant tenant in tail, to enter into a qualified covenant for their production; and, accordingly, in their letter to Messrs. Annesley & Reade of the 14th of March 1838 they say, "We will give you a covenant from Messrs. Fownes & White for the production of the deeds, and we daresay the guardian of the infant tenant in tail will join them in the covenant, in which the usual proviso will be inserted for relieving them therefrom, in the event of their parting with the deeds, and delivering to the mortgagee a new deed of covenant for their production by the party to whom they may be handed over: but we cannot consent to the deeds being taken out of the hands of the parties who now hold them." Ultimately, by a deed

dated the 9th day of June 1838, being the same as the date of the mortgage, and which was executed at the same time, and made between Fownes & White of the one part, and the mortgagees of the other part, after reciting that the tenant of the first estate of freehold was an infant, that the deeds were then in the custody of Fownes & White, and that it might be doubted whether they would be justified in delivering [367] up the deeds to the mortgagees, and on other accounts, it was agreed that the deeds should be retained by Somerville and White, upon their entering into the covenant after mentioned; Fownes & White covenanted that they would, from time to time, during the continuance of the security, or during such part of that period as the deeds should remain in their custody or power, at the request of the mortgagees and without expense to them, produce the deeds and deliver copies thereof to the mortgagees, and would also keep and preserve the deeds undefaced, and would not deliver them over to any other person, unless or until such person should, at his own expense, at the expense of the estate, give to the mortgagees a good and valid covenant to the satisfaction of the mortgagees, for the production of the deeds, or unless or until Fownes & White, or one of them, should have given to the mortgagees two calendar months' previous notice in writing, of their or his intention to deliver up the same, with the intent that the mortgagees might be enabled, before the actual delivery of the deeds, to take such proceedings as they might be advised in relation thereto. And it was declared, that on the procuration and delivery of such covenant, or on the expiration of two months after service of such notice, in case the deed should not be delivered to the person named in such notice, the covenant of Fownes & White should cease.

It appears to me that this transaction was of a nature to be beneficial to all parties. It was beneficial to the infant that the charge should be raised, which probably not have been done at that time without the covenant of Fownes & White, who acted for the benefit of the infant Plaintiff, and at the same time provided means of relieving themselves from all care and responsibility, after the infant should come of age, by [368] the declaration that their covenant should cease on their delivering the deeds to another person, on the expiration of two months' notice of their intention to do so.

Considering the transaction as beneficial to the infant, and that the infant received the benefit, I must do justice to Messrs. Fownes & White, and cannot take the deeds out of their hands without relieving them from their responsibility. I am of opinion, that whoever may have been previously entitled to the possession of the deeds, Messrs. Fownes & White were afterwards entitled to hold them, for the purpose of performing the covenants which they had entered into, until they were duly relieved from those covenants; and it therefore appears to me, that after the execution of this deed, the title-deeds ought to be deemed to be held by White & Carew, as the solicitors of Fownes & White.

By a decree on further directions, made in the cause on the 6th day of December 1840, it was, amongst other things, declared, that the costs due to the solicitors were to remain as charges on the estate, bearing interest at the rate of 4 per cent. from the date of the Master's report. This must have been done for the purpose of avoiding the expense of raising further sums of money before the Plaintiff attained his age of twenty-one; and I cannot doubt but that it was the intention of all parties, that things should remain in the state they were until the time arrived, and then that the course most beneficial and least expensive should be adopted.

If that were the intention, as I suppose it to have been, the execution of it has been much impeded by the disputes which have since taken place.

[369] In March 1841 Mr. Henry White was admitted into the firm of White & Carew, which was thereupon changed to White, Carew & White; but in the month of May following, Mr. Carew retired from the partnership, and it was agreed amongst other things, that the deeds relating to the business of all clients should not give an authority for their removal or delivery to Mr. Carew, but should remain with Messrs. White, and that the deeds relating to any business in which Mr. White was a trustee, should remain with Messrs. White.

I am of opinion that agreements of this kind, however much they may affect

interests, or, what is perhaps thought much more important, the feelings of the creditors who enter into them, ought not to be allowed to have any operation whatever against the clients, whose business and interests cannot, without their own express consent, be made the subject of any such arrangement; and I think, that the right to the possession of these deeds is to be determined without reference to that arrangement.

Soon after the dissolution of partnership, the next friend of the infant Plaintiff and the several members of the Hotham family thought fit to employ Mr. Carew as their solicitor; and they, together with Mr. Fownes, authorised, or signed letters purporting to authorise, Mr. Carew to receive the deeds in question into his custody.

Mr. Carew thereupon demanded the deeds from Mr. White, who objected and refused to deliver them, on the ground of the covenant which he and Fownes had entered into with the mortgagees. I think that Mr. White's objection was at that time well founded; and that, whatever Mr. Fownes may have thought proper [370] to do (and his conduct as to this matter appears to have been somewhat vacillating), Mr. White, having entered into these covenants for the benefit of the infant, had a right to insist on being relieved from them before he gave up the deeds.

The means of obtaining relief from the covenant were obvious on the face of the deeds; and I think it would have been better if Mr. White had suggested the propriety of adopting them, or had himself given notice of his intention to deliver them up, so that the mortgagees might have intervened, if they thought proper. He did nothing of this kind, and seems to have relied, in some degree, upon his saving a right to retain the deeds under the agreement of dissolution. On the other hand, it does not appear that the proceedings of Mr. Carew to obtain the concurrence of Messrs. Annesley & Reade to the deeds being delivered to him, as solicitor for Mr. Fownes, were of such a nature that Mr. White was bound to be satisfied with them. And, in the result, this petition is presented by the Plaintiff, praying that the deeds and documents may be delivered to Mr. Carew, and that Messrs. White & Co., having refused to deliver them under the circumstances in the petition mentioned, may pay the costs of the application and consequent thereon.

Upon consideration of the whole case, I am of opinion that Mr. White is not, at his moment, bound to deliver up the deeds and documents relating to the estate; but that, upon being properly relieved from the covenant, he will be bound to deliver them up. I think that he has no right to hold them for Mr. Craven, the surviving trustee of the term of 600 years, or for any costs, other than the costs which he may be put to in seeing that he [371] is properly relieved from the covenants, and that he has no right to require that they should be delivered to the receiver.

Not thinking Mr. White bound to deliver up the deeds at this time, I can give no costs against him. If he had contented himself with saying that he would deliver up the deeds on being relieved from the covenants, and being paid his costs, or, of being so relieved, I should have thought him entitled to his costs of this petition. Considering the many objections which have been made, and the difficulties raised about doing that which I am persuaded Mr. White would have been prompt to do for the Plaintiff's benefit, if he had not been biassed by his reliance on the agreement made on the dissolution of the partnership with Mr. Carew, I do not think that he ought to have costs. I shall, therefore, give no costs of this petition to either side, as between the Petitioner and Messrs. White. The Petitioner must pay the costs of the other parties who have been served, except Mr. Fownes.

All that is required is, that a covenant (to be entered into by the persons to whom the Plaintiff desires the deeds to be delivered) should be approved by the mortgagees. Mr. White, upon being satisfied that such a covenant has been entered into, may, and I think ought, to deliver the deeds to such person. He can, if he thinks fit, give notice to the mortgagees that he has been required and accordingly intends to deliver up the deeds to the Plaintiff, or to Mr. Fownes, leaving the mortgagees to take such steps as they may think proper.

If an order is required, I think that it should be that Messrs. White do deliver up the deeds to the Plaintiff, [372] or such person as he shall appoint, upon Messrs. Fownes & White being satisfied that the Plaintiff, or such other person, has entered into a good and valid covenant to the satisfaction of the mortgagees, for the pro-

duction of the deeds, according to the intent of the deed of covenant of the 9th of June 1838.

[372] STARTEN v. BARTHOLOMEW. STARTEN v. BARTHOLOMEW. Nov. 2, 1842.

[S. C. 6 Beav. 143.]

Two suits were instituted for similar objects, one was attached to the Lord Chancellor and the other to the Master of the Rolls' Court. A reference was made at the Rolls to inquire which was most for the benefit of the infants.

Mr. F. Bayley moved, that it might be referred to the Master to ascertain which of the above two suits was most for the benefit of the infant. He stated that the only difficulty was as to the jurisdiction, one of the causes being marked M. R. and the other L. C. (9th and 12th Orders of May 5th, 1837. See Ord. Can. p. 114, 115.)

THE MASTER OF THE ROLLS [Lord Langdale]. Before the abolition of the Exchequer, such a reference might have been obtained upon a motion in this Court alone where there were two suits, one in this Court and the other in the Exchequer. I am therefore inclined to make the order. The registrar, however, had been in the habit of inquiring as to the practice.

The registrar made inquiry, and the order was afterwards made.

[373] BARWELL v. BARWELL. Nov. 4, 1842.

Upon an application for an injunction to stay proceedings at law, affidavits cannot be read against the answer as to facts therein stated on information and belief. An application was made, after answer, for an injunction to stay proceedings at law and was refused. The Plaintiff was ordered to pay the costs.

This was a motion, after answer, for an injunction to restrain proceedings in an action at law.

The case made by the bill was, that in 1837 the Plaintiff Edward Barwell borrowed of David Barwell a sum of £200, and gave his promissory note for that sum. In 1838 and 1839 they had some joint dealings in a speculation in potatoes, in the course of which the £200 became paid.

The Defendant, who was the executrix of David Barwell, commenced an action at law on the promissory note; and the Plaintiff filed this bill for taking the account between Edward and David, and for an injunction to restrain the action.

The Defendant, by her answer, stated, she had been *informed, and believed it true*, that in every case of joint speculation between the parties the accounts were immediately settled, and was the subject of a separate and distinct account, and there was no open account at the death of the testator, and that the accounts of the speculation were never blended with the account of what was due on the promissory note; and she stated, she was confirmed in such belief by the entries she was enabled to obtain inspection of, and she believed that the £200 and interest was due from the Plaintiff to the testator.

Mr. Turner moved for the injunction. He proposed to read an affidavit contradicting the statement as to the [374] settlement of the accounts, and the effect of the entries. He contended that he was entitled, by the practice of the Court, to do so on the affidavit; because the Defendant had contradicted the allegations of the bill on information and belief only, and without stating the ground of such belief; *Ord. v. White* (3 Beav. 357; and see *Castellain v. Blumenthal*, 12 Simons, 47).

That as the Defendant professed that her belief was supported by the entries in the books, an affidavit was admissible to shew their effect.

THE MASTER OF THE ROLLS [Lord Langdale]. I stated what was my impression on the subject when the case of *Ord v. White* was before me; but I did not decide the point. When the case comes regularly before the Court, it will be seen what

that impression was well founded. Lord Eldon often had occasion to observe on the great degree of credit which must be given to the answer on an application for an injunction to stay proceedings at law; but as to receiving affidavits, he seemed to me to have expressed different opinions in two cases; nobody ever doubted that an affidavit is inadmissible where a Defendant distinctly states his belief. The motion must be refused.

Mr. Pemberton and Mr. Tennant asked for the costs of the motion, on the ground that this was not a case of shewing cause on the answer, but was an independent motion.

THE MASTER OF THE ROLLS. The Plaintiff is not right in this motion, he must therefore pay the costs.

[375] DAVIS v. PROUT. Nov. 4, 1842.

After one of several Defendants has answered, the Plaintiff can only obtain one order of course to amend. Any further leave must be obtained upon special application.

This was a motion to discharge an order to amend, obtained, as of course, by the Plaintiff.

The bill was filed in April 1841 against several Defendants. Owen, one of them, filed his answer in June 1841. In January 1842 the Plaintiff obtained an order of course to amend his bill. It was accordingly amended in February 1842, but it required no answer from Owen.

Hamby, one of the original Defendants, did not answer the bill until May 1842.

In July 1842 the Plaintiff obtained a further order of course to amend.

Mr. Tripp moved to discharge it; and in support of the motion, contended that after the answer of one Defendant had been filed, it was not competent for the Plaintiff to obtain more than one order of course to amend his bill; and that if a Plaintiff, in such a case, required a second order to amend, he must obtain it on special application, accompanied with the requirements of the 13th Order of 1828 (Ord. Can. 8); *Attorney-General v. Nethercoat* (2 Myl. & Cr. 604).

Mr. Pemberton and Mr. Rogers, *contra*, contended that a Plaintiff was at liberty to obtain one order of course to amend this bill after the last Defendant had answered, then, for the first time, the Plaintiff would be able to see [376] the case made by Defendants. That in *The Attorney-General v. Nethercoat* the sole original Defendant put in his answer, and there, as the right to amend as of course had expired, it was held that it could not be revived by adding a new Defendant. That if the rule were otherwise, one Defendant might, by collusion, delay putting in his answer, and prevent the Plaintiff amending his bill, and thus enable the other Defendants to obtain an order for dismissal for want of prosecution. They cited *Swann v. Swann* (2 Myl. & K. 362).

Mr. Kinglake, for the other Defendants.

THE MASTER OF THE ROLLS [Lord Langdale]. This general order was made for the benefit of all Defendants who have answered, and for each and every of them. As appears in the present case, the amendments were made under such circumstances, that if a special application had been made to the Court, leave to amend would have been given without the least hesitation; but the question is, whether the case comes within the order, and whether the Plaintiff was right in obtaining an order as of course, without the affidavit required by the 13th Order. I think he is not. This order is irregular, and it must therefore be discharged.

[377] LIDBETTER v. SMITH. Nov. 14, 1842.

The Plaintiff may obtain the order absolute to confirm a sale under the Court, though the order nisi has been obtained by the purchaser, but the application was, in this case, refused, on the ground of there having been great laches on the part of the Plaintiff.

A sale had been made under the Court, and the purchaser obtained the order nisi

to confirm the Master's report. He served it on the 26th of January 1841, but refused to proceed any further in the procuring the confirmation of the sale.

In the present month the Plaintiff in the cause gave notice to the purchaser to proceed, or otherwise that he, the Plaintiff, would prosecute the order.

Mr. Romilly now moved to confirm the Master's report. He stated that the only question was, whether the Plaintiff could proceed to confirm the order *nisi* obtained by the purchaser, or whether he must proceed *de novo*. He cited *Chillingworth v. Chillingworth* (1 Sim. 291), in which Sir John Leach held that a vendor might confirm an order *nisi* obtained by the purchaser, if the latter neglect to do so.

THE MASTER OF THE ROLLS [Lord Langdale] thought that the case cited was an authority for the application; but he said that in this particular case the *laches* of the Plaintiff himself had been such, that he could not make the order.

[378] SLOGGETT v. SOREL. Nov. 17, 1842.

The Long Vacation is not to be excepted in the computation of the six days for referring exceptions for impertinence, to a bill.

On the 17th of October 1842 the Defendant delivered exceptions for impertinence to the Plaintiff's bill.

On the 28th of October he obtained an order for referring them to the Master, which was served on the Plaintiff on the following day (the 29th of October).

All these proceedings took place in the Long Vacation.

Mr. Pemberton now moved to discharge the order of reference, for irregularity. He argued as follows:—By the 11th Order of April 1828 (Ord. Can. 7), no order for referring any pleading for impertinence can be obtained, "unless such order be obtained within six days after the delivery of the exceptions." The 19th Order (Ord. Can. 14), directing that the Long Vacation is not to be reckoned in the computation of time, does not apply to this case. It applies only to the cases of "referring exceptions to any answer, or for obtaining a Master's report upon any exceptions."

Mr. Follett, *contra*. By the 19th Order the Long Vacation is not to be computed in the time for obtaining "a Master's report on any exceptions," it therefore is not to be computed in any of the steps necessary for obtaining it. By the [379] 11th General Order, the order of reference is to be obtained within six days; but this does not impose upon the party obtaining it, the necessity of serving the order. It would be useless to obtain such an order where it is unnecessary to serve it, and where it is impossible to proceed on it before the Master during the Long Vacation. The general words, in the 19th Order, as to obtaining the Master's report upon exceptions, must embrace the whole process necessary to obtain it.

THE MASTER OF THE ROLLS [Lord Langdale]. Unless there has been some contrary decision on the point, and none has been cited, I must adhere to the terms of the order. The 19th Order excepts the Long Vacation in the cases of amending bills, filing, delivering, or referring exceptions to any answer, and for obtaining the Master's report; the case, therefore, of a reference of a bill for impertinence is not, by this order, excepted further than as to obtaining the Master's report.

The 11th Order directs that the order of reference for impertinence should be obtained within six days after the delivery of the exceptions. This may be done in the Long Vacation as the office is then open. By the following order, the Master's report must be obtained thereon, within a fortnight, which is extended by the 19th Order, by excluding the Long Vacation.

The consequence of all this is, that where exceptions to a bill are taken in the Long Vacation, the order of reference must be obtained within six days, although it is not necessary to obtain the Master's report in the Long Vacation. The Defendant has not obtained the order of reference within the six days limited by the [380] 11th Order, and has not brought himself within the 19th Order. The order is irregular and must therefore be discharged with costs.

[380] LORD HUNTINGTOWER v. SHERBORN. Nov. 19, Dec. 22, 1842.

[S. C. 5 Beav. 162.]

After a demurrer had been put into a bill, the sole Plaintiff became bankrupt. Upon the motion of the Defendant who had demurred, the Court ordered that the assignee should remedy the defect in the suit within a month, or that the bill should be dismissed without costs.

A party ordered to take a step within a fixed time, or that the bill should be dismissed, if desirous of an extension of the time, must give notice of motion so as to enable him to bring it on before the expiration of the time fixed.

A bill was filed (5 Beav. 162), to which the Defendant put in a demurrer. Before it came on to be argued, the Plaintiff became bankrupt. The demurrer came on and was struck out of the paper, there being no appearance on either side. A motion was now made, on behalf of Sherborn, that the assignees might file a supplemental bill in a fortnight, or that the bill might be dismissed without costs.

Mr. Beavan supported the motion, and referred to *Chowick v. Dimes* (3 Beav. 290. and see *Lee v. Lee*, 1 Hare, 617, and *Dryden v. Walford*, 1 Y. & C. (C. C.) 625), and the cases in the notes.

Mr. Tripp suggested that in a case of demurrer, the order asked could not be granted.

Mr. Romilly, for the assignees, asked for further time to file a supplemental bill, because the Defendant Sherborn, as he said, disputed the bankruptcy.

THE MASTER OF THE ROLLS made the order, giving the assignees a month to file their supplemental bill, and said that they might apply for further time if circumstances should warrant it.

[381] Dec. 22. On the 22d of December 1842, and after the expiration of the month, the assignees applied for further time. The notice of motion had been given previous to the expiration of the month.

THE MASTER OF THE ROLLS [Lord Langdale] refused the application with costs, on two grounds, first, because the notice of motion ought to have been given so as to have enabled the assignees to move before the expiration of the time limited by the first order; and secondly, because the affidavits were not sufficient to entitle the assignees to the indulgence asked.

[381] LEE v. READ. Nov. 21, 1842.

[S. C. 12 L. J. Ch. 26; 6 Jur. 1026.]

A Defendant is not bound to discover the principal fact, or any one of a long series or chain of facts, which may contribute to establish a criminal charge against himself, and he cannot waive this right by any agreement.

During the proceedings in the cause, the Plaintiff indicted the Defendants in respect of the same transactions, the time for answering was extended until after the trial of the indictment.

In October 1840 the Plaintiff mortgaged a vessel called the "Pearl" to the Defendants for £196, and in April 1842 the Defendants took possession of the vessel.

According to the Plaintiff's representations, the Defendants, having taken possession, proceeded to cut her in half, and to lengthen her, and to make other considerable alterations and repairs; but, according to the Defendants' case, they broke her up, and employed part of the materials in building another ship, which they called the "Lightning."

The Plaintiff filed this bill for redemption in August 1842, insisting that the two vessels were identical. The bill charged "that with a view to obtain the registry of

the ship called the "Lightning" in the names [382] of the Defendants, they made divers written and other statements and representations to the Custom House officers or clerks, or other persons to whom such application for registry was made, respecting the ship now called the "Lightning," and particularly respecting the registering of the said ship; and they thereby stated and represented (amongst other things) that the said ship or vessel was an entirely new vessel, and that the Defendants were absolute owners thereof, or to that effect; and they also made other representations, with a view to induce the officers or clerks to register the said ship or vessel by the name of the "Lightning," and in the names of the Defendants as the absolute owners thereof. The Plaintiff charged that all such statements and representations to the officers or clerks were wholly untrue, and that the same would so appear upon the Defendants stating and setting forth true and correct copies of all such statements or representations as were in writing, and when and by whom the same were written and signed, and the true and correct words or the true and exact meaning and effect of all such statements and representations as were not in writing, and when, where, and by whom, and to whom the same were respectively made, and what answers were given to all, or any, or either of such statements and representations. The bill prayed for a redemption of the ship, and to restrain the Defendants "from procuring the name of the Plaintiff to be withdrawn from the registry, as the sole owner thereof, and from causing any new registry thereof to be made in the names or name of the Defendants."

On the 7th of September the Plaintiff moved for the injunction, which the Court refused, but made a special order permitting the Defendants to apply to the Board of Customs for such new registry, the Plaintiff undertaking, in case of obtaining it, to hold the said vessel by the same title and subject to the same liabilities as he held the "Pearl" under the former registry.

The Defendants accordingly applied to the Board of Customs for a new registry, and filed various statutory declarations, &c. On the 24th of September the Commissioners decided that the vessel was not a new vessel, and ought not to be registered in the name of the "Lightning."

On the 27th of October 1842 the Plaintiff preferred an indictment at the Central Criminal Court, in London, against the Defendants and several other parties, for a conspiracy to defraud the Plaintiff of his right to the ship, and to impose upon the Board of Customs, by falsely representing the vessel to be a new vessel, knowing the same to be the old one repaired.

On the 4th of November the Defendants obtained a warrant for a month's further time to answer. On the 5th of November, the Defendants' solicitors wrote to the solicitor of the Plaintiff, referring to this warrant, and stating "if you will consent to three weeks or a month, it will save the expense of the order." On the 7th of November, the Plaintiff's solicitor wrote to the Defendants' solicitors as follows: "I consent to the Defendants having fourteen days' further time to put in their answer. This consent to be in lieu of an order, and to be peremptory. If you agree to the above please to write me so." On the following day (November the 8th), the Defendants' solicitors replied, "We agree to the Defendants having fourteen days' further time to put in their answer, and that it shall be peremptory."

On the 14th of November the Defendants applied to the Master for a fortnight's time to put in their answer [384] after the indictment for conspiracy had been disposed of, which the Master refused to grant, on the ground of the peremptory undertaking. It was now moved on behalf of the Defendants, that they might have a fortnight's time to answer after the trial of the indictment.

Mr. Pemberton and Mr. Rogers, in support of the motion. The Defendants went before the Commissioners in pursuance of the order of the Court, and the Plaintiff thereupon, on his own evidence, indicted all the parties, not for perjury but conspiracy. Having thought fit to proceed criminally against the Defendants, he has no right to enforce an answer which may tend to criminate them. If the proceedings be not stayed in the meantime, the Defendants, who cannot answer the bill without furnishing some admissions affecting the criminal charge, must decline to answer, and they will thus be deprived of the opportunity of making a defence in support of their civil rights.

Mr. Kindersley and Mr. Dixon, *contra*. The peremptory undertaking prevents the Court granting any indulgence. The Defendants might at least answer such parts of the bill as do not tend to criminate them; and under the New Orders (Ordines Can. 175), they may object by answer to discover the rest. The Defendants cannot set up their own criminality, as a reason for depriving the Plaintiff of his civil rights.

THE MASTER OF THE ROLLS [Lord Langdale]. The only question is as to the form of the application.

Mr. Pemberton, in reply.

[385] THE MASTER OF THE ROLLS [Lord Langdale.] As to the principle upon which the Court acts in these cases, there is, I apprehend, no doubt whatever. A Defendant is not to be called upon to discover the principal fact, or any one of a long series or chain of facts which may contribute to establish a criminal charge against himself. He may protect himself by demurrer, plea, or answer, or in any way in which he can bring the matter fairly under the consideration of the Court. It being a right to protection given to him by the law, I apprehend he cannot, by any agreement, deprive himself of the benefit of it. The point comes before me rather suddenly this morning; but I think I recollect a case in which it was held that a Defendant cannot make an agreement by which he is to deprive himself of that right to protection which by law he is entitled to. If that be so, he might, under his hand and seal, have covenanted to put in a full and perfect answer to every interrogatory, and yet, after having done that, he might claim the protection of the law of this Court, in respect of the discovery required of him. To what extent that may go, it is not necessary for me to state upon the present occasion; because all that has happened here is, that after the indictment was preferred, the Defendants obtained an enlargement of the time, which they agreed should be peremptory. For anything I can see here—for anything that has been argued or alleged to the contrary—there is not one fact in this bill which must not necessarily be proved at the hearing of that indictment. It has been argued that possibly it might not be so; but all the facts stated both in the original and amended bill, so far as I have heard them, are facts which constitute part of the narrative, and of that statement of circumstances which must necessarily be brought before the jury upon the trial.

[386] Now if this be so, the Defendants might undoubtedly protect themselves in this suit, by stating that there was a criminal prosecution pending against them, and that they could not answer any one of the facts stated in this bill, without contributing towards the establishment of that criminal charge. The question is, whether, under the circumstances of the case, they are at all bound to do that; and I cannot agree with the Plaintiff's counsel that the rule laid down in these cases must be extended to any case whatever, or that we shall have Defendants coming here every day and asking an enlarged time to answer, because, forsooth, there might be some criminal charge at the same time brought, or about to be brought, the prosecution of which would be facilitated by the discovery made to the bill. That is not the case here. The case is that an indictment has been actually preferred since the commencement of the proceedings here pending, and at the very time the Defendants are called upon to put in an answer, which must necessarily discover those very matters which will be in issue at the trial. The only hesitation I have had in the course of these proceedings is, as to the form of the order; and I think that, considering the very peculiar circumstances of the case, the time when this indictment was preferred, and the circumstances which must of necessity be substantiated in it, I shall not do wrong in granting this motion in the form now asked.

With respect to costs, that which has happened is very material. I think that the party ought to have applied for protection at a much earlier period; and I think I cannot grant this motion without making the Defendants not only pay the costs of it, but of the applications to the Master, and any other costs which have been incurred in the negotiation for further time. I think the Defendants ought to pay those costs; and upon their paying these costs, let this motion be granted.

[387] There are many authorities upon this subject, which, if it had been necessary to establish the principle at all, it would have been very material to have gone into. They are very important, and cases have occurred, I think before myself, in which I

have had to look very minutely through every interrogatory in the bill, for the purpose of discovering whether there was any interrogatory which could be answered without having a bearing upon a criminal charge. I have been obliged to do so on more than one occasion; and if this had come on in the ordinary course, I might have been compelled to do so here, and I certainly should not have hesitated to perform that part of my duty. The circumstances under which the indictment was preferred, and the fact of its being now pending, are my reasons for making this particular order. (See *Thorpe v. Macaulay*, 5 Mad. 229; *Wigram on Discovery*, 80, and *Redesdale*, 194.)

[388] ROBINSON v. WOOD. Nov. 24, 1842.

[S. C. 12 L. J. Ch. 93. See *Harris v. Beauchamp Brothers* [1894], 1 Q. B. 808.]

A judgment having been obtained against a party to whom a sum standing to the credit of the cause had been ordered to be paid, the Court, on the application of the judgment creditor, stayed the delivery to the debtor of the Accountant-General's cheques.

The Defendant, Thomas Wood, was entitled to one-sixth of the residuary estate of the testator in the cause, which, in June 1842, had been ordered to be paid to him.

This share consisted of two sums of £211, 17s. 5d. and £1103, 16s. 6d. cash, the produce of stock standing to the credit of the cause; and for the payment of which the Accountant-General had prepared cheques on the Bank of England.

The Petitioners, Charles Wade and John Pavier, had, in June 1841, obtained a judgment against Thomas Wood, in the Common Pleas, for the sum of £2500. They caused it to be duly entered, and in November 1842 they issued a *fi. fa.*, which was delivered to the Sheriff of Middlesex, who, under the 1 & 2 Vict. c. 110, sought to seize the cheques in the hands of the Accountant-General.

The petition prayed that the Accountant-General might be ordered not to deliver to Thomas Wood, or his solicitor or agent, the cheques drawn and signed by the Accountant-General, or any other cheques for the said sums of £211, 17s. 5d. and £1103, 16s. 6d., or either of them or any part thereof, without the authority of the Petitioners; and that the Accountant-General might be ordered to deliver the said cheques to the Petitioners or to the Sheriff of Middlesex.

[389] Mr. Pemberton and Mr. Parry, in support of the petition, referred to the 1 & 2 Vict. c. 110, s. 12, and 3 & 4 Vict. c. 82.

The Defendant did not appear.

THE MASTER OF THE ROLLS [Lord Langdale] considered the Petitioners entitled to the first part of the prayer of the petition, staying the delivery of the cheques, and he gave leave to mention the case as to the other part of the prayer of the petition, which he did not now finally dispose of. (See *Hulkes v. Day*, 10 Sim. 41.)

[389] GARDNER v. DANGERFIELD. Dec. 15, 1842.

On a motion for the production of documents, the Defendant was permitted to shew by affidavit, that they could not be left in the office without great inconvenience; but as the ground for this indulgence was not stated by the answer, he was ordered to pay the costs.

On a former day, a motion having been made by the Plaintiff, that the Defendant might deposit with the Clerk of Records and Write the documents admitted by his answer to be in his possession, it was stated, on behalf of the Defendant, that most of them were in constant use, and could not be produced without great inconvenience to the Defendant. It was therefore asked that they might be produced at Cheltenham, where the Defendant resided.

The ground for this indulgence not having been stated in the Defendant's answer,

was allowed to file an affidavit to verify the circumstances, (1) and the case stood over.

The affidavit was now produced and the order made.

[390] Mr. Turner and Mr. Parry, for the Defendant.

Mr. Pemberton asked for the costs.

THE MASTER OF THE ROLLS [Lord Langdale]. The Defendant must pay the costs, as he ought to have made this statement in his answer.

[390] SIMMONS v. WOOD. Dec. 15, 1842.

An application by the Plaintiff to take a traversing order off the file, cannot be made *ex parte*.

This was an application, on behalf of a Plaintiff, to take a traversing note off the file. The *subpoena* had been served previously to the General Orders of August 1841 (Ord. Can. 170) coming into operation; and it having been held, that a traversing order could not be filed in such a case (*Gregory v. Gregson*, 1 Hare, 108), the Plaintiff was desirous of having it taken off the file.

Mr. Cankrien moved, *ex parte*, for that purpose, and proposed to undertake not to enforce an answer until the expiration of the ordinary time.

THE MASTER OF THE ROLLS [Lord Langdale] said he could not make the order in the absence of the other parties, who might be seriously affected by it; that the Plaintiff could not compel an answer while there was a traversing note on the file, but immediately on its being taken off, he might insist on the Defendant's putting in an answer, and in default might forthwith proceed as for a contempt; the Plaintiff must consequently give notice.

[391] COOPER v. WOOD. Dec. 9, 22, 1842.

Substituted service of a *subpoena* ordered on the solicitor of a Defendant residing out of the jurisdiction.

It was moved, on behalf of the Plaintiff, that service of a *subpoena* to appear upon Mr. Fisher a solicitor, might be good service on the Defendant Mr. Wood.

The bill was filed by the assignees of a bankrupt, to set aside a mortgage executed to the Defendant before the bankruptcy.

Fisher was concerned for the Defendant Wood, and, on his behalf, had given notice to the Plaintiff to pay off the mortgage, or in default that he would sell the property, and he had also been concerned for the Defendant in a suit of foreclosure, filed by a prior mortgagee of the same property.

The affidavit stated that application had been made to Fisher to appear for the Defendant, who stated that he would write to him, and if he gave instructions, would appear. It also stated, that the witness had been informed and verily believed, that Fisher was the solicitor for or on behalf of Wood; but that Fisher would not accept service of the *subpoena*, knowing that Wood, being out of the jurisdiction of the Court, personal service on him could not be effected. It proceeded to state that the Deponent had heard and believed, that Wood was residing out of the jurisdiction of this Court in order to evade service of process.

Mr. Hardy, in support of the motion.

[392] THE MASTER OF THE ROLLS said that he should not hesitate to make the order; but he thought that another application should be made to Fisher, and reasonable time ought to be given him to communicate with Wood.

Dec. 22. The cause was again mentioned, when a further affidavit was produced,

(1) See *Parsons v. Robertson*, 2 Keen, 605; *Morrice v. Swaby*, 2 Beavan, 500; *Smith v. Masse*, 4 Beavan, 417; *Curd v. Curd*, 1 Hare, 274; *Llewellyn v. Badeley*, *Ib.* 527; *Hughes v. Biddulph*, 4 Russ. 190; and *Parkhurst v. Lowten*, 1 Mer. 394.

stating that Fisher had written to Wood, but had not received any instructions from him to appear.

THE MASTER OF THE ROLLS [Lord Langdale] made the order.(1)

[392] BUTCHER v. LEACH. Jan. 30, 1843.

[S. C. 7 Jur. 74.]

Bequest of the interest of the residue to the widow for the maintenance of the testator's children; and after her decease, the property "to be shared equally amongst all his children, if they should have attained twenty-one, and if any had not attained that age, then that his executors should act as trustees until the eldest attained that age, and then pay him his share, and each one as he or she attained that age." A child who died under twenty-one, in the lifetime of the widow, had not to have a vested interest.

The testator, John Willeter Dearle, by his will dated in 1821, after directing investment of his residue in Government securities, and making a provision for his widow, ordered and directed his executors to pay to his widow all the interest and proceeds of the monies placed out at interest, as they should become due and payable half-yearly, for the maintenance and education of his children; and he further "declared it to be his will, that after the decease of his wife, all his effects and [393] property should be shared equally amongst all his children, if they should have attained the age of twenty-one; and if any had not attained that age, then that his executors should act as trustees until the eldest attained that age, and then pay him his share, and each one as he or she attained that age, unless his executors were satisfied with his or her conduct; then and in that case, he ordered and directed his executors to detain the money of such an one until he or she should be twenty-five years, in the lifetime of the widow.

Mary Redford Dearle, one of the children of the testator, died under twenty years, in the lifetime of the widow.

The question was, whether Mary Redford Dearle took a vested interest.

Mr. Winstanley, for the Petitioners, the surviving children, who had all attained twenty-one.

Mr. Hallett, *contra*, cited *Wadley v. North* (3 Ves. 364).

THE MASTER OF THE ROLLS [Lord Langdale]. I am of opinion that the child who died under twenty-one, in the lifetime of her mother, had not a vested interest. The Petitioners are therefore entitled. (See *Taylor v. Bacon*, 8 Simons, 100.)

[394] JOHNSTON v. TODD. Feb. 14, 1843.

[S. C. 5 Beav. 597.]

A. and B. were found to be next of kin by the Master, who rejected C.'s claim. excepted to the report, and upon an issue directed by the Court, he was found to be sole next of kin. A. alone moved for a new trial. Held, that B. might be heard in support of the motion.

The question in the cause was who was entitled to the residuary estate of Robert Marshall deceased. (3 Beav. 218.)

On a reference to the Master, he found the Plaintiffs and certain of the Defendants to be his next of kin. Peter Marshall, who was not a party to the cause, having claimed to be next of kin, the Master of the Rolls directed an issue, to wit, "whether Peter Marshall of, &c., was the next of kin of Robert Marshall, the testator, at the time of his death, which took place in or about the month of December 1835."

(1) See *Kinder v. Forbes*, 2 Beav. 503; *Weymouth v. Lambert*, 3 Beav. 333; *Leach v. Hardwicke*, 5 Beav. 222; *Hobhouse v. Courtney*, 12 Sim. 140.

Peter Marshall was directed to be Plaintiff in the issue, and the Plaintiffs in equity were to be Defendants at law, and the Defendants in equity were all to be at liberty to attend the trial.

The jury found in favour of the claim of Peter Marshall, whereupon the Plaintiffs in equity gave notice of motion for a new trial of the issue, but the Defendants in equity gave no such notice.

Mr. Kindersley and Mr. Parry, for the Plaintiffs in equity, were heard in support of the motion; after which,

Mr. George Turner, for the Defendants in equity, was proceeding in support of his motion, when

Mr. S. Wortley, Mr. Anderson, and Mr. Monteith, for Peter Marshall, objected that he could not be heard, his [395] clients not having given notice of motion. They argued, that this was like the case of exceptions to a Master's report, in which case but the excepting parties could be heard against the report; or the case of an appeal, in which the Appellants only could be heard against the decree. They cited *Webb v. Sargon* (3 Beav. 408. And see *Bonserv v. Cox*, 4 Beav. 379; and *Attorney-General v. Potter*, *antè*, 168), to shew that the same principle applied to the case of a motion.

[THE MASTER OF THE ROLLS. There is a distinction between the case of an appeal from the whole decree and from part.]

Mr. Turner, *contrà*. The general rule is, that the Court will not make an order affecting the interests of parties, without giving them all an opportunity of being heard.

In the instances referred to, there was an existing order or decree of the Court, in which a party could not complain unless he gave notice or appealed; here there is none, the object of the issue being only to inform the conscience of the Court.

Mr. S. Wortley, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. It is strange that no direct authority has been produced on this point; but as the matter stands, I think Mr. Turner must be heard. The Master has found in favour of his clients, and all proceedings which have subsequently taken place were for the purpose of assisting the Court in determining on the validity of the Master's finding.

[396] All persons interested in a report have a right to support the Master's finding, and I therefore think the parties are entitled to be heard, because that which is now asked to be done tends to disturb the report.

[396] CATTELL v. SIMONS. Feb. 15, 1843.

[S. C. 6 Beav. 304.]

The Plaintiff was ordered to pay some costs to the Defendant, and, on the other hand, the Defendant was ordered to pay other costs to the Plaintiff. The Plaintiff, being in contempt for non-payment of the costs, moved that the costs might be set off. Held, that it was competent for the Plaintiff, though in contempt, to refer, for scandal and impertinence, an affidavit filed on the part of the Defendant in opposition to the motion.

The Defendant was ordered to pay certain costs to the Plaintiff, under an order of the 5th of November 1842, and which costs had been taxed. On the other hand, the Plaintiff was ordered to pay certain other costs to the Defendant, which had also been taxed, but were less in amount than the costs payable to him by the Defendant.

On the 11th of January the Defendant caused an attachment to be issued against the Plaintiff for non-payment of the whole of the costs ordered to be paid to the Defendant by the Plaintiff.

On the 16th of January 1843 the Plaintiff gave notice of motion to set off the costs due to him from the Defendant from those payable to him by the Defendant, and to set aside the proceeding for compelling the Plaintiff to pay. In opposition to

this motion the Defendant filed an affidavit which, under an order of course obtained by the Plaintiff on the 6th of February 1843, was referred for scandal and impertinence.

Mr. Pemberton, for the Defendant, now moved to discharge the order of the 6th of February 1843 for irregularity, on the ground that it was not competent [397] for the Plaintiff, who was in contempt, to take that step.

Mr. Teed and Mr. W. T. S. Daniel, *contra*.

Wilson v. Bates (3 Myl. & Cr. 197) was cited.

THE MASTER OF THE ROLLS [Lord Langdale]. In this case the Plaintiff was ordered to pay costs to the Defendant, and a *subpoena* and an attachment were issued for compelling payment; and in the result the Plaintiff is clearly in contempt for non-payment of these costs.

There being, however, a previous order, by which the Defendant was ordered to pay costs to the Plaintiff, the Plaintiff was desirous of being relieved from the process of contempt; and for that purpose, gave notice of motion, that the costs might be set off. This was a motion which the Plaintiff was clearly entitled to make, being an application for relief against the process of attachment. For the purpose of this motion an affidavit was filed by the Defendant, which, it is alleged, is scandalous and impertinent. The question is, whether, pending this proper motion, the Plaintiff is in contempt is not entitled to an order referring it to the Master to ascertain whether the affidavit is scandalous and impertinent. It being necessary to use evidence for this motion, I am of opinion that it is proper that such evidence should be clear and free from scandal and impertinence. I must therefore refuse this motion with costs.

[398] GOODCHILD v. TERRETT. Feb. 1, 11, 21, 1843.

In a creditor's suit, since the 3 & 4 W. 4, c. 104, making the real estate subject to the debts, it is not necessary to establish the will against the heir.

This was a creditor's suit. The 3 & 4 W. 4, c. 104, was applicable, and therefore the real as well as the personal estate was liable to the debts, and it seemed probable that it would be necessary to resort to the former for payment.

One of the Defendants, a *feme covert*, was alleged and admitted herself to be the heiress at law of the testator.

Two questions arose, first, whether it was necessary to prove the will *per testes*; and, secondly, whether there ought to be an inquiry as to who was the heir at law.

Mr. Parker, Mr. Rasch, and Mr. C. Hall, for different parties.

THE MASTER OF THE ROLLS held that as the claim of the creditors against the real estate was paramount to the title both of the heir and devisee, and did not depend on the will, it was not necessary to establish the will.

His Lordship, however, recommended the parties to take the reference, as in case it should become necessary to make a sale of the real estate, it would be very convenient to have the heir at law ascertained by the report of the Master, the admission of a married woman being quite ineffectual for that purpose. (NOTE.—The heir at law and the devisee are necessary parties. *Brown v. Weatherby*, 10 Simons, 128.)

[399] ROBEY v. WHITEWOOD. June 22, July 7, 1843.

[S. C. 7 Beav. 54, 77.]

A Defendant was taken under an attachment for not answering, and not having been brought to the Bar within the proper time, was discharged. The Court directed, that unless he answered within a fortnight, a new attachment should issue against him.

This was a foreclosure suit. The Defendant Edward Whitewood appeared, having neglected to put in his answer, an attachment was issued against him, under which he was arrested on the 24th of June 1842. He was brought up to the Bar at the Court on the 11th of May 1843, and was turned over to the Fleet.

On the 27th of May 1843 he was, however, discharged, in consequence of the day in bringing him up. (11 G. 4 & 1 W. 4, c. 36, s. 15, rule 5. *Williams v. Townsend*, 6 Sim. 296.) On the 6th of June the Plaintiff gave the Defendant notice, that if he did not put in his answer within ten days, or signify his willingness to do so within a reasonable time, application would be made to the Court for a new attachment.

The Defendant having failed to put in his answer, Mr. Shebbeare now moved that an attachment might be issued against the Defendant for not answering the bill.

THE MASTER OF THE ROLLS, after some hesitation, made the order.

July 7. THE MASTER OF THE ROLLS [Lord Langdale] again mentioned this case, and observed that some difficulty had been felt in the registrar's office as to the notice in such cases; and [400] having referred to *Williams v. Townsend* (6 Sim. 296) and see *Hughson v. Cookson*, 3 You. & C. 579; 1 Daniel's Pr. 579, note (c.); and *Arn. & Ven.* 117, his Lordship said, that the way in which the Plaintiff might move an answer would be by amending his bill, and issuing a new *subpoena* to serve the amended bill; but that he thought it unnecessary to put the Plaintiff to a circuitous proceeding; that he saw nothing which ought to deprive the Plaintiff of equity, or why he should not be allowed to proceed in his suit, and the only objection seemed to be as to the form of the order.

His Lordship ordered that the Defendant should put in his answer within a fortnight after the service of the order, and in default, that the Plaintiff should be at liberty to sue out a new attachment.(1)

[401] ALLEN v. ALDRIDGE. *In re* WARD.(2) Dec. 20, 1843; Feb. 19, 1844.

[S. C. 13 L. J. Ch. 155; 8 Jur. 435.]

Fees of the steward of a manor, who is a solicitor but acts in the character of steward only, are not taxable under the 6 & 7 Vict. c. 73.

The statute does not authorise the taxation of every pecuniary demand or bill of a solicitor, for every species of employment in which he may happen to be engaged. He may be taxed though no part of the business was transacted in any Court of Law or Equity, but such business must be connected with the profession of an attorney or solicitor:—business in which the attorney or solicitor was employed because he was an attorney or solicitor, or in which he would not have been employed if he had not been an attorney or solicitor, or if the relation of attorney and solicitor and client had not subsisted between him and his employer.

This case came on upon a petition for the taxation of the bill of fees and charges of Mr. Ward, the steward of the manor of Cookham. Mr. Ward was a solicitor of the Court.

The 6 & 7 Vict. c. 73, s. 37, provides that no solicitor shall commence an action for the recovery of any fees "for any business done" until the expiration of one month after he shall have delivered a bill of such fees; and that upon the application of the party chargeable therewith, the Lord Chancellor or Master of the Rolls may cause such bill to be taxed, "in case the business contained in the bill or any part thereof shall have been transacted in the High Court of Chancery,

NOTE.—The Defendant was afterwards arrested on a second attachment, and on a motion to discharge him out of custody, the regularity of the above order was argued on the 6th of December 1843. The Master of the Rolls, however, made the order regular. See *post*.

This and the four following cases have been inserted out of their regular order, for the convenience of the branch of the profession peculiarly interested in them.

or in any other Court of Equity, or in any matter of bankruptcy or lunacy, or in case no part of such business shall have been transacted in any Court of law or Equity."

The circumstances which gave rise to this application were as follows:—

A portion of the estates sold under the decree in the cause of *Allen v. Aldridge* was copyhold, held of the manor of Cookham, of which Mr. William James Ward was steward, and for the purpose of completing the sale, it [402] became necessary that certain surrenders and admissions should be made at a special court of the manor.

On the 14th of July 1843 a court was held for the purpose; but before the required surrenders and admissions were made, Mr. Ward, the steward, claimed for the amount of £74, 15s. 2d. which were complained of at the time, but Mr. Ward stated that the fees which he demanded were the usual fees, and that he would take no less.

The court was adjourned till the next day, when the sum of £74, 15s. 2d. was paid for the steward's fees, the parties, as they alleged, protesting against the fairness of the charges.

This petition was presented by the Plaintiffs and Defendants in the cause. It alleged that Mr. Ward, the steward of the manor, was a practising solicitor and that his charges were excessive, and they therefore prayed that his bill of fees might be taxed.

Mr. Pemberton Leigh and Mr. Stinton, in support of the petition.

The thirty-seventh section of the 6 & 7 Vict. c. 73, enacts, that a solicitor shall not bring an action to recover "any fees, charges, or disbursement for any business done by such solicitor," till one month after he has delivered his bill; and upon application of the party chargeable, the Lord Chancellor or Master of the Rolls may direct a taxation, "in case no part of such business" (that is of any business "shall have been transacted in any Court of law or Equity.")

It does not therefore require that the relation of solicitor and client should exist, nor that any part of the business should be done in Court, nor is it necessary [403] that the business should be of a nature which can only be properly done by a solicitor. Thus, for instance, a certificated conveyancer may undertake conveyancing business and his fees would not be taxable under the Act; yet if the same business were done by a solicitor, there can be no doubt that the fees and charges for it would be taxable under the provisions of this statute. The only qualification seems to be that the business must be connected with matters of law. These charges which are all for law business are therefore taxable.

The Court has interfered summarily in the case of a steward of a manor. Thus in *Rawes v. Rawes* (7 Sim. 624), the steward of a manor, who was also a solicitor, was ordered, on the petition of the lord and in a summary manner, to deliver up the court rolls to the receiver in the cause. And the same principle was acted on in *Hughes v. Mayre* (3 Term. Rep. 275).

Mr. Kindersley, *contra*. The fees of a steward of a manor are not taxable under this Act. To bring a case within the statute, the relation of solicitor and client must first be shewn to exist. The thirty-seventh section gives the right of taxation to the party chargeable, that is, to the client. The twenty-eighth section gives a similar right to the party who is liable to pay or who has paid, and by the thirty-ninth section the same right is given to the *cestui que trust*; but in both the latter instances the relation of solicitor and client must first be established, as between the solicitor and his direct employer who is the "party chargeable." Here the Respondents were neither the attorney of the tenant nor of the lord; he is the representative merely of the latter, and might fill the office of steward, though he were not a solicitor. [404] Can the accidental circumstance of being a solicitor make these charges taxable when they would not otherwise be the subject of taxation?

In the instances of a coroner, or of the officers in the Prerogative Court, or the clerk of the city companies, or the secretary of bankrupts, their fees cannot be the subject of taxation in this Court; but suppose the persons who filled those offices happened, accidentally, to be solicitors, would that circumstance draw with it the right of sending their account of fees to the Taxing Master for taxation? There is no remedy in the present, as in those cases, if there be an extortionate charge, at common law. The fees of a manor depend on the custom, which varies in different

manor; these are not matters that come properly within the province of a taxing officer. To send this sort of matters to the Taxing Masters will be to refer to them to decide on the custom of all the manors in England, and their decision on the question of *quantum* would be final. The cases cited do not apply, they were cases between the lord and his steward, who as an attorney had obtained possession of his lands. The Court always interfered in such cases.

Mr. Pemberton Leigh, in reply. The object of the Act was to render all the fees and charges of a solicitor taxable, provided they were connected with law business. It is not necessary that the relation of solicitor and client should exist, as parties interested in the fund out of which payment is to be made are entitled to demand a taxation.

The steward has duties to perform towards the tenant as well as the lord, he has the custody of the rolls in which the tenant has a recognised interest, and in surrenders and searches he is employed on behalf of the tenant as well as the lord.

[405] The proper remedy is by an application for taxation; for the steward says, "I will not admit you unless you pay certain fees." The tenant being thus obliged to pay, has no other remedy. If he brought an action, the answer would be that the payment was voluntary; and if he indicted for extortion, he could not, on such a proceeding, recover back the money.

Feb. 19, 1844. THE MASTER OF THE ROLLS [Lord Langdale]. This petition is presented by the Plaintiffs and Defendants in the cause. They allege that Mr. Ward, steward of the manor, is a practising solicitor, and that his charges are excessive, and they therefore pray that his bill of fees may be taxed.

The question is, whether the charges of the steward of a manor who happens to be a solicitor, but was not employed as such, and who acted only as steward of the manor on the occasion in question, are taxable under the statute, and I am of opinion, they are not.

The statute does not authorise the taxation of every pecuniary demand or bill which may be made or delivered by a person who is a solicitor, for every species of employment in which he may happen to be engaged.

The business contained in a taxable bill may be business of which no part was transacted in any Court of law or Equity; but I am of opinion that it must be business connected with the profession of an attorney or solicitor—business in which an attorney or solicitor was employed, because he was an attorney or solicitor, or in which he would not have been employed, if he had not been an attorney or solicitor, or in which the relation of attorney or solicitor and client had not subsisted between him and his employer.

[406] It may perhaps, on some occasions, be questionable, whether the business contained in a solicitor's bill be or be not such as to make the bill taxable under the statute; but in the present case I do not see any reason to doubt. The relation of attorney and client did not subsist between Mr. Ward and the Petitioners, or any of them, or between Mr. Ward and any other person in relation to this matter. He was employed by the Petitioners because he was a solicitor, but because he was steward of the manor, and he might have been steward of the manor, without being a solicitor. His bill is not as to any part of it a solicitor's bill; it is the bill of charges due to be payable to the steward of a manor, and nothing else; and I am of opinion that the statute gives me no jurisdiction over it. I dismiss the petition with costs.

[406] *In re BECKE AND FLOWER.* Dec. 22, 1843; Feb. 19, 1844.

[S. C. 13 L. J. Ch. 157; 8 Jur. 505.]

On payment of a bill, an order for taxation is not to be obtained as of course, even if a party liable to pay the same.

By the 6 & 7 Vict. c. 73, any party entitled to the order may obtain it, as of course, and without special directions, within one month after delivery, and with such special directions as the Court may order to be imposed, after the expiration

of one month from the delivery, but not after verdict, writ of inquiry, or payment. In those cases a special order made upon special circumstances, to be proved to the satisfaction of the Court is required.

A mere volunteer, under no previous liability, does not by paying a solicitor's bill acquire a right to tax it.

In January 1843 Mr. Whately assigned his estate to Messrs. Becke & Flower, who were solicitors, on trust to pay the expenses and divide the residue amongst the scheduled creditors. Messrs. Becke & Flower accepted the trusts and incurred the expenses therein.

- In June 1843 Mr. Whately took the benefit of the Insolvent Debtors Act, and Mr. Hearne was appointed [407] his assignee. The solicitor of the assignee applied to Messrs. Becke & Flower for the delivery to him of the deed of the assignment and other documents, and the assent of the creditors under the trust deed having been obtained, Messrs. Becke & Flower were willing to do so, on payment of the costs incurred in the preparation of the deed and otherwise about the trusts. On the 15th of August 1843 the particulars of these costs were sent by Messrs. Becke & Flower to the solicitor of Mr. Hearne, the assignee.

On the 10th of November 1843 Mr. Hearne, the assignee, by his solicitor, paid the amount of the charges under protest, at the same time stating that it was his intention to apply for an order for taxation.

On the 16th of November 1843 Mr. Hearne, as assignee of Mr. Whately, obtained *ex parte* an order for the taxation of the bill of Messrs. Becke & Flower.

A petition was now presented by Messrs. Becke & Flower to discharge the bill, and order for taxation, with costs.

Mr. Pemberton Leigh, in support of the application. This order is perfectly irregular as an order of course. First, it was obtained *ex parte* after payment, and under the forty-first section of the 6 & 7 Vict. c. 73, it was necessary that the Court should determine whether under "the special circumstances of the case," the required taxation, and that it should impose "such terms and conditions" as should seem right; secondly, it was obtained after the expiration of a month from the date of the delivery of the bill; and after the expiration of that time, by the thirty-seventh section, a taxation can only be obtained "with such directions [408] subject to such conditions as the Court or Judge making such reference shall think proper."

Lastly, the business was never transacted by Messrs. Becke & Flower as solicitors of the insolvent or his assignee, neither of them was therefore a party chargeable by such bill, nor was the Respondent "liable to pay" within the meaning of the thirty-eighth section, and consequently he had no right to get any order for taxation.

Mr. Craig, *contra*. The right of this party to have the bill taxed arises under the thirty-eighth section. It enacts "That where any person, not the party chargeable with any such bill within the meaning of the provisions thereinbefore contained, shall be liable to pay or shall have paid such bill, either to the attorney or solicitor, executor, administrator, or assignee, or to the party chargeable with such bill as aforesaid, it shall be lawful for such person, his executor, administrator, or assignee, to make such application for a reference for the taxation and settlement of such bill as the party chargeable therewith might himself make." Here, the right to have the bill taxed accrued to Mr. Hearne upon payment of the bill, and the provision in the thirty-seventh section, cannot therefore apply.

The payment was made under protest, and reserving the right to taxation. If, as is argued on the other side, Mr. Hearne, the assignee, is not "the party chargeable," the bill has not been delivered a month, and the order was not obtained as of course within a month after the right to taxation accrued.

Mr. Pemberton Leigh, in reply. The thirty-eighth section of the Act applies to a party not chargeable, but who pays a bill, in the same situation as the party chargeable.

[409] A stranger having no interest in the matter cannot, by paying a solicitor's bill, acquire, under this Act, a right to tax it.

Feb. 19, 1844. **THE MASTER OF THE ROLLS** [Lord Langdale]. This petition is presented by solicitors to discharge an order, obtained as of course, to tax their bill, the instance of a person who had paid the bill without having been liable to do so. Two objections were made to the order sought to be discharged.

First; it was obtained as of course after payment of the bill, and three months or it was delivered.

Secondly; it was obtained by a mere volunteer, who, being under no liability, simultaneously paid the bill.

I am of opinion that, after payment of a bill, an order for taxation is not to be made as of course even by a party liable to pay the same. Under the Act, any party entitled to the order may obtain it as of course, and without special directions, one month after delivery, and, with such special directions as the Court may think fit to be imposed, after the expiration of one month from the delivery, but not before a verdict, writ of inquiry, or payment. In those cases a special order, made upon special circumstances to be proved to the satisfaction of the Court, is required.

This order must be discharged, with costs, upon the first objection, that it was made as of course after payment, and without any special direction after the expiration of a month from the time when the bill was [410] delivered. It is therefore unnecessary for me to give any opinion upon the second objection; but I may say that I see no reason to think, that payment by a mere volunteer under no previous liability (which the Respondent has admitted to be the case here), can, upon a fair construction of the Act, give any right to obtain an order to tax the bill.

Order discharged, with costs.

[410] *In re LEES*. Dec. 21, 22, 1843; Feb. 19, 1844.

[S. C. 13 L. J. Ch. 151. See *In re Eyre*, 1843, 2 Ph. 370; 41 E. R. 986.]

A bill of costs of a mortgagee's solicitor for business done in relation to the mortgage, and the sale of the mortgaged estate, is taxable at the instance of the mortgagor, under the 6 & 7 Vict. c. 73, though no part of the business may have been conducted in any Court of law or Equity.

The 6 & 7 Vict. c. 73, as regards taxation, is retrospective with respect to bills previously taxable, and also as to bills thereby made taxable, provided the latter remained unpaid at the passing of the Act.

Payment before the Act came into operation of a previously taxable bill, would not preclude taxation under the Act, upon a proper application made in due time.

Payment before the Act came into operation of a bill not previously taxable, precludes taxation.

This was a petition by a mortgagor for the taxation of the bill of costs of the solicitor of the mortgagee, which had been paid before the 6 & 7 Vict. c. 73, came into operation. The circumstances were as follows:—In 1841 Mr. Ratcliffe, the mortgagor, mortgaged some property to Mr. Bullman. The mortgage contained a clause of sale in case of default, and Mr. Ratcliffe, who was in possession, attorned to the mortgagee.

Mr. Bullman employed Lees as his solicitor; and the interest of the mortgage being in arrear, Lees, as solicitor of the mortgagee, proceeded to sell the estate. He at the same time distrained for rent, and brought an action at law for the mortgage.

[1] The transaction was completed before the passing of the 6 & 7 Vict. c. 73 (August 1843). Mr. Lees rendered to the mortgagee an account of his costs, amounting to £92, 11s. 9d. (omitting all charges for the proceedings at common law), and gave a receipt for the same on the 26th of July 1843. An account was also made out of the receipts and payments in respect of the transaction, and after deducting for the purchase-money and the money levied under the distress, it shewed a balance of £8, 10s. due from the mortgagor to the mortgagee.

Mr. Ratcliffe now presented a petition for the taxation of the bill, alleging in his petition specific errors and overcharges in the bill of costs.

Mr. Pemberton Leigh and Mr. Fleming, for the Petitioner, contended that the Act gave jurisdiction to tax the bill, and that the special circumstances of this case, (on which they commented at length) required it. They argued that the right to tax the bill of costs could not be defeated by the fraudulent omission of all the taxable items.

Mr. Kindersley and Mr. Bagshawe, *contra*. The bill and accounts were fully settled before the Act came into operation, and cannot now be taken into consideration under the authority of that Act. Before the Act, the mortgagee was not entitled to refer the bill of the mortgagor's solicitor for taxation, and he cannot therefore do so now; for the Act had no operation in a transaction finally settled before it came into operation. In addition to this, the bill contains no items taxable according to the old law.

[412] As to the specialties complained of, viz., the amount of charges, they have all been occasioned by the default and misconduct of the Petitioner.

Mr. Pemberton Leigh, in reply.

THE MASTER OF THE ROLLS. I will reserve this case for consideration; but if I depended merely on its specialties, I must say I think there are circumstances to warrant the interference of the Court.

The case depends upon the question, whether these are matters properly to be considered under the authority of the recent Act of Parliament. The principal objection is, that all the accounts were fully settled and disposed of before the Act came into operation. To decide this case I must look at the affidavits to ascertain what really took place; for if there be jurisdiction under the Act to tax costs and charges arising out of an employment before the Act, the only question will be, whether the jurisdiction is excluded by the payment which is alleged to have been made.

I will read the affidavits; but I wish it to be understood that the decision on the construction of the Act will not be influenced by the imputed misconduct of the parties. They may however be observed upon on a proper occasion.

Feb. 19, 1844. THE MASTER OF THE ROLLS [Lord Langdale]. This petition is presented by a mortgagor, and it prays for the taxation of a bill of costs delivered to the [413] mortgagee by his solicitor, for business done in relation to the mortgage and the sale of the mortgaged estate.

The relation of solicitor and client subsisted between the mortgagee and the solicitor whose bill it is desired to tax, and a just bill being payable by the mortgagor or out of the mortgaged estate, this is one of the cases in which the bill is made taxable under the statute, although no part of the business contained in it may have been transacted in any Court of law or Equity.

But three objections are stated: first, that the whole of the business was done before the statute came into operation; secondly, that the bill was actually paid by the mortgagee before the statute came into operation; and, thirdly, that the bill, even if it were taxable before payment, cannot, after payment, be taxed without special circumstances, which, in the present case, do not exist.

Upon the last point I expressed my opinion at the hearing of the petition, and a subsequent perusal of the affidavits has strongly confirmed the view which I then took of the case, that the special circumstances are such, as to make taxation proper if the bill were taxable, notwithstanding that the business charged for was done, and the amount paid, before the statute came into operation. I have therefore now to consider only the two first points.

I entirely concur in the opinion of Mr. Justice Patteson, who has held that the statute applies to matters which occurred before it passed, although the bills had been delivered before that time. This opinion has reference to bills which were taxable under the law existing before the Act was passed; and if there had been no [414] payment, it appears to me that the Act would have been equally applicable to bills which were for the first time made taxable by the statute. In this case, if there had been no payment, the solicitor might have been put to his action, or to his right of

forcing a lien, and the mortgagee would have had a right to resist the demand, and to shew its exorbitancy by legal means, and this Act coming into operation, would have enabled him to ascertain the just amount by taxation; and I think that a mortgagor would, under the Act, have had the same right. I am therefore of opinion, that it is no sufficient objection to the taxation of this bill that the business was done before the Act came into operation.

I am further disposed to think, that the payment of a previously taxable bill before the Act came into operation, would not have precluded taxation under the Act, on a proper application made in due time, because, as the law before stood, taxation might have been had upon a proper case after payment, and the client made, the solicitor received payment, knowing that taxation might have been had. By the payment of a bill which was not taxable, the demand of the solicitor was satisfied, and the mortgagor, as the law then stood, could not, after payment, obtain an order for taxation; there was an end of the solicitor's claim, and of the client's right or power to recover an over-payment by taxation; and, after some doubt, it came to me that the Act does not apply to a case where a bill not previously taxable was paid before the Act was passed.

It was argued, that there was not sufficient proof, that the bill was in fact paid at the time when it is alleged to have been paid; but on the evidence I think that, upon the petition, I must consider that the bill was paid at the time alleged.

[415] I am, therefore, under the necessity of dismissing this petition; but, having regard to the conduct of the Respondent, it must be without costs.

[415] SAYER v. WAGSTAFF. Feb. 9, 19, 1844.

[S. C. 13 L. J. Ch. 161; on appeal, 14 L. J. Ch. 116; 8 Jur. 1083. See *In re London, &c., Banking Company*, 1865, 34 Beav. 336.]

petition being presented for the taxation of a solicitor's bill: Held, that the application was to be considered as made at the latest at the time of answering the petition, and not at the time of service of the petition, or the day appointed for hearing. In cases of accidental delay in the office, the period may be carried further back.

Where a debtor delivers to his creditor his promissory note for the amount of the debt, the debt may be considered as actually paid, if the creditor, at the time of receiving the note, has agreed to take it in payment of the debt, and to take upon himself the risk of the note being paid; or if, from the conduct of the creditor, or the special circumstances of the case, such an agreement is legally to be implied. But in the absence of any special circumstances, the transaction does not amount to a discharge of the original debt, but a mere extended credit.

A solicitor delivered his bill of costs on the 14th of October 1842, for which, the client, on the 3d of November 1842, gave his promissory note, which was paid on the 14th of November 1842. On the 15th of November 1843 the client presented a petition for the taxation of the bill, which was answered on the 16th, and was heard on the 21st. The day appointed for hearing was the 24th. Held, first, that the bill must be considered as paid on the 17th of November 1842; and, secondly, that the application for taxation must be considered as made at the latest on the 14th of November 1843, and consequently that the application for taxation had been made within twelve months, according to the forty-first section of the 6 & 7 W. 4. c. 73.

This was a petition by a client for the taxation of his solicitor's bill.

The facts which were not in dispute, were as follows:—

The signed bill, amounting to £135, 2s. 8d., was delivered to the Petitioner on the 14th of October 1842, and payment was then requested.

On the 3d of November 1842 the Petitioner, with a view to discharge the bill,

gave to the Respondent his promissory note for £135 payable in fourteen days, and on the 17th of the same month of November, the promissory note was duly honoured and paid.

[416] On the 15th of November 1843 the present petition for taxation was brought to the secretary's office. On the following day the common answer or order requiring the parties concerned to attend on the then next petition day (the 24th of November) and that notice should be given, was written on the petition, and signed by the secretary in the usual manner. The petition was served on the 31st of November, and might have been heard on the 24th, if the parties had been ready and the state of business in Court had allowed it.

The Respondent alleged, that the bill had been paid more than twelve calendar months before any application had been made to tax it, and that, therefore, taxation was precluded by the proviso in the forty-first section of the 6 & 7 Vict. c. 73.

The Petitioner, on the other hand, alleged, that the bill in question had been paid less than twelve calendar months at the time he applied for the order to tax it; and that, under the special circumstances, there ought to be a reference for taxation notwithstanding payment.

The questions therefore raised were, first, as to the time when the bill was paid, and, secondly, as to the time when the Petitioner, according to the terms of the forty-first section, "made the application for such reference" for taxation.

A third question arose, in the event of its being determined that the application was made within twelve months, which was this: whether "the special circumstances of the case," in the opinion of the Court, appeared to require a taxation of the bill. It was, however, arranged between the parties, that the third question should not be discussed until the preliminary question had first been disposed of.

Mr. Kindersley and Mr. George Turner, in support of the petition, contended that the forty-first section did not in all cases preclude taxation, where the application was not made within twelve months after payment; and that if such had been the intention of the Legislature, it would have been distinctly expressed. That before the statute, a solicitor's bill could be taxed after payment, if there were special circumstances, *Horlock v. Smith* (2 Myl. & Cr. 495); and that now the Court under its general jurisdiction over its officers, had still the power, in a proper case and under special circumstances, of sending a bill for taxation, although twelve months had expired.

[THE MASTER OF THE ROLLS. The forty-first section seems to impose two conditions: it says that payment shall not preclude taxation if "the special circumstances of the case shall require it, and provided the application is made" within twelve calendar months after payment.]

The forty-first section only applies to bills of costs "taxed and settled;" for this section only provides for the case "of any such bills as aforesaid," and, therefore, refers to the bills mentioned in the clause immediately preceding, namely, a bill "taxed and settled." The thirty-seventh section authorises all bills to be taxed; and the forty-first creates an exception limited to those bills which have been "taxed and settled."

Secondly, they insisted that the application for taxation had been made within twelve calendar months [418] after payment; and in support of this position they contended, that payment of the bill of costs took place on the 17th of November when the promissory note was paid; that giving a promissory note was but a promise and not a payment, and created a mere suspension of the right to sue, for it had been repeatedly decided, that upon the dishonour of a bill given for a debt, the original cause of action revived.

Next they argued, that the application for taxation must be considered as having been made on the day on which the party had presented his petition, and applied to have a day fixed for the hearing, or at least on the day on which it was answered. They contended that this was like the case of filing a bill, in which to save the Statute of Limitations, proceedings were said to have commenced upon filing the bill, and not upon service of the *subpoena*. *Coppin v. Gray* (1 Y. & C. (C. C.) 205).

[THE MASTER OF THE ROLLS. There are four periods at which it may be argued that the application was made; first, the time of presenting the petition; secondly,

time of answering it; thirdly, the time of service; and, fourthly, the day appointed for hearing.]

The time appointed for hearing cannot be considered the time at which the application is made, otherwise if the application be made before the Long Vacation, the next petition day would be three months off, so that in effect, three months might be taken from the twelve months given to the party to apply for a taxation. Neither can the time of service be the period: the words [419] of the Act preclude that construction, in that "the application for such reference" be made, &c. The other two periods remain, in either of which cases the Petitioner is in time.

Mr. Cooper and Mr. Moore, *contra*. The Petitioner has not come within twelve months after payment, and has therefore no right to any order for taxation. After payment, the forty-first section of this Act precludes the taxation of a bill in all cases, and in cases of fraud, unless the application be made within twelve months. In case of fraud the Court, we admit, has still jurisdiction over its officer, but by another proceeding, and not by the taxation of his bill of costs.

Secondly, the bill must be considered as having been paid on the 3d of November, when the promissory note was given. A note duly honoured must, for the purpose of this Act, be considered as payment as from the day on which it was given. The Court thereby settles and adopts the bill of costs, and the solicitor may then transfer the right to another party. In *Ross v. Clifton* (Bail Court, November 22, 1843) a bill of exchange had been given in August 1842, for the balance of a bill of costs. Mr. Justice Patteson referred to a case in which Mr. Justice Coltman was of opinion that payment was made when the securities were given; and Mr. Justice Patteson added, as to the question whether what took place in August 1842 amounted to payment, "I hesitate in determining that it did not, after the opinion ascribed to my brother on the point." The rule there in question was however discharged on other grounds.

[420] Thirdly, it is not necessary to argue whether the time of hearing is to be the period at which the application is to be considered as having been made. It is sufficient for the purpose of the Respondent to carry it to the time of service. That is the period best adapted for the purpose of giving effect to the intentions of the Act. All orders, of course, like the present, take effect from the service; and if it were otherwise, a party might present the petition, and wholly neglect to serve it, the solicitor, having no notice of the pendency of a petition, might nevertheless prevent availing himself of the benefit of the lapse of time afforded by the statute.

THE MASTER OF THE ROLLS. The petition must necessarily be served before the day appointed for hearing, which is always the next petition day.]

If the proceeding had been by motion and not by petition, the application for taxation could not be said to be made when the notice was served, but when the petition was brought before the Court.

THE MASTER OF THE ROLLS reserved judgment.

[421] 19. THE MASTER OF THE ROLLS [Lord Langdale]. There can be no doubt that the bill in question was paid on the 17th of November 1842; but the Respondent insists that it ought to be deemed to have been paid on the 3d day of the same month, when he received from the Petitioner the promissory note, which was afterwards duly honoured and paid.

Again, the Petitioner alleges that his application for an order to tax the bill, if made on the day when [421] he left his petition at the secretary's office, must, at least, be held to have been made on the 16th of November 1843, when the petition was answered. On the other hand, the Respondent insists that service of the petition was necessary to make the application effectual; and that, therefore, the application ought to be deemed to have been made on the 21st of November 1843, on which day the petition was served.

I shall first consider the time when the application for a reference was made.

Any party desirous to have a matter heard on petition takes his petition to the secretary's office. The secretary makes an entry in his book of the cause or matter on which the petition is presented, and writes upon the petition itself the usual order for the parties to attend on the day appointed for hearing the petition, and for notice to be given. The petition is, from the time when such order is made, a regular

proceeding in Court, upon which affidavits may be made; and any party interested to inquire whether a petition in his matter has been presented or not, may ascertain the fact on application to the secretary. Previously to the time appointed for hearing, and before the petition can be set down to be heard, a copy of it is to be left for the perusal of the Judge who is to hear it, and the petition itself is to be filed before any order upon it is passed. (Ord. Can. 53.)

And such being the course of proceeding, I am of opinion, that an application for the purpose stated and prayed by the petition must be considered as made, at the latest, at the time when the order appointing the [422] time for hearing the petition, is signed either by the Judge to whom the petition is addressed, or by his officer acting under his directions. If it should happen that a petition was duly brought to the office, and without any default of the Petitioner, but by some accident or neglect in the office, the answer or order was not made at the time when it ought to have been, the application might be considered as made even before the answer or order for attendance was signed (*Richards v. Wood*, 2 Myl. & K. 621; *Barnes v. Wilson*, 1 Russ. & Myl. 486; *Dearman v. Wych*, 4 Myl. & Cr. 550); but no such question arises here. The petition was answered; and I must consider that the application for reference to tax the bill in question was made on the 16th of November 1843.

Now the proviso in the forty-first section of the statute is, "that the application for such reference be made within twelve calendar months after payment." It is the application, not the service of a petition or the time appointed for hearing a petition, but the application alone which is to take place, or be made within twelve months after payment; and I have now to inquire whether the 16th of November 1843, the time of the application in this case, was within twelve calendar months after payment of the Respondent's bill.

If the bill was paid on the 3d of November 1842, as the Respondent alleges, more than twelve months had elapsed between the payment and the application for the reference; but if the payment was not made till the 17th of November, as the Petitioner alleges, then, at the time of the application for the reference, twelve months had not elapsed from the time when the bill was paid.

[423] The substantial question is, whether a debt is to be considered as paid, at the time of the delivery to the creditor of a promissory note for the amount payable on a future day, on which, or in due time after which, the note is afterwards duly honoured and paid.

The debt may be considered as actually paid, if the creditor, at the time of receiving the note, has agreed to take it in payment of the debt, and to take upon himself the risk of the note being paid, or if, from the conduct of the creditor or the special circumstances of the case, such an agreement is legally to be implied.

But in the absence of any special circumstances throwing the risk of the note upon the creditor, his receiving the note in lieu of present payment of the debt, is no more than giving extended credit, postponing the demand for immediate payment, and giving time for payment on a future day, in consideration of receiving this species of security. Whilst the time runs, payment cannot legally be enforced, but the debt continues till payment is actually made; and if payment be not made when the time has run out, payment of the debt may be enforced as if the note had not been given. (1) If payment be made at or before the expiration of the extended time allowed, it is then, for the first time, that the debt is paid.

There may, as I have said, be special circumstances, from which it may be concluded that a note or bill of exchange was taken as payment of the debt for which it was given; and it is said that, in a case before Mr. [424] Justice Colman & Chambers, he held that payment was to be considered to have been made at the time when a bill and note were given as securities for payment. There may have been circumstances leading to that conclusion in the case referred to; there are, I think, no such circumstances in the case now before me. I have thought it right to examine the affidavits, for the purpose of ascertaining whether there was any evidence that Mr. Sanders took this note in lieu and full satisfaction of the debt due to him.

(1) See *Puckford v. Maxwell*, 6 Term Rep. 52; *Owenson v. Morse*, 7 Term Rep. 64; *Tempest v. Ord*, 1 Mad. 89; *Atkinson v. Hawdon*, 2 Ad. & E. 628.

the bill of costs, and I find no such evidence. Mr. Sanders did not take upon himself the whole risk of the note. The Petitioner was not released from the debt. If the note had not been duly paid, Mr. Sanders would have been entitled to enforce payment of the amount due to him upon his bill, and might have brought an action against the Petitioner to recover it.

I am, therefore, of opinion that the bill was not paid till the 17th of November 1842, and that the application for the reference to tax the bill was made on the 16th of November 1843, being one day less than twelve calendar months after the payment. The bill may be taxed, if there are such special circumstances as to make taxation proper, and the petition must be further heard as to that point.

The petition stood over to the next petition day to be heard on the special circumstances.

[425] *In re DOWNES. Feb. 10, 19, 1844.*

[S. C. 13 L. J. Ch. 159. Followed, *In re Wellborne* [1901], 1 Ch. 316.]

Application by *cestui que trust* for the taxation of a bill of costs paid by his trustees more than twelve calendar months, refused.

Where a *cestui que trust* applies for taxation, then if there has been no payment, the rules under which taxation is to be directed are such as are pointed out by the thirty-seventh section of the 6 & 7 Vict. c. 73, and if there has been payment, by the forty-first section.

Whenever the 6 & 7 Vict. c. 73 applies, the Court cannot in any case whatever send a bill for taxation as against the solicitor, if it has been paid more than twelve months, but the Court may, after that period, direct a taxation as between a trustee and his *cestui que trust*, to justify the payments of the former.

The words "any such bill," in the forty-first section, do not mean the bill mentioned in the section immediately preceding, viz., any bill "previously taxed and settled;" nor are they limited to such bills as under the provisions of the Act are sought to be taxed by a party directly chargeable.

Where a solicitor's bill has been paid by a trustee, the *cestui que trust* cannot after the expiration of twelve months from payment, obtain a taxation, as against the solicitor, although he had no notice of the payment until after the twelve months had expired. *Semble*.

This petition was presented by persons interested in the estate of John Bullock, deceased, praying that several bills of costs paid by the trustees of John Bullock's estate might be taxed.

On the first hearing of the petition, the Court expressed an opinion that the only question upon which any question arose was to be considered as paid on the 2d day of November 1842, and the application for a reference to tax the bill having been made more than twelve calendar months after payment, the question was, whether the bill was taxable under the Act.

Mr. Turner, in support of the petition.

As the Petitioners are interested in the property out of which the trustees have the bill in question, the Court is, by the thirty-ninth section of the 6 & 7 Vict. c. 73, authorised to refer the bill for taxation. That clause directs, "that in any case in which a trustee has become chargeable with such bill, the Court, on the application of a party interested in the property out of which the trustees may have the bill, may refer the same for taxation."

[426] The fact of payment for more than twelve months does not, under the thirty-ninth section, preclude the taxation.

The forty-first section must be limited to some particular bills, and cannot be extended to all paid bills; for the thirty-seventh section, which extends to all bills paid or unpaid, authorises a taxation after twelve months "under special circumstances to be proved to the Court." Now, by the forty-first section, "the fact of any such bill as aforesaid," is in no case to preclude taxation, provided

the application for the reference be made within twelve calendar months after payment. The words "any such bills as aforesaid" have reference to the bills mentioned in the section immediately preceding the fortieth, which are bills "previously taxed and settled;" therefore, to bring the case within the forty-first section, the bill must have been previously taxed as well as settled.

Lastly, the words "any such bill as aforesaid," contained in the forty-first section, apply only to bills sought to be taxed by parties directly chargeable, and not those sought to be taxed at the instance of parties out of whose property the bills are payable as in the present case, who may have no notice of the payment until long after twelve months have expired.

Mr. Kindersley, *contrâ*. The proviso in the forty-first section, "that the application for the reference be made within twelve calendar months after payment," precludes any taxation after that period.

The forty-first section is the first which relates to bills which have been paid. The thirty-seventh relates to unpaid bills alone, which may be taxed as of course [427] within a month after delivery of the bill, or with special directions and conditions after that period until the expiration of twelve months: but no reference is to be made after verdict, &c., or after twelve months, "except under special circumstances, to be proved to the satisfaction of the Court." The thirty-eighth and thirty-ninth sections relate to taxation at the instance of third parties; but they only give to such persons similar rights to those to which the parties chargeable are entitled.

The forty-first section applies to all cases in which payment has been made.

Mr. Headlam, for the trustees.

Mr. Turner, in reply.

Feb. 19. THE MASTER OF THE ROLLS [Lord Langdale]. This petition is presented by persons interested in the estate of John Bullock, deceased, praying that certain bills of costs, paid by the trustees of John Bullock's will, may be taxed.

On the hearing of the petition, I expressed my opinion that the only bill on which any question arises was to be considered as paid on the 2d day of May 1884, and the application for a reference to tax the bill having been made more than twelve calendar months after payment, the question is, whether the bill is taxable under the Act.

The Act provides, that where a trustee has become chargeable with a bill of costs, the Court, upon the application of a party interested in the property on which the trustee may have paid, or be entitled to pay, the bill, may refer the bill to be taxed, with such directions as may be thought proper; and I think that, as to such special directions as may be thought proper in the peculiar case, the directions under which the taxation is to be directed are such as are pointed out in the thirty-seventh section, if there has been no payment, and by the forty-first section if there has been payment.

By the thirty-seventh section, the case of the bill having been paid is not at all contemplated. It relates to unpaid bills only, and provides that, within one month after delivery, taxation may be ordered without special direction; that, after the expiration of one month from the time of the bill being delivered, taxation may be ordered with such directions as the Court may think proper, and that after verdict or writ of inquiry, taxation is only to be ordered on special circumstances, to be proved to the satisfaction of the Court.

The forty-first section contemplates the case of payment before any application for tax the bill is made; and it provides that payment shall not preclude taxation, if special circumstances of the case shall, in the opinion of the Court, appear to require the same, upon such terms and conditions, and subject to such directions as the Court shall seem right, "provided the application for such reference be made within twelve calendar months after payment."

It was argued that the forty-first section, if construed to extend to all paid bills, would be inconsistent with the thirty-seventh section, which extends to all unpaid bills; secondly, that, upon the true construction of the Act, the words, "any such bills as aforesaid," contained in the forty-first section, mean only any such bill as is mentioned in the section immediately preceding to have been "taxed and settled."

and, thirdly, that, at all events, the words "any such bill as aforesaid" contained in the forty-first section cannot be construed to mean any bill which is sought to be taxed by parties other than those directly chargeable therewith.

I cannot concur in any of these arguments. The thirty-seventh section relates exclusively to unpaid bills; and, if it were not for the forty-first section, paid bills would not be taxable at all under this Act. But the forty-first section enacts, that payment shall not preclude taxation, if the circumstances be such as to make taxation proper, and if the application be made within twelve calendar months after payment. Mr. Justice Patteson, in the case of *Bians v. Hey* (Q. Bench Bail Court, 22d Nov. 1843), stated that he considered the true construction of the clause to be, that wherever the Act applies, the Court cannot send a bill for taxation if it has been paid more than twelve months in any case whatever. I entirely concur in that opinion, as affording the general rule, subject, however, to a qualification in this Court. I think that in this Court the bill cannot be ordered to be taxed as against the solicitor himself, if twelve calendar months have elapsed after the payment. But if a trustee or executor has paid a solicitor's bill improperly, and has neglected to procure the bill to be taxed in due time, there appears to be nothing in this Act to prevent this Court (when called upon to disallow the whole or part of a payment alleged to have been made by a trustee or executor) from ascertaining, by taxation, if necessary, what is a proper sum to be allowed to the trustee or executor for his payment. (*Hazard v. Lane*, 3 Mer. 291; *Grove v. Sansom*, 1 Beav. 297.)

[430] I cannot so construe the Act as to make the words "any such bill as aforesaid" in the forty-first section to mean only "any such bill as is hereinbefore mentioned to have been taxed and settled," or "any such bill as under the provisions of this Act is sought to be taxed by a party directly chargeable with such bill." The words themselves import no such restriction, and I can find nothing to warrant the proposed construction.

It is supposed that there may be some hardship on third parties who are enabled to tax the bills within a limited time only, and may have had no notice of the payment till too late. Such cases may arise, and in them the statute does not give so much benefit as might perhaps be desired; but the case stands thus:—Before the Act came into operation, the *cestui que trust*, out of whose estate a solicitor's bill was to be paid, could not procure the bill to be taxed as against the solicitor directly, but he might impeach any improper or extravagant payment made by his trustee in discharge of the solicitor's bill, and might, as against the trustee, cause the solicitor's bill to be taxed. Under the Act, every remedy which the *cestui que trust* had against the trustee remains to him, and, besides that, he is entitled to ask for taxation against the solicitor directly, at any time before payment of the bill, or within twelve calendar months after payment.

I am of opinion that there ought to be no taxation of the bill which was paid on the 2d of May 1842.

[431] HINDE v. BLAKE. Nov. 25, 1842.

[S. C. 12 L. J. Ch. 56.]

Attachment discharged, with costs, on the ground of the order upon which it was founded having inaccurately stated the consequences of a non-performance.

An order had been made on the 7th of May 1842 upon the Defendant for the transfer into Court of the sum of £11,000 consols. (4 Beavan, 597.)

The order was served on the Defendant; but at this time the 11th and 12th General Orders of the 26th of August 1841 (Ord. Can. 166, note (a.), and 167, note (a.)) had been amended by the 6th Order of the 11th of April 1842. (Ord. Can. 166, 167, and 198.)

The order, instead of stating that if the Defendant neglected to obey it, "he would be liable to be arrested under a writ of attachment," as it ought to have done

according to the amended orders, stated, in the old form, "that he would be liable to be arrested by *the serjeant-at-arms*." &c.

The Defendant neglected to make the transfer, and an attachment issued.

Mr. Lovat now moved to discharge it for irregularity, on the ground that the copy of the order served incorrectly stated the consequences of a default in obeying it.

THE MASTER OF THE ROLLS [Lord Langdale] discharged it with costs.

[432] SMITH v. HARTLEY. Dec. 3, 1842.

Upon an application to file a supplemental answer, the Defendant should state on notice of motion the facts intended to be introduced therein.

Mr. Simpson moved on behalf of the Defendants for liberty to put in a supplemental answer.

The notice of motion did not, however, specify the facts intended to be introduced into the supplemental answer.

Mr. Shebbeare, for the Plaintiffs, did not oppose the motion; but two of the being infants, he said he could not consent thereto.

THE MASTER OF THE ROLLS [Lord Langdale]. The rule adopted in this Court to require a Defendant coming for liberty to file a supplemental answer to state his notice of motion the facts intended to be introduced therein. It is necessary that the party coming here as a Respondent should know beforehand what it is the intention of the Defendants to ask of the Court.

His Lordship said, that if the Plaintiffs did not object, he should be disposed to give liberty to the Defendants to introduce into the supplemental answer the facts stated in the affidavit filed on his behalf in support of the motion.

The Plaintiffs' counsel thinking this insufficient, the motion stood over. (*Haslar v. Hollis*, 2 Beav. 236, and *Whitcombe v. Minchin*, 1 Wils. C. C. 1.)

[433] MARCH v. THE ATTORNEY-GENERAL. June 10, July 22, 1842.

[S. C. 12 L. J. Ch. 31; 6 Jur. 829. See *Walker v. Milne*, 1849, 11 Beav. 518.]

Policies of assurance by which the directors engage "to pay out of the funds, "that the funds shall be liable," or "that a share of the funds shall be paid," not so connected with land, as, under the Mortmain Act, to render invalid a gift of them to charity, although the assets of the assurance companies consist partly of real estate.

The rule is the same, although, by the policy sealed with the corporate seal of the company, the assured becomes a member.

The testatrix, Mary Barfield, bequeathed the residue of her monies, securities, money, and her other personal estate to certain charities; and it being alleged that part of such personal estate was so connected with land as to render the gift of it to charity invalid, under the Statute of Mortmain (9 G. 2, c. 36), this suit was instituted for the purpose of having the rights of the next of kin and of the charities ascertained.

A decree was made in the cause, dated the 24th of July 1838, which, directing the usual accounts to [434] be taken of the personal estate of Mary Barfield, ordered the Master to ascertain and state the clear residue of such personal estate, and of what the same consisted, and the nature and particulars thereof, how much consisted of pure personalty, and how much of personalty connected with land.

The Master, by his report, dated the 20th of December 1841, certified that the residuary personal estate of the testatrix, at the time of her death, consisted, in part, of the following particulars:—

1st. A sum of £2000 due from John Wall, with an arrear of interest from

14th of August 1838, and which was secured by mortgage of a policy of insurance from the Society of Equitable Assurances.

2dly. A sum of £210 received from the Economic Life Assurance Society upon a policy of insurance on the life of Margaret Maria Adam.

3dly. A sum of £150 assured on the life of Joseph Hudson (who was still living) in the Law Life Assurance Office.

And, 4thly. A sum of £1200, which was received on a policy of insurance effected by the testatrix on the life of George Hornsby in the Amicable Assurance Society.

The Master stated his opinion, that the same several sums of £2000, £210, £150, and £1200 received upon or secured by such policies of insurance were personal estate connected with land, according to and in the proportion, which the funds properly subject to the payment thereof, which consisted of estates or securities on real estates, bear to the funds and property subject to the payment thereof, which consisted of pure personal estate.

[435] To this finding three sets of exceptions were taken; and the exceptants alleged, that the Master ought to have found all the several sums of £2000, £210, £150, and £1200 to be pure and personal estate.

It appeared that all of the several insurance companies by whose policies these several sums were secured, and upon which policies all the sums except the £150, had been received, were entitled to some real estate, or chattels real, or some funds which were secured on mortgages of real estate or chattels real; and that such being the stocks or funds of the several insurance companies, they adopted several distinct modes of providing for the payment of the sums payable on the policies they granted.

The policies granted by the Equitable Assurance Society consisted of covenants by two trustees, that they, upon the payments becoming due, would pay or cause to be paid, out of the stock or fund of the society, unto the executors of the assured the full sum assured.

The policies of the Economic Life Assurance Society were instruments signed by three directors, providing, that if the premiums were duly paid, the funds and property of the society, according to the articles of settlement, after payment of all prior charges, should be liable to pay the sums assured; and it was declared, that the funds or property of the society, after payment of prior charges, should alone be answerable for the payment of the sums assured.

The policies of the Law Life Assurance Society were signed by three directors, and provided, that if the premiums were duly paid, the stocks, funds, securities, and property of the society should be liable, according [436] to the provisions of the deed of settlement, to pay the sum assured; and that the subscribed capital and other stocks, funds, and securities and property of the society should alone be liable to answer the claims on the society.

The policies of the Amicable Society were sealed with the common seal of the society, and thereby the assured were admitted members of the society, and the society obliged themselves to pay to the person effecting the policy, such a proportion or share of the joint stock and fund of the society, as would become due on the death of the assured according to the charter or bye-laws of the society.

The exceptions now came on for argument.

Mr. Pemberton, and Mr. Metcalfe, and Mr. Teed, and Mr. Rolt, in support of the charitable gifts. This case is governed by the authority of *The Attorney-General v. Piles*, which was before Sir C. C. Pepys, M. R., in 1835. There, India stock had been given to a charity, and it was contended, that because the company held real estate, the gift to the charity was void under the Mortmain Act, but the Master of the Rolls decided otherwise; he considered the real estate held merely for trading purposes. The principle established by this decision was, that stock in a public company is not subject to the operation of the Mortmain Act, although a part of the property used for the purposes of trade consists of realty. And so it was held in *Bligh v. Brent* (2 You. & C. 268), where a question arose as to shares in the Chelsea Water Works Company, it was held [437] that real estate belonging to a trading company was personal property, and would pass by a will not executed with the formalities then required for devising real estate. The policies are merely personal obligations to pay certain sums in a given event; *Andrews v. Ellison* (6 Moore, 199); and it is quite

immaterial out of what fund they may ultimately be paid. They create no specific lien on any property, and give the assured no right to interfere with the property of the assurer.

In *Gurney v. Rawlins* (2 Mea. & W. 87) it was held that monies due on a policy were *bona notabilia* where the insured died and the policy was, and not where the stock and fund out of which it was payable was situate. Lord Abinger there observed: "The Defendants are liable in their own persona. The policy does not give any right against the fund itself."

The covenant to the extent of assets of a company is similar to the limited covenant of an individual; it resembles the liability of an executor to pay to the extent of assets, and it gives no lien on the property. All debts are now payable out of the real estate of a testator, and no part of the assets of a testator which consist of debts, can (according to the doctrine of the other side) be given to charity.

It is true that in *Howse v. Chapman* (4 Ves. 542) bonds given by Commissioners for improving the City of Bath were held to be within the statute; but as the Master of the Rolls, in *The Attorney-General v. Giles* observed, it does not appear from the report on what grounds that decision was made, nor on what estates the bonds were secured.

[438] The inconvenience of apportioning the real and personal estates of an insurance company, for the purpose of awarding to a charity the proportion of the legacy which the personal estate of the company bears to its real estate, is to appear.

Mr. Tinney, for the executors.

Mr. Wray, for the Attorney-General.

Mr. George Turner and Mr. Stinton, *contra*, for the next of kin. The Court cannot be governed by the consideration of convenience; if it could, the inconvenience of repealing a statute, and the very numerous decisions upon it, would be a very forcible reason for adopting the construction contended for by the next of kin. The statute (9 G. 2, c. 36), which was passed for the purpose of preventing "the disherison of the lawful heirs," enacts that no lands, &c., shall be given, &c., "or any ways charged or incumbered" for any charitable uses whatsoever. This statute, therefore, in its terms strictly prohibits the charging of real estate for charitable uses.

The decisions shew the inclination of the Courts to carry out the intention of the Act to its very letter, in order to prevent the disherison of the heirs. Thus, it has been held, that the benefit of a grant from the Crown to lay down chains in the Thames for mooring ships is an interest in land and within the statute; *Negus v. Coulter* (Amb. 367). So also a mortgage of turnpike tolls, *Knapp v. Williams* (4 Ves. 430, n.); the bonds of Commissioners for the improvement of the City of Bath, *Howse v. Chapman* (4 Ves. 542); and money secured on the poor rates, *Finch v. Squire* (10 Ves. 41). Again, where a testator who has given his personal estate to charitable uses, contracts to sell real estate, but the sale is not completed in his lifetime, his lien upon the estate for the amount of the purchase-money is an interest in land within the Statute of Mortmain, and the purchase-money will not pass by his will to a charity, *Harrison v. Harrison* (1 Russ. & M. 71, and Tamlyn, 273). So judgment debt due to a testator, and which was paid out of the real estate of the debtor, was held to be incapable of passing to a charitable use under the statute, *Collinson v. Pater* (2 Russ. & Myl. 344).

The question is not, as stated by the other side, whether there is a lien on land or a right to take possession of it in satisfaction, this objection would be answered by the cases of *Negus v. Coulter*, where the right was to lay chains, and *Knapp v. Williams*, where the security was on the tolls and not on the gates, and *Howse v. Chapman* and *Finch v. Squire*, in which no such lien or right existed. If it were a question of lien the policies, in some of these cases, create a lien on the property of the companies. Again, it does not depend on there being a personal liability by covenant or otherwise. The instance of a mortgage debt is an answer to that argument.

In *The King v. Bates* (3 Price, 341) parish bonds, secured "upon the credit of the rates or assessments" under Paving Acts of the parish of Marylebone, were held to be not mere chattel interests, but charges on the owners of the houses in respect of the houses.

[440] *The Attorney-General v. Giles* was decided on this:—the Court considered that under the East India Company Acts, there was a mere right to receive and an obligation to pay interest in respect of trading profits not exceeding 10½ per cent., and that the real estate, so far as it was situate in England, was held merely for trading purposes.

The charge cannot be apportioned in favour of the charity; *Hobson v. Blackburn* (10 Ves. 273) and *Finch v. Squire* (10 Ves. 44); in which Sir William Grant, referring to the fact of the poor and county rates being payable out of both real and personal property, says, "As to that part of the poor rates that is raised out of the personal property, it cannot be distinguished. I cannot divide and apportion the security; so much is to be imputed to the produce of land, and so much is from personal property. I must take the whole. They are so blended that it is impossible to distinguish them. If the consequence of their [the Christian Knowledge Society] adding this security would be that something real would go to the charity, it must all altogether."

The case differs from *Waite v. Webb* (6 Mad. 71).

Mr. Teed, in reply.

July 22. THE MASTER OF THE ROLLS [Lord Langdale]. In the various forms used, the mixed funds or stock of the societies or companies are referred to as the funds out of which the grantors of the policies are to make the payments. "The grantors will pay out of the funds," [441] "the funds shall be liable," or "a share of the funds shall be paid," are the different forms of expression used; the seeming intent being, to relieve, if practicable, those who execute the policies from personal liabilities, and to hold out to the grantees the notion of security for the payment of the sums of money payable on the policies. The question is, whether, under such circumstances, the sums secured are pure personal estate or personal estate connected with land.

The grantees of the policies contract for a sum of money to be paid on a future event. Whatever may be the property possessed by the grantors, the grantees are not, by their contract, any immediate control over it or lien upon it. The grantors or their trustees continue to have the entire control or management over the whole fund; the real estate or chattels real may be sold and converted into pure personalty, and the pure personalty may be converted into chattels real. This state of things may continue, not only during the contingency upon which payment depends, but after the contingency has determined; for the grantee acquires no specific lien after the payment has become due. Even in default of payment when the grantee cannot, by reason of such default only, resort immediately and at once to land or chattels real, but must resort to legal process which will not affect the land possessed by the office at the time of the contract, although it may, in its result, affect such land as the office may have at the time when the process is executed. Ordinarily, the grantee has nothing but a right of action from the date of the contract until actual payment; and although I conceive it to be possible in some circumstances to arise, in which from the state of the funds, the claims upon it, or the misconduct of trustees and directors, the Court would take possession of the property, and apply it for [442] the benefit of all persons having claims upon it, I conceive that the bare possibility of such interference, within the meaning of the Mortmain Act, does not connect a sum of money payable on a policy of insurance with the quality of the property which may be held by the grantors.

The cases which have been decided, have gone a great length in bringing money upon securities which affect real estate within the meaning of the Mortmain Act; none of them go so far as is attempted in this case. Where there is a right to toll turnpike tolls, or poor rates, or county rates specifically applied in payment of mortgage, the money so secured has been held within the Mortmain Act. There are other cases which have scarcely met with approbation; but this case does not appear to come within the Act, or within any of the decided authorities; and it seems, that if the money secured by a policy of assurance is to be deemed to be connected with land so as to be brought within the Statute of Mortmain, there would be no reason why the same consequence should not attach upon any debt, owing by any person who has real estate or chattels real; for though the right of action

imports only pure personalty, yet the result of an action may be to obtain payment out of the land or chattels real.

On the whole I am of opinion that the sums secured by the policies are not within the Act, and that the exceptions must be allowed.

[443] *LANGLEY v. FISHER. Feb. 22, 24, 1843.*

[A note in the Addenda to 7 Beav. states that this judgment was affirmed by Lord Chancellor, April 10, 1844.]

A husband cannot be examined as a witness against his wife, in a suit affecting her separate estate, although there are other Defendants in respect of whom he would be competent.

The proper mode of taking the objection is by demurring to the interrogatories. The costs of a demurrer of a witness follow the rule of ordinary demurrers.

The object of this bill was to recover an estate, one-seventh part of the produce of which, after paying certain charges, had been bequeathed in trust for the separate use of Frances the wife of Neast Greville Prideaux. The remainder belonged to other Defendants to the cause.

Mrs. Prideaux answered separately from her husband, who put in an answer and disclaimer.

The bill contained allegations of fraud and collusion as against Mr. Prideaux.

The cause being at issue, the Plaintiff sought to examine the Defendant Mr. Prideaux as a witness in support of his case; but being produced as a witness before the examiner, he demurred, and for cause of demurrer said "that he was the husband of Frances Prideaux, one of the Defendants in this cause, and he therefore submitted to the Court, whether, having regard to the issue joined in this suit and to what these interrogatories related, he ought to make any answer thereto."

The demurrer now came on for argument.

Mr. Kindersley and Mr. Phillips, in support of the demurrer.

It is a general rule, founded on public policy and to preserve the peace of families to exclude the evidence of husband and wife against each other; *Davis v. Davis* (4 T. R. 678); *Vowles v. Young* (13 Ves. 144); *Barron v. Grillard* (3 V. & B. 165). And see *Cartwright v. Green*, 8 Ves. 405). The rule applies notwithstanding there are other parties besides the husband or wife interested in the proceedings, the interest of the latter is to be affected by the evidence. On the trial of an indictment against two prisoners for burglary, in which each of them set up the defence of a distinct *alibi*, it was proposed, on the part of one of the prisoners, in proof of his *alibi*, to call the wife of the other prisoner; but her evidence was rejected, on the ground of tending to shew that the witness for the prosecution was mistaken as to one of the prisoners, which would weaken the effect of that witness's testimony as to the other prisoner her husband. It was then decided by a majority of the Judges that the witness had been properly rejected; *Rees v. Smith* (Moody, 289).

Mr. Pemberton and Mr. Romilly, *contra*. The form in which this objection is taken is wrong. The objection is one which goes only to the reception of the evidence and ought to be raised at the hearing. A witness has no right to judge of the admissibility or effect of his evidence; and there is no instance in which the objection has been taken by demurrer, except where the party by giving evidence would commit a breach of duty, as in the case of a solicitor, as in *Parkhurst v. Lowten* (2 Swan 19). Again the rule does not apply where third parties are interested; for the evidence may be received as to the other Defendants to the suit, and rejected as against the wife of the witness. The Plaintiff might, at the hearing, waive relief against Mr. Prideaux, and then he would be entitled to use her husband's evidence.

[445] The rules of equity are different from those at law: parties to a suit who could not be examined at law are constantly examined in equity, and also in suits directed by this Court. This, being a case of fraud, would form an exception to the rule, and such exceptions are numerous. (1 Phill. Ev. 169.)

If this objection were to prevail, then in a case in which the husband is an importer

ness, it is only necessary to assign to his wife an interest in the subject of the suit in order effectually to exclude his testimony.

Mr. Kindersley, in reply, referred to *Pedley v. Wellesley* (3 Car. & P. 558) and *Fulgrave v. Lord Dunbar* (2 Swanst. 198, n.), which was a case of a demurrer of a witness to defamatory matters.

THE MASTER OF THE ROLLS [Lord Langdale]. The bill in this case charges several things, but prays no relief against Mr. Prideaux, and he has put in an answer whereby he disclaims all interest. It being proposed to examine him as a witness, he has put in a demurrer to the interrogatories, "and for cause of demurrer says that he is the husband of Frances Prideaux, one of the Defendants in the cause, and he therefore submits to the Court whether, having regard to the issue joined in the suit, and to the facts these interrogatories relate, he ought to make any answer thereto."

Now the issue in the cause is one which clearly affects the interest of the wife; the object of the bill is to have it declared that a certain fine levied of the estate, which now enures to the benefit of the wife and [446] other Defendants may be used to enure to the use of the Plaintiff. The effect and object of the bill is therefore to deprive the wife of the interest which she now claims in the property in question. The question in the cause therefore being, whether she is to maintain her interest or not, Mr. Prideaux submits, that as the husband of the person whose interest is sought to be taken away by this suit, he ought not to be examined as a witness.

I apprehend that the general rule is subject to no doubt, and that a husband and wife cannot be examined for or against each other. It is not founded on interest, but on public policy. The same public policy sanctions many exceptions, but I do not find this present case contained amongst the cases of exception to the general rule.

It is said this is not the form in which the objection can be taken; but how does it stand? The question in the suit being, whether the wife shall maintain her interest against the claim of the Plaintiff, there is a direct point in issue between her and the Plaintiff. The witness says, I am her husband, and ought not to be examined. In the same way, in the case of an attorney, he says, I stand in a privileged relation, and ought not to be examined. The cases seem analogous; and though no direct authority has been produced, my impression is, that the husband cannot be examined. I mention the case again.

Nov. 24. THE MASTER OF THE ROLLS [Lord Langdale]. I have looked over the authorities, and, though I have not found any in which the present point has been raised, yet I confess I do not see why I am not to apply the principle of the cases to the present.

It appears to me, that the general rule, with some exceptions (among which this is not to be found included), is that a husband and wife cannot be examined for or against each other; the consequence of which is, that if this examination had taken place the evidence could not have been received. If so, it seems the most regular and proper course to take the objection in the first instance.

Generally speaking, a witness has no business to concern himself with the merits of a case in which he is called on to give evidence, or whether, when given, it will be material to the cause; but here the witness is a party to the cause, and he knows the evidence which he is called on to give affects the interest of his wife.

I think he is right in his objection, and right in the form in which the matter has been brought forward. I must allow the demurrer. (See *Gregg v. Taylor*, 5 Russ. 19.) He costs follow the rule of ordinary demurrers. (See *Ordines Can.* 17, and *Sawyer v. Moore*, 3 Myl. & K. 572.)

[448] NOKES v. WARTON. Nov. 5, 8, 9, Dec. 17, 1842.

Costs of costs, settled and paid after examination, discussion, and an abatement made by the solicitor, referred for taxation under the circumstances, but on the terms of the client admitting the cash payments contained in the settled account.

The solicitor delivered his bill of costs. His client had time to examine it, and obtained

professional advice and assistance respecting it. Objections were made to the items, and after discussion the client obtained a considerable deduction. He settled the account, admitted the balance, obtained the vouchers, and afterwards paid the amount admitted to be due. The relation of solicitor and client continued after the payment. The Court directed a taxation of the bill, notwithstanding this settlement, thinking that the client was, "to an alarming extent," in the power of the solicitor:—that the bill, which contained general items to a very considerable amount under the terms, "numerous attendances" and "innumerable attendances," was not sufficiently explanatory:—that the solicitor did not do all, which under the circumstances he ought to have done, to facilitate to the client the exercise of his right to a full statement of the particulars of the charge and to the proper investigation of each particular item: and "that the parties were on terms as unequal as to make it difficult to make any bargain which could be binding upon the client in the absence of other assistance."

Where accounts and bills of costs of a solicitor are delivered a sufficient time before the settlement to allow the client to examine them, and obtain advice and assistance respecting them, and the opportunity is taken advantage of, and the bills, being examined, objections are taken, upon discussion of which an allowance is made, a settlement come to, and the balance paid, *prima facie*, a taxation is precluded; but if, under the above circumstances, the client is in the power or at the mercy of the solicitor, if the bills delivered be not sufficiently explanatory, if the client though having time to examine the bills has not been able to obtain, or has not been allowed to employ the most effective means of examination, if it appears that the solicitor in whose power the client is, is driving a bargain with him on unequal terms, and that the relation of solicitor and client and the power of the solicitor continues, then all the circumstances above referred to as tending to establish that the settlement may be unavailing.

This was a petition presented by the Plaintiff, James Wright Nokes, for the taxation of his late solicitors' bill of costs. The application was resisted on the ground that it had after investigation, been settled and paid.

The circumstances are fully stated in the judgment of the Court.

Mr. Pemberton and Mr. Teed, in support of the petition.

Mr. G. Turner and Mr. Jenkins, *contra*.

[449] Mr. Pemberton, in reply.

Crossley v. Parker (1 Jac. & W. 460), *Horlock v. Smith* (2 Myl. & Cr. 495), and *Massie v. Drake* (4 Beavan, 433) were cited.

THE MASTER OF THE ROLLS reserved his judgment.

Dec. 17. THE MASTER OF THE ROLLS [Lord Langdale]. The Petitioner in this case, having for some time employed the Respondents as his solicitors and agents, in his petition prays, that it may be referred to the Master to tax their bills of costs in all the matters in which they have been employed, and to take an account of the monies received by them on account of the Petitioner, and of the application thereon by the Petitioner offering to pay what, if anything, shall appear to be due on the taxation and account. The Respondents allege, that their bills of costs have, with a trifling exception, been settled and paid, and they insist that the Petitioner is now entitled to have them taxed.

The Petitioner appears to have been a person engaged in the purchase and sale of land on speculation, borrowing money to complete his purchases, and expecting to re-sell to repay the sums borrowed, and realize a profit for himself. In the year 1838 he had agreed to buy the White Knight's estate, and wanting money to enable him to complete his purchase, he became acquainted with the Respondents, the solicitors of Mr. Beardmore, who agreed to advance the money, and on the decease of Mr. Raphael, the former solicitor of [450] the Petitioner, the Respondents became and acted as his solicitors.

In the year 1839 the Petitioner contracted to buy Pope's Villa at Twickenham, and the Respondents were, as his solicitors in that matter, employed to do what was required in completing the purchase, and employed to borrow money for that purpose, and to prepare for the re-sales which were intended. In various other matters,

Respondents appear to have been employed by the Petitioner as his solicitors and agents, and to have received and paid several sums of money on his account, till early in the year 1842, when they ceased to act for him.

During the whole time of the employment of the Respondents, the Petitioner appears to have been in great want of money for his speculations, and to have been thereby reduced to very considerable difficulty. The Respondents not only induced their client, Mr. Beardmore, to advance the Petitioner £21,000 in December 1838, but also a further sum of £2000 in May 1839, and a further sum of £3140 to pay off Mr. Cholmeley, who had threatened execution on a judgment which he held for that sum. These several sums were charged on the White Knight's estate, and amounted to the whole purchase-money which the Petitioner had agreed to pay for it; the Petitioner was not only without means of raising the money which was required for the purpose of completing the purchase of that estate, but was involved in considerable difficulty in the other speculation as to Pope's Villa, and in other matters; and in the course of the transactions, considerable sums of money became due from the Petitioner to the Respondents personally, for business done and for monies advanced. On the 14th of April 1840 the Respondents, as the so-[451]-solicitors of Mr. Beardmore, gave notice to the Petitioner, that Mr. Beardmore required the Petitioner to pay off the sum of £26,140, then due to him on mortgage of the White Knight's estate, on or before the 13th of July then next.

Under these circumstances, Mr. Beardmore must have been anxious about his money, and the adoption of any lawful means in his power to obtain payment was reasonably to be expected; but, having regard to the facts stated in the affidavits filed in behalf of the Respondents, I think that they must have known that the Petitioner would not comply with the notice which they sent to him. The notice appears to me to have been well calculated to suggest to the Petitioner (if any suggestion was necessary) that he was dependent upon and in the power of Mr. Beardmore and the Respondents as his solicitors, and that he must be indebted for any remaining hope of making a profit by his White Knight's speculation to their favour or forbearance. It does not clearly appear from the affidavits, at whose instance or on what particular day, the Respondents sent their account current and bills of costs to the Petitioner. They appear to have been delivered about July 1840. During some part of the transactions to which the bills relate, the Petitioner's father had acted in the name and on the behalf of the Petitioner as his agent, in a manner of which the Respondents might have just reason to complain, if they had not continued to act for the Petitioner under the facts were known. But the Petitioner's father, being his agent and so identified with him, that for a time he seems to have personated him with his authority, was, when the bills and account were delivered, a prisoner in the Fleet Prison, the place where the discussions leading to the settlement in question took place.

[452] The Petitioner was not induced to acquiesce in the account and bills by any confidence which he placed in the Respondents. He might be under the influence of some fear, but confidence in the statements of the Respondents he had not, and instead of acquiescing in the account and bills, he appears to have examined them with all the attention in his power. He had an interleaved copy made and placed in the hands of Mr. Pirie and Mr. Browning. Mr. Pirie is described as having been a solicitor, and afterwards a barrister, who had not practised for a considerable time. Mr. Browning, who says that he was brought up to the law, was a prisoner in the Fleet with the Petitioner's father, and these persons appear to have made many observations on the bills of costs, and the several items therein, and to have represented to the Petitioner that the bills contained many gross overcharges. Mr. Browning represented the bills of costs to be founded in fraud.

The Petitioner was therefore put upon his guard; and this circumstance must be taken into consideration, in connection with the other circumstances, tending to shew the power which the Respondents might have exercised over him. The Petitioner says, that being surprised at the amount of the charges, he expressed his desire to refer them to some solicitor or other person capable of advising him as to the propriety thereof, who should meet and confer with the Respondents relative thereto, but that the Respondents absolutely declined and refused to meet any such person at

the settlement of the accounts. This allegation is not met in the way that might have been expected, if the Respondents had really been willing to submit to the exercise of the Petitioner's right to have their bills and accounts fully examined by a competent person. Pirie and Browning [453] are referred to as having advised the Petitioner, and the refusal to meet a solicitor is not noticed.

The meetings respecting the accounts and bills were held in the Fleet prison, in the room of Mr. William Nokes. On the 4th of August, the items of the account current, with the exception of those which consisted of the amounts of bills of costs, appear to have been carefully considered and compared with the vouchers then produced, and the bills of costs underwent some discussion in the presence of Pirie. An adjourned meeting was appointed for the 10th of August; on that day no discussion appears to have taken place, but soon afterwards, the Petitioner gave to one of the Respondents his interleaved copy of the bills of costs, with the objections and observations, and the 25th of August was appointed for another meeting. A meeting was accordingly held in the Fleet prison on that 25th of August. It is admitted that the Petitioner and his father were present on the one side, and the Respondents and Mr. Stevenson their clerk on the other side; but it is disputed whether Pirie was present. The Respondents and Mr. Stevenson say that he was, whilst Pirie swears that he wished to be present, and was excluded; and Browning says that Pirie was in his room whilst the bills were under examination in the room of William Nokes, and, consequently could not be present at the time alleged. The Respondents and Stevenson admit, that on one occasion when the accounts were under discussion, Pirie had been excluded from the room, but state, that the occasion occurred before the 25th of August, and that on such previous occasion Pirie was put out, in consequence of his intemperance. This circumstance tends to shew that Pirie, even if he had been present, could not have been an effectual protection to the Petitioner: and whether he was in fact present on the [454] 25th of August does not appear to me to be of so much importance as at first sight it might appear to be. No great assistance could be derived from a person who came to a meeting for business in a state of intoxication, or who being at such a meeting for the purpose of assisting one party, could be turned out of the room at the will of the other party. At the meeting on the occasion of which Pirie was turned out, the bills, if at all discussed, were discussed in the absence of the only person whose assistance the Petitioner could at that time have.

The Petitioner, with the assistance of such observations as had previously been made by Pirie and Browning, desired that deductions should be made from the amount of the Respondents' charges. Taking the charges as they were, and as they were brought into the account current, they left a balance of £631, 15s. 1d. due to the Respondents; and the Respondents, who had had an opportunity of reading and examining the objections, and who now admit that there were several objectionable items in the bills, say, that after some discussion, and a private consultation with Mr. Stevenson their clerk, the Respondent Mr. G. K. P. offered to take £300 for the balance. The Petitioner contended for a further reduction, and finally, as Mr. Stevenson says, the Respondents agreed to accept £250 in full discharge of the balance, thereby making a deduction of £381, 15s. 1d.; and this agreement being made, the two memoranda which are set forth in the petition were drawn up by Mr. Stevenson, and were signed by the Petitioner. By one memorandum, it was acknowledged that the accounts and bills were settled, that the balance was £250, and that certain vouchers were delivered up; and by the other memorandum, the Petitioner acknowledged that he was indebted to the Respondents in £250, and agreed to charge the same on the White Knight's estate. Certain vouchers were delivered up, and the Respondent Mr. G. K. P. thereupon destroyed the interleaved copy of the bills of costs, upon which the observations on and objection to the bills had been stated.

During the preparation for the settlement, at the time of the settlement, and afterwards, the relation of solicitor and client continued to subsist between the Petitioner and the Respondents. Soon after the settlement, attempts were made to sell the White Knight's estate for the purpose of raising money to pay Mr. Brownmore, and those attempts failing, the Petitioner released his equity of redemption

Mr. Beardmore for £250, the amount of the balance, which, on the accounts, was admitted to be due to the Respondents, and which was actually applied in satisfying that balance.

It is alleged on this petition, that accounts and bills settled as these were, ought not to stand or to be held to be in any way binding on the Petitioner; and further, that even if the accounts should be considered as *prima facie* binding, they ought to be opened, in consequence of the many and important errors which they contained. It is admitted that there are several errors; but it is at the same time alleged (I think in respect of every error admitted), that they were all considered on the settlement, and allowed for in the £381, 15s. 1d. deducted from the balance. Whether this was so, in fact, cannot now be ascertained, in consequence of the Respondent Mr. G. K. P. having destroyed the written objections and observations which were made.

In this case, therefore, we have the account and bills delivered a sufficient time before the settlement to allow the client to examine them and to obtain advice and [456] assistance respecting them. The opportunity was taken advantage of, and the bills being examined, many objections were taken, and upon the discussion of those objections, the client obtained an allowance of no less than £381, 15s. 1d., in respect of the objections taken. A memorandum of settlement was signed, and also another memorandum admitting the balance to be due, and agreeing to charge it on the White Knight's estate, and some months afterwards, on releasing the equity of redemption on that estate, the Petitioner directed the consideration money to be applied in satisfaction of the balance.

These circumstances, taken of themselves, constitute a strong argument for the Respondents. In the absence of other circumstances, they would be conclusive, as in other cases circumstances of the like kind, and even less cogent, have often been considered to be; but they are not conclusive, if attended by other circumstances which shew that a fair consideration of the accounts was not, and could not be, had. If the client be in the power or at the mercy of the solicitor, if the bills delivered be not sufficiently explanatory, if the client, though having time to examine the bills, has not been able to obtain, or has not been allowed to employ, the most effective means of examination, if it appears that the solicitor, in whose power he is, is giving a bargain with him on equal terms, and that the relation of solicitor and client, and the power of the solicitor, continues, then all the circumstances to which have referred, as tending to establish the settlement, may be unavailing.

In this case, I think that the Petitioner was in the power of the Respondents to a great and even an alarming extent. They themselves personally claimed to be creditors of the Petitioner to a considerable amount, and [457] held acceptances for the sum of £1200, which the Petitioner was liable to pay. They were the solicitors of Mr. Beardmore, a creditor for not less than £26,140, the whole amount of the purchase-money for White Knight's. Mr. Beardmore held a judgment for £3140, part of the £26,140. Upon that judgment he might have issued an execution, and he had a power of sale, the exercise of which might effectually disappoint the Petitioner's hope of profit from that transaction; and the Petitioner, having repeatedly failed in the payment of interest, and in his endeavours to obtain money, by means of which he might at the same time improve the security of Mr. Beardmore, and obtain profit for himself, had received from Mr. Beardmore, through the hands of the Respondents, a formal notice that payment of the whole debt was required. The Petitioner was besides engaged in other transactions of a complicated nature, in which the Respondents were his solicitors and agents, whose active and skilful assistance was the only foundation on which he could rest a hope for extrication; and when we attend to these circumstances, the fact which appears on the accounts, that the Petitioner was, from time to time, receiving small advances of money from the Respondents, I think that the extent to which he was in their power must be sufficiently apparent.

Observations were made upon the conduct of the Petitioner in engaging in such transactions without capital; and I do not dissent from them. A man who without capital engages in transactions, and enters into contracts, the conduct and performance of which requires a large capital, pursues a course which is always imprudent

and hazardous, and generally dishonest, because generally accompanied by misrepresentation, express or implied, to those with whom he is dealing, and [458] by consequent fraud upon them. Such conduct is not to be justified or excused; but the last persons who have a right to complain of it are those who, knowing the facts, consent, for their own profit, to be the solicitors and agents of the party engaged in such business; and it cannot fail to be observed, that the very nature of the transactions, the shifts and devices which must be resorted to, and the equivocal position of the principal, must place him, more than ordinary clients, in the power of the solicitors and agents; nor can I think it improbable, that solicitors in such a situation may be under some temptations to obtain more than usual compensation in money, for the very troublesome and disagreeable business in which they are employed; but on this head I confine myself to the opinion, that the Petitioner was greatly in the power of the Respondents, from the time when the bills of costs were delivered, up to a time long subsequent to the settlement of the bills of costs.

It is alleged by the Petitioner and denied by the Respondents, that threats were used to induce the Petitioner to settle the accounts as he did. I am disposed to give credit to the denial; but the circumstances were such as to render any threat unnecessary. The Petitioner must have known his position, must have felt the power under which he was, though he was not wholly subdued by it; and I cannot suppose that solicitors, with such means in their hands as these Respondents had, were not perfectly conscious of their power, or incapable of conveying a sense of it to the Petitioner without actual threats.

I am further of opinion, that the bills delivered were not sufficiently explanatory. A bill commencing with an item of £157, 10s. "for numerous attendances," and which contains several items of charge for particular [459] attendances, and another item of £31, 10s. for attendances called "innumerable," cannot, I think, be considered as a proper bill. It is not, I think, such a bill as would have been delivered by a solicitor to a client desiring to have the bill investigated, and in a situation to call for such explanation and details as he was entitled to have. These and some other items which have occurred to me in reading the bills, lead to a conclusion, that the Respondents rather expected the Petitioner to submit to the charges as they were made.

With respect to the assistance which the Petitioner had, the facts sufficiently show that Pirie and Browning were of considerable use to him. It was probably in consequence of their observations, that the Respondents were induced to make a considerable deduction from the balance they claimed; but the Petitioner states positively that he required further assistance—a solicitor, or some other person who might discuss the matter with the Respondents, and that the Respondents refused their consent to that proposition. Without saying that the Petitioner was entitled to an acquiescence in his proposition as made, it is very clear that he was entitled to a full statement of the particulars of charge, and to a proper investigation of each particular item; and I think that the Respondents did not do all, which, under the circumstances, they ought to have done, to facilitate to the Petitioner the exercise of that right.

It is to be regretted that the observations and objections of Pirie and Browning were destroyed. The Respondents had them in their possession for some time; and after they were thereby apprised that the bills were to a considerable extent erroneous, it was peculiarly [460] incumbent upon them to take care that their client (particularly a man involved in difficulties and greatly in their power) was duly protected; and it was important for themselves to take care that the settlement which they were about to make, was subject to no future question. What they did, was to talk over the items in the Fleet prison, where the Petitioner's father and agent was a prisoner; propose to reduce the balance—obtain a memorandum of settlement prepared by the clerk, and then destroy the evidence of the objections. The declaration which one of the Respondents is stated to have made, that, after the settlement then made, the bill of costs could not be questioned as to their correctness and propriety, was ill-timed, and, I think, ill-founded.

The first proposal as to the balance was to reduce it to £300 in money. It being, as I conceive, clear, that the Petitioner had no means of paying £300 in money, it is difficult to regard the proposal as anything but a means of hinting to the Petitioner

the power under which he was held. The discussion ended in a reduction to £250 to be left on credit and charge. The Petitioner was not so far subdued as to be unable to make any effort for relief; and he did obtain a reduction of £381, 15s. 1d., which is a very large sum to deduct on such an occasion. And it being admitted, as clearly as it was, that a deduction was to be made from the balance, and the question then being to what extent, I think that the Petitioner and Respondents were on terms so unequal, as to make it very difficult to make any bargain which could be binding upon the Petitioner in the absence of other assistance. Browning seems to have given the Petitioner reason to think that he was entitled to a reduction of £1500. If the objections had not been destroyed, we might have had some means of [461] judging, whether the allowance made was fit to be considered as a fair compromise; but as the case stands, I am of opinion that the allowance was made, and the account settled, under circumstances which do not preclude the Petitioner from having the bills of costs taxed.

I have come to this conclusion with the less regret, in consequence of having minutely examined the several items of the bills which are objected to by this petition. There are several which require much more explanation than has been given in the affidavits; there are others which are probably unjustly complained of. A man engaged in such speculations, and involved in such difficulties as the Petitioner was, is too apt to require things to be done promptly at any cost, rather than suffer the delay which is necessary for a due observance of the ordinary rules of prudence and economy. I am not prepared to say that he is in all cases to be relieved from expenses not strictly necessary, which his own urgency has occasioned. But independently of cases of that kind, I think that there are in these bills some charges, which, from their nature and amount and under the circumstances stated in the affidavits the Petitioner would have been entitled to have investigated, even if he had been held bound by the settlement.

I think that it must be referred to the Taxing Master to tax all the bills of costs, and to take an account of what, if anything, is due to or from the Respondents in respect thereof. I think, however, that in taking the account, the Petitioner ought to admit that the Respondents have paid him, or on his account, the several sums in cash which are stated to have been so paid in the account; and that the Respondents ought to be [462] at liberty to explain, or state in detail, any of the items in the bills of costs. (1)

[462] SAYER v. WAGSTAFF. Nov. 12, 14, 1842.

A new commission granted, and publication enlarged, on the ground of misconduct of one of the commissioners nominated by the party applying.

A solicitor may communicate with a witness before his examination, and take down in writing what he can depose to, but to prepare the depositions of a witness beforehand would be improper, and form a ground for suppressing the depositions.

A commissioner should not act as solicitor on behalf of a party.

A motion was made on behalf of the Defendant Wagstaff, that the depositions taken on behalf of the Plaintiffs under a commission in this cause might be suppressed, and that a new commission might issue for the examination of witnesses; or if the depositions already taken were not to be suppressed, that a new commission might issue.

The grounds for making this application were, that the Defendant had not examined the witness under the commission in consequence of the misconduct of A. B., the gentleman whom the Defendant had named as his commissioner. It appeared that the Plaintiffs and Defendant had joined in a commission for the examination of witnesses, which was appointed to be executed on the 27th of September. One of the commissioners nominated by the Defendant Wagstaff, was A. B., a solicitor of Worcester.

(1) NOTE.—The rule as to taxation after payment has been altered by the 6 & 7 Vict. c. 73; and see *In re Lees*, ante, p. 410., and *In re Downes*, ante, p. 425.

After A. B. had been appointed commissioner, he had acted as solicitor for the Defendant Wagstaff in this [463] matter; he had seen several of the parties proposed to be examined for Wagstaff, and had ascertained from them the nature of the evidence which they would be able to give. He had also seen some depositions which had been prepared by one of the other Defendants, and others which had been prepared by the Plaintiffs' solicitor for their witnesses to swear to, and he was desirous of having the intended depositions of Wagstaff's witnesses drawn out to shew them to the solicitor on the other side. After obtaining this information and seeing the depositions prepared by the other side, he recommended Wagstaff to refer the cause, being afraid that he had a bad case. This impression was stated in a letter to Wagstaff's London solicitor, who, in reply, expressed a fear that some of the opposite parties had intimidated and tampered with him.

An angry correspondence then took place, and in the result, Wagstaff, who seemed no longer to have regarded A. B. as his partizan, gave him notice not to act as commissioner.

The Plaintiffs proceeded to examine their witnesses before the two remaining commissioners, but neglected, as it was alleged, to give the names of their witnesses to A. B. or Wagstaff. Wagstaff, insisting on the irregularity of the proceeding, and relying on the alleged misconduct of his commissioner, refrained from examining his witnesses, and now moved, in the terms stated, to suppress the depositions, and for a new commission.

Mr. Kindersley and Mr. Moore, in support of the motion; Mr. G. Turner, for A. B.; and Mr. Pemberton and Mr. Parry, for the Plaintiffs.

[464] Mr. Kindersley, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. I regret the circumstances which have given rise to this application. After being appointed a commissioner, A. B. was totally unjustified in acting as solicitor for a party who had to examine witnesses under the commission. (Wy. Pr. Reg. 121; *Selwyn's case*, 2 Dick. 563; *Cooke v. Wilson*, 4 Mad. 380.) It seems, however, that he not only assumed to act as a commissioner, by signing summonses for witnesses to attend, but also took upon himself to act as solicitor for the Defendant Wagstaff, advising him, proceeding to make inquiries, communicating with his solicitor in London, giving advice as to the framing of the interrogatories and taking steps to know the evidence to be given for the Plaintiffs; these are facts admitted by himself, and are proved by his bill of costs. In all this his conduct was erroneous; having regard to his character of commissioner, he ought not to have so proceeded.

But it is said, that however indiscreet it might have been to act thus, the Defendant has no right to complain, because he acquiesced in its being done; and it is said that even the Defendant's town solicitor was willing to take advantage of the advice given and of this conduct of A. B. I am of opinion that both Wagstaff and his London solicitor were aware that A. B. was acting as solicitor, and that they were willing to have the benefit of his services as such; but it does not follow that because the Defendant has acquiesced in an error, he cannot be allowed to complain of that which not only affects him personally, but also seriously affects the due administration of justice.

[465] What subsequently happened seems to explain the differences which took place. The impression made on the mind of A. B. in the course of his enquiries, was not so favourable to the interests of Wagstaff as Wagstaff had hoped, and probably as had been expected by his solicitor. His solicitor however expressed no indignation at A. B.'s interfering as solicitor, but merely complaints and apprehensions that he had suffered himself to be intimidated. Wagstaff and his solicitor appear at that time to have lost their confidence in A. B.'s zeal in their favour; they had expected from him something more than his duty as commissioner, namely, his services as solicitor, and they thought his zeal had been damped.

The result was, that Wagstaff gave notice to A. B. not to act as commissioner. The commission had been sealed, and authority had been given by this Court to the commissioners, yet this Defendant thought he was at liberty to countermand that authority, as if the commissioners were his agents. I am surprised that such a notion should be entertained. A. B. had a duty committed to him by the Court.

and I have no doubt that if he had not been engaged as solicitor in this transaction he would utterly have disregarded the notice and have performed his duties as commissioner. But he could not do this with propriety, for the Plaintiffs had a right to complain of his having deviated from his duty as commissioner, by acting as he solicitor of the Defendant. Had he not acted wrong previous to the notice, he could not have been justified in declining to act as a commissioner; but considering the circumstances and the position in which he had placed himself, I think he was right in abstaining from acting.

There remained two commissioners who were perfectly competent to proceed on the commission; but that [466] did not suit the purpose of Wagstaff. He had at his time lost his confidence in the zeal of A. B., who ought not to have entertained any avour towards either party. He seems to have said, "I will not interfere with this matter at all. I am dissatisfied with the conduct of A. B.;" and A. B. instead of attending there as a person who desired the commission to proceed, seems to have been wandering about the Bar, the House, and in the streets, and to have done anything rather than attend to the commission.

The Plaintiffs, on the other hand, seem to have been perfectly regular, and to have done all that could be required. But it is said that they did not give the names of the witnesses to A. B. or to Wagstaff's solicitor. Why should they have given them to a person, who said he would not interfere? It does not appear to me that the Plaintiffs were in any way in fault, and whatever comes of this case, they must be indemnified as to costs. Mr. Kindersley said he could not ask to suppress the depositions, but that there might be grounds for depriving the Plaintiffs of the costs, because they had not done what they ought, namely, given the names of witnesses: my opinion is that both A. B. and Wagstaff so conducted themselves as to release the Plaintiffs from the performance of that duty.

As to a new commission, the question is of some importance. One of the witnesses for the Plaintiffs was F., and it was stated to me (though I have not sufficient evidence to prove the fact), that his depositions had been prepared by C. D., a Defendant; and it has been assumed in the course of this discussion, that this was a proper thing to do. I cannot consider it to be a right thing, for any solicitor to prepare depositions for a witness before examination. He ought to be examined upon the interrogatories by the Examiner; and if he [467] goes before him with the depositions ready prepared, it is a reason for suppressing them. (*Shaw v. Lindsey*, 15 Ves. 380; *Attorney-General v. Nethercote*, 10 Sim. 311.) It is right for a solicitor to communicate with a witness to know what he can depose. (*Kelly v. French*, 2 Ll. & Co. 166.) That is a thing necessary to be done before the interrogatories can be prepared; and I do not mean to say that it is at all improper for a solicitor to take down from a witness what he can depose to; or that it is improper for both parties to see a witness, to inquire what he can depose to. But what was done here? A witness had been examined and communicated with on behalf of the Plaintiffs, not as to what he could say on the whole question, but as to what had been prepared for him to say on behalf of the Plaintiffs. A. B. goes to the solicitor of the Plaintiffs, who shews him drafts of depositions ready for the witnesses to depose to. I think that was not a right thing to do. It was very proper for the solicitor of Wagstaff, knowing that the witnesses were acquainted with the facts which were in controversy between the parties, to ascertain what they could say, in order that they might be properly examined; but it was not proper to go and ascertain what had been prepared for them to say on behalf of another party.

The consequence of all this is, that I cannot hold the Defendant or A. B. free from acting with impropriety in a matter seriously affecting the administration of justice. I am of opinion that the Plaintiffs are exempt from misconduct in this matter; but the Defendant Wagstaff, who has really evidence to produce, has not examined his witnesses. I understand that the time when publication ought to pass, has arrived to-day. If that had not been so, the forms and practice of the Court [468] would have enabled Wagstaff to examine his witnesses before the Examiner in London. He now desires a commission. I doubt whether he is entitled to that, on account of his own neglect and conduct; yet, if his witnesses are not examined, the probability is, that there will be a decree against him, and that, although the facts

which his witnesses might depose to might produce a different result. This is an event which I cannot contemplate without uneasiness; but, at all events, if a new commission issues, the Plaintiffs must be exonerated from any costs.

A. B. and Wagstaff are both in fault as regards the Plaintiffs, and the fault may be imputed to the Defendant in the first instance, because he selected A. B. as Commissioner. I think, therefore, that the Defendant Wagstaff is the person who must be answerable to the Plaintiffs; and A. B. having acted improperly, may have no costs of the refusal of the application against him.

His Lordship ultimately ordered that publication should be enlarged for four weeks, and that the Defendant John Wagstaff should be at liberty to take out a new commission, paying to the Plaintiffs their costs of this application, and such costs they should be put to by the new commission.

[469] ALLEN v. M'PHERSON. Nov. 2, 5, 12, 1841.

[S. C. 11 L. J. Ch. 59; 12 L. J. Ch. 97; 1 Ph. 133; 41 E. R. 582; 1 H. L. C. 199; 9 E. R. 727 (with note); 11 Jur. 785. On question as to jurisdiction, *Melhuish v. Milton*, 1876, 3 Ch. D. 30.]

Whether, where A., a residuary legatee by artful and fraudulent misrepresentation to the testator of the character of B., induces the testator to revoke a legacy given to B., the benefit of which revocation results to A., this Court has jurisdiction to affix a trust on A. in favour of B., to the extent of the fruit of the fraud possessed by A., or whether the matter belongs exclusively to the Ecclesiastical Court; and secondly, whether such trust can be declared after a sentence of the Ecclesiastical Court, in which the question of undue influence was in issue, *quære*. Held, in the affirmative by the Master of the Rolls, and in the negative by the Lord Chancellor. The parties thereupon appealed to the House of Lords.

This case came before the Court upon demurrer to the whole bill.

According to the statements of the bill, the testator had amassed a large property amounting to £80,000. His family consisted of his wife Hannah Allen, William Allen, an illegitimate son, Susannah Evans, a legitimate daughter, the Plaintiff Benjamin Allen and his brother and sister, who were the children of a deceased nephew of the testator resident in Somersetshire, and other more distant relatives.

The testator, who, it was alleged, was interested in, and had a great regard for the Plaintiff and his family, by his will, dated in 1834, and subsequent codicils bequeathed considerable legacies to the Plaintiff and his brother and sister.

In the beginning of March 1837 the Plaintiff visited and ingratiated himself with the testator, by whom he was treated with great kindness and preference: and on that occasion informed the Plaintiff and his brother "that he had handed over to them the property provided for them by his will."

Shortly afterwards the testator made a sixth codicil, dated the 23d of May 1837, whereby he bequeathed one-fourth of the residue to the Plaintiff.

[470] The children of the testator being informed of this codicil by the solicitor, became exceedingly jealous of, and conceived a great dislike for the Plaintiff, and formed a determination, if possible, to procure a revocation of the sixth codicil, or at least a great diminution of the bequest to the Plaintiff therein contained.

The bill stated, that the testator in June following became much enfeebled, his health began to decline; "and although it could not be said that in strictness his mind was of unsound mind, from that time to the day of his death, yet, during that period his intellects became so impaired, that he was totally unfit to transact any business requiring any extraordinary mental exertion."

The bill then stated that "Susannah Evans (who at the time was living with the testator, and was a very shrewd person, and of quick perception, but of a cunning and designing disposition)" acquired great influence over the testator, "and used to promote the object which she and William Allen had in view, of obtaining the whole, or as much as possible, of the property of the testator to be left to her;

ing a secret understanding that whatever the testator should give to her should be shared with William Allen.

In May 1837 the Plaintiff's brother was about to marry a woman of bad character; and the testator received information of the circumstance through an anonymous letter. On the supposition that the Plaintiff was the author of the anonymous letter, the Plaintiff's brother wrote to the testator several letters containing statements to the Plaintiff's prejudice; but the state of [471] his mind prevented his investigating the truth of these matters.

That Susannah Evans, seeing the effect of these letters, and with a view to get the revocation of the bequest to the Plaintiff, suggested that the Defendant William Allen should be sent to the country to inquire as to the disputes between the Plaintiff and his brother, and their characters.

The bill further alleged that the Defendant William Allen went into Somersetshire, merely to deceive the testator, and that he did not make any inquiries concerning the character of the Plaintiff, or at least he did not make any such inquiries with the *bona fide* object and intention of ascertaining the truth on that point.

That on the 30th of September 1837 the Defendant William Allen made his report, which, after stating the want of success of the Plaintiff in his business of a butcher, which was attributed to a want of judgment and gross neglect, proceeded as follows:—"In addition Mr. Bartlett states (and he did so with regret), that his (the Plaintiff's) habits are of the lowest and worst kind, that he drives a horse eaten up with the mange and fistula, which is enough to deter people buying meat from his stall, if it were of the best kind; he also states him to be the greatest blackguard in the village, and a nuisance to the place, is constantly quarrelling with his wife, who, she alleges, has another husband in London. His sister states that there is no believing a word he utters, &c.; he has received £50 from his brother, who has not yet turned the proceeds (which are to be divided) into cash; but, from his bullying and threatening to put the lawyers upon his back, he procured £50 and paid him, and gave a note of and, payable on demand for [472] the other £50; this money he is now living upon. If it is intended to do anything for him, I would recommend that it be a weekly allowance of about 10s. to be paid him during good conduct: he may thus be rendered tolerably respectable member of society."

The bill alleged that the report was read to the testator, who did not appear to thoroughly understand the contents, and requested it to be read again, which was not done; but William Allen, without any express direction from the testator, took the report to a solicitor, who, from the suggestions contained therein and from verbal instructions given him by William Allen, prepared a ninth codicil to the will of the testator, which was executed the same evening without any draft having been previously submitted to him for perusal.

By this ninth codicil, dated the 3d of October 1837, all the bequests to the Plaintiff and his brother and sister were revoked, and the testator directed his executors to invest £800 3 per cent. Bank annuities in the names of William Allen, Nathaniel Bartlett, and Susannah Evans in trust to pay the dividends to the Plaintiff by weekly instalments during his life, or until he should attempt to sell or incumber the same. The testator gave other legacies by his ninth codicil.

The bill alleged that the affection and regard entertained by the testator for the Plaintiff, and which induced him to execute in his favour the said sixth codicil, remained unabated till he heard the report; and that that alone was the means, by which the unwilling assent of the testator was obtained to the preparation and execution of the ninth codicil; and that had it not been for the report, the testator would have left the said bequests in favour of the Plaintiff unrevoked.

[473] "That the said pretended report was wholly without foundation or truth, and everything contained in it respecting the Plaintiff was false, and a complete fabrication by William Allen, by whom the same was concocted, with the assistance, or at least with the knowledge, of Susannah Evans, for the express purpose of procuring the revocation by the testator of the benefits provided for the Plaintiff by his said will and codicils, and particularly the sixth codicil, and in furtherance of a scheme formed and projected by William Allen and Susannah Evans, or by William Allen, with the knowledge of Susannah Evans, for that purpose, before William

Allen even set out for Somersetshire, and which scheme succeeded so far as to the execution of the codicil of the 3d of October, which was so executed by the testator with great reluctance, and solely on account of his having placed implicit confidence in the truth of the statements contained in the pretended report." The testator, a few days afterwards, took to his bed, became totally imbecile, and remained so to his death on the 28th of November 1837.

The bill alleged that the will and all the codicils had been proved in the Prerogative Court, after an attempt by the Plaintiff "to prevent such probate being granted as to the ninth codicil, on the grounds that the testator was of unsound mind at the time of its execution, and that undue influence was exercised over the mind of the testator by William Allen in procuring such execution; but that in the interim which arose in the Prerogative Court, touching the validity of the said ninth codicil, the Plaintiff was confined, by the Court, to grounds of objection which affected only said codicil as an entire instrument, and was not permitted to go into the case before stated, or into any other case solely relating to the parts of such codicil which affected only the Plaintiff.

[474] M'Pherson, Tomkin, and W. Allen, the executors, proved the will.

The bill, which was filed against William Allen and the two other executors, Susannah Evans and her husband, prayed a declaration that the Plaintiff was entitled to the legacies given to the Plaintiff by the will and the first eight codicils, notwithstanding the revocation in the ninth; and that the Defendants were trustees for the Plaintiff, and for the necessary accounts.

To this bill the three executors filed a demurrer for want of equity, and for want of parties, which now came on for argument.

Mr. Kindersley, Mr. J. Russell, and Mr. Giffard, in support of the demurrer. The object of this bill is, in fact, to have the ninth codicil set aside for fraud and imposition. This Court has no jurisdiction in such a case. However doubtful the law may be upon the earlier authorities, it is now clearly settled by the more recent decisions, that this Court has no jurisdiction to set aside a will of personal estate. *Kerrich v. Bransby* (4 Bro. P. C. 437), it was held by the House of Lords upon appeal reversing the decree of Lord Macclesfield in the Court below, that a will cannot be set aside in equity for fraud or imposition; because if it is of personal estate, it may be set aside in the Ecclesiastical Court, and if of real estate it may be set aside at law by the issue *devisavit vel non*. The principle was followed in the recent case of *Gardiner v. Horne* (9 Sim. 539; and see the cases in 8 Bac. Abr. 529). The jurisdiction exclusively belongs to the Ecclesiastical Court, which has power to interfere in cases where [475] fraud or imposition has been practised upon the testator. (3 Swin. 885, 7th ed.; *Stephenson v. Gardiner*, 2 P. Wms. 286.) The bill states that the Plaintiff attempted to prevent probate of the ninth codicil being granted on the ground of the testator's unsoundness of mind, "and that undue influence was exercised over the mind of the testator by William Allen in procuring its execution." The Ecclesiastical Court by its sentence has decided the point. The proper course is to question that decision is to appeal to the Privy Council, for this Court has no jurisdiction to overrule it, and nothing more inconvenient could exist than a collision between the two Courts, and between the two Appellate Courts of the House of Lords and Privy Council.

It is admitted, that at the date of the codicil, the testator had no intention to benefit the Plaintiff. There is nothing on which the Court can proceed in declaring any trust in favour of the Plaintiff. Any interference of this Court must be founded upon mere speculations as to the wishes and views of the testator at the time of his death.

In the cases of *Segrave v. Kirwan* (1 Beat. 157) and *Kennell v. Abbott* (4 Ves. 101) the question was merely one of construction, depending on the intention of the testator. *Bulkeley v. Wilford* (8 Bli. 111, 2 Cl. & Fin. 102) was a case of a trust in real estate, arising out of a species of fraud, over which the Courts of law have jurisdiction.

Lastly, Bartlett, who is one of the trustees for the Plaintiff of the £800 and other persons interested in the ninth codicil, are necessary parties to this bill, in which the accounts must be taken.

[476] Mr. Pemberton and Mr. Jolliffe, in support of the bill. The bill in this

not contest the authority or decision of the Ecclesiastical Court; it admits that the Ecclesiastical Court *Susannah Evans* is entitled to the benefit of the testamentary papers; and, proceeding upon the foundation of the validity of the judgment of the Spiritual Court, it insists that there are circumstances, which, in the contemplation of a Court of Equity, would make the legal owners trustees for the Plaintiff. The prayer of the bill is framed in that view of the case.

The testator, according to the allegations of this bill, intended to benefit the Plaintiff, and that intention continued to his death; but the Defendants, by fraudulent representations, induced the testator to revoke the previous gifts by means of the Ecclesiastical Court. The question is, are the Defendants to hold the fruits of this fraud, or, to the extent of the interest which they gained by the fraud, to be declared trustees for the Plaintiff. If this were a case of forgery or of the competency of the Court, the Ecclesiastical Court would undoubtedly have jurisdiction; but the contention of a case of trust or fraud peculiarly belongs to this Court. The case here is similar to that of real estate, where a Court of law, which has exclusive jurisdiction, determines and rightly determines, the devolution of the legal estate; but this Court alone can attach on that legal estate equities arising out of a breach of trust, and either declare the legal owners to be trustees, or direct a legal recon-

There are authorities distinctly supporting the equities raised in this case. In *Ex parte Porel* (1 Ves. sen. 119, 283), Lord Hardwicke held that a probate obtained might [477] be relieved against in this Court, and he decreed the Defendant's petition to a revocation of the probate.

Kennell v. Abbott (4 Ves. 802), a legacy was given by a woman to a man whom she erroneously supposed to be her husband, and bequeathed it to him by that name, and it appeared that the motive of the testatrix's bounty was the assumed name. The Court, notwithstanding the will had been proved in the Ecclesiastical Court, declared that the pretended husband was not entitled. The principle of this case is much discussed in a recent case of *Giles v. Giles* (1 Keen, 689).

Marriot v. Marriot (1 Strange, 666), the Court held, that after probate, it had jurisdiction in a case in which a bequest of a residue had been obtained by fraudulent means and surprise. It is there said, "Courts of Equity may, in notorious cases, declare a legatee that has obtained a legacy by fraud to be a trustee for another, as the drawer of a will should insert his own name instead of the name of a legatee, but he would be a trustee for the real legatee."

Modern cases of *Segrave v. Kirwan* (1 Beat. 157), and *Bulkley v. Wilford* (8 Cl. & Fin. 102), are strong authorities in favour of the Plaintiff. In the first case a counsellor, who was employed to make a will of a testator, allowed himself to be named executor, without informing the testator of the legal consequence of doing so to the law as it then stood, which was to give the whole residue to the executor beneficially. The will was duly proved in the Ecclesiastical Court; but the Chancellor of Ireland [478], on the ground of fraud and of the suppression, set aside the executor to stand as a trustee for the next of kin. Sir Anthony Hart has been argued, that the relief prayed in this bill, if granted, would, in effect, set aside the will; that a Court of Equity is not the proper forum for such a relief; and that the Plaintiffs ought to be left to the Ecclesiastical Court, which has the jurisdiction. That the Ecclesiastical Court has exclusively the power to decide what is or is not a will of personalty cannot be controverted. Its seal to a will is conclusive in every Court of Justice; but it is equally clear, that to this Court belongs the authority to give construction and effect to the will, and that there are circumstances attaching personally on those who take by force of it, which authorise this Court to engraft an equity on the gift, and convert them into trustees for other persons. The rule of equity, by which an executor having a legacy is declared a trustee for the next of kin, is founded on this principle. Other implications arising from particular expressions in the will which convert an executor into a trustee of an undisposed residue, are the same." In that case, as in the present, the will had been proved in the Ecclesiastical Court; yet the Court of Chancery attached its authority upon the property, and the decision was afterwards approved of by the House of Lords.

In *Bulkley v. Wilford*, a testator having devised his estate to his wife, was advised by his attorney, who was his presumptive heir, to levy a fine. He did so without having been informed that the effect would be to revoke his will, and he died without republishing his will. There was no doubt that the will was wholly revoked at law, yet the House of Lords and the Court below held, that the attorney, having failed his duty of informing the testator of the legal consequence of the act, could not take the estate beneficially, but as a trustee only for the widow.

Lord Redesdale, in his *Treatise* (p. 257), recognises this jurisdiction. He says: "Where the fraud practised has not gone to the whole will, but only to some particular clause, or if fraud has been practised to obtain the consent of the next of kin to the probate, the Courts of Equity have laid hold of these circumstances, and declare the executor a trustee for the next of kin."

THE MASTER OF THE ROLLS. I will read the papers before giving judgment.

The question on the demurrer is very short, but one of very great importance. The testator had intentions of bounty towards the Plaintiff, which continued till the date of the eighth codicil. If nothing further had passed, the law would presume that the intention of bounty continued till his death. But a ninth codicil was executed, and it expressly revoked the bequests previously given; and this codicil has received the sanction of the Ecclesiastical Court, which has undoubted jurisdiction to decide on the *factum* of testamentary papers.

There was, at the time of executing the ninth codicil, an intention to revoke; the Plaintiff alleges, that it was obtained by fraud practised by the Defendants, without which the ninth codicil would never have been executed; and if it had been, the presumption of law would have been, that the testator's intention of bounty, evidenced by the previous testamentary papers, continued to his death. I will consult the authorities and give my decision on Friday next.

Nov. 12. THE MASTER OF THE ROLLS [Lord Langdale]. The bill prays for a declaration, that the Plaintiff is entitled to several bequests given to him, or intended for him, by the testator John Allen, by his will and the first eight codicils thereof, notwithstanding the revocation of these bequests by the ninth codicil; and that the Defendants, the executors, or the Defendant Susannah Evans, are or is trustees for the Plaintiff, to the extent of such benefit; and for the usual accounts.

The testator, John Allen, by his will, gave to the Plaintiff, and to his brother and sister, a legacy of £4000, to be divided equally amongst them; and by the same will he gave the residue of his estate to his executors, to be held on the same trust, a sum of £20,000 3½ per cent. stock, which was, in effect, given to trustees for the separate use of his daughter Susannah Evans for life, with power for her to dispose thereof by her will, with a limitation to her next of kin in default of appointment.

By a fourth codicil, the testator gave to the Plaintiff a contingent benefit in the sum of £2000; and by the sixth codicil he gave to the Plaintiff one-fourth part of the clear residue of his estate; but by a ninth codicil he revoked the benefit given to the Plaintiff and some other persons, and directed that they should take no further or other benefit under his will and codicils, except as followed; and, after giving various directions with respect to other persons, he directed his executors to purchase in the names of William Allen, Nathaniel Bartlett, and Susannah Evans, the sum of £800 3 per cent. Bank annuities, and pay the dividends thereof, by weekly instalments, to the Plaintiff for his life, or until he should attempt to sell the same, in either of which events the £800 3 per cent. stock was to be sold into the residue.

Upon a contest in the Ecclesiastical Court, in which the Plaintiff seems to have alleged that the ninth codicil was obtained by fraud and undue influence, probate of the will and codicils, including the ninth, has been granted to the Defendant M'Pherson, Tomkin, and William Allen.

The Plaintiff, still alleging that the ninth codicil was obtained by the fraud and misrepresentation of William Allen acting in concurrence with and with the knowledge of Susannah Evans the residuary legatee, now applies himself to the jurisdiction of this Court, and prays to be relieved here, by declaration of trust, in which he has failed to obtain relief in the Ecclesiastical Court by disputing the validity of the codicil.

To this bill demurrers have been put in by the executors, and by Susannah, and in support of the demurrers, it is argued, that to give the relief sought, would be to interfere with the jurisdiction of the Ecclesiastical Courts, which alone have authority to determine upon the validity of testamentary instruments relating to personal estate. The counsel for the bill admit the jurisdiction and authority of the Ecclesiastical Courts in their fullest extent, and that the Plaintiff has no right to dispute the legal validity of the probate or of the ninth codicil. The gifts bequeathed to the Plaintiff by the will and preceding codicils are admitted to be fully revoked, but it is said that the effect of that revocation is, to confer a great [483] increase of benefit to the residuary legatee, and that as that revocation was, the bill alleges, procured by her fraud, this Court has jurisdiction to deprive her the benefit of it, and to declare her to be a trustee of that to which the law titles her, for the benefit of the person to whose prejudice the fraud was practised.

The case appears to me to be attended with considerable difficulty; but the Court has already exercised jurisdiction in cases so analogous, that the Plaintiff cannot be deprived of the benefit of it without great consideration.

"There may be," as was said by Sir Anthony Hart in *Segrave v. Kirwan* (1 Beat. 7), "circumstances attaching personally on those who take by force of a will, which will authorise the Court to engraft an equity on the gift, and convert the case into a trustee for other persons."

Thus in *Marriot v. Marriot* (1 Strange, 666), it was held, that, notwithstanding estate, a Court of Equity had authority to inquire whether a gift of the residue was obtained by fraud, and issues were directed to try the matter of fraud and surprise insisted on by the Plaintiffs, and certain cases were mentioned, in which the Court would declare a trust in the will, though it were not contained in the will itself.

In *Kennell v. Abbot* (4 Ves. 807), Lord Alvanley stated that wherever a legacy is given to a person under a particular character which he has falsely assumed, and which alone can be supposed the motive of the bounty, the [483] law will not permit him to avail himself of it, and therefore he cannot demand his legacy.

Segrave v. Kirwan (1 Beat. 157) was a case, in which the executor, who, under the estate, would have been entitled to the residue, was held not to be so entitled, because he did not inform the testator that the effect of appointing him executor was to give him a title to the residue, it being clearly his duty to give such information.

Bulkeley v. Wilford (2 Cl. & Fin. 102) was a case in which an heir at law was not permitted to take an estate by descent, to the disappointment of a will revoked by a will, because he did not inform the testator, as it was his duty to do, that the effect of the fine was to revoke the will.

The cases of *Marriot v. Marriot*, *Kennell v. Abbot*, and the cases in which the legatee made promises, which he has afterwards refused to perform (*Podmore v. Gunning*, 8 M. 644; *Denys v. Locock*, 3 Myl. & Cr. 205), shew, that in the consideration of this Court, the simple fact of the testator appearing by the probate to have given a particular legacy or a residue to a person in his will named, is not, of itself, a reason why this Court should permit the legatee to take the benefit of the gift, if he appears to have obtained it by fraud. If fraud be established, this Court has authority to deprive the fraudulent party of the benefit, and, by declaration, to give that benefit to those to whom it would have belonged if the fraud had not been committed.

The present case is not precisely like any former one. The Defendant Susannah takes her interest [484] subject to the payment of pecuniary legacies. The completion of any legacy was productive of benefit to her. By the sixth codicil, a fourth part of the residue is given to the Plaintiff, and all prior gifts to the Plaintiff being revoked by the ninth codicil, they fell into the residue for her benefit; and if the revocation were, as alleged, procured by her fraud, it seems difficult to distinguish this case, in principle, from those which have before occurred, or to understand why jurisdiction, which is exercised in case of direct gifts, should not be applied in a case where the effect of the fraud is to increase the gift made by a prior instrument, why, if the case alleged be true, Mrs. Evans should, in this Court, be permitted to enjoy the fruit of the imposition practised upon the testator and upon the Plaintiff.

The allegations in this bill are diffuse, and in some instances ambiguous; but, on the whole, it appears to me, after reading it through, that there is sufficient allegation

against Mrs. Evans, as a party to the fraud, alleged to have been practised; and however doubtful it may be, whether the Plaintiff will ever be able to establish the claim he sets up, I cannot say that upon this record he may not be entitled to relief.

I do not think that the demurrer for want of parties can be sustained. Bartlett, if here, being a mere trustee for the Plaintiff, has no interest and no duty except that which the Plaintiff is fully competent to sustain, and the other persons interested in the ninth codicil are not interested in the relief which the Plaintiff prays, which does not relate to the whole codicil, but only to so much of it as, by the revocation, gives a benefit to the residuary legatee to the prejudice of the Plaintiff.

[485] The demurrers must be overruled. (This decision was reversed by Lord Lyndhurst C. on appeal, see 1 Phillips, 133, but an appeal from that decision is now pending in the House of Lords; 1 H. L. C. 191; 9 E. R. 727.)

A motion was also made in this cause, on the 2d of November, to discharge the order which the Plaintiff had obtained to sue *in forma pauperis*, on the ground, that in any view of the case the Plaintiff was entitled for life to the dividends on the £800 consols bequeathed thereby, which had been invested, and on which £60 was due to the Plaintiff; and that, consequently, this Plaintiff was not in the situation to sue *in forma pauperis*.

Mr. James Russell, in support of the motion. The Plaintiff is either entitled to the interest on £800 consols, or to one-fourth of the residue and other legacies of greater value. He cannot, therefore, be permitted to sue as a pauper. He cites *Spencer v. Bryant* (11 Ves. 49).

Mr. Pemberton, *contra*. The Plaintiff has made the usual affidavit, that he is worth more than £5, excepting his wearing apparel and the subject-matter of the suit. He claims in opposition to the ninth codicil, and therefore cannot be entitled to the benefits under it, and he is in possession of neither bequest. His right is the subject of dispute in the present suit.

The motion stood over until the demurrers had been disposed of.

Nov. 12. THE MASTER OF THE ROLLS now refused the motion without costs.

[486] ACLAND v. BRADDICK. Dec. 5, 1842; Feb. 25, 1843.

A decree was made in 1830 against executors, charging them personally; in 1831 they obtained leave to rehear the cause. The Plaintiff in 1842 presented a petition for leave to file a supplemental bill, putting in issue new facts to support the personal decree against the executors. The Court refused the application without costs, on the ground that the facts appeared to be either without proof or to be immaterial, or else to have been so long known to the Plaintiff as to preclude him from making them the foundation of the extraordinary relief prayed.

This was a petition presented by the Plaintiff, after decree, for liberty to file a supplemental bill.

The original bill was filed in the Exchequer, in May 1824, against William Braddick, a surviving trustee, and against Edward Lutley and George Braddick, who were made parties in their representative character of executors of Robert Blackmore.

The decree made in 1830 charged the executors personally, as if they had been personally interested, and had personally acted in the several matters complained of. In 1838 the executors, alleging that they ought simply to have been charged *de bonis testatoris*, obtained leave to rehear the cause.

The Plaintiff now presented a petition to be allowed to file a supplemental bill (see *Hodson v. Ball*, 1 Phillips, 177), to put in issue certain facts which he alleged had recently discovered, and which, if proved, would entitle him to a personal decree against the executors.

The facts are stated in detail in the judgment of the Court.

Mr. Pemberton and Mr. Freeling, in support of the petition.

Mr. Kindersley and Mr. Follett, *contra*.

[487] Mr. Pemberton, in reply.

Feb. 25. THE MASTER OF THE ROLLS [Lord Langdale]. This case comes on a petition of the Plaintiff for leave to file a supplemental bill, under special circumstances.

The Plaintiff, Robert Acland, was a purchaser from John Blackmore of an estate by the will of James Troake, and by the bill, which was filed in the Court of Chancery in May 1824, it was prayed, that he might be declared entitled to the estate, subject only to the payment of a legacy to Joan Blackmore; and it was further prayed, that an account might be taken of the rents of the estate received by trustees under the will since Acland's purchase, that the unpaid legacy might be paid out satisfied, and that the residue of the rents might be paid to Mr. Acland; and that he might have a conveyance, and be paid the costs, charges, and expenses which he had incurred in certain actions, and also the costs of the suit.

It appears that James Troake, by his will dated the 11th of May 1811, devised the estate to Robert Blackmore and William Braddick, on trust to receive the rents, and thereout pay a sum of £124, 10s. 6d. to Mary Dyer, and legacies of £10 each to the children of Richard Blackmore, deceased, named in the will, and after the discharge of the legacies and debt, he devised the estate to John Blackmore in fee.

Soon after the death of the testator, John Blackmore was permitted to take possession of the estate, and ought to have paid the legacies and debt; and it was agreed, that the trustee Robert Blackmore became his surety [488] by bond, for the payment of a sum of £150, which he borrowed from Simon Smith for the purpose of paying the legacy and debt, but that the money was not applied for that purpose, the debt was not paid, till John Blackmore was compelled to pay it by a bill in Chancery; and Robert Blackmore being afterwards compelled to pay the bond to Simon Smith, became a creditor of John Blackmore to that amount, and he claimed a lien on the estate for repayment.

In the year 1817 the Plaintiff purchased the estate from John Blackmore for £1000, and in the month of July in that year a conveyance to the use of the Plaintiff was executed by John Blackmore.

At that time some of the legacies were unpaid, and Robert Blackmore claimed the money he had paid to Simon Smith; and under these circumstances, the Plaintiff, Robert Blackmore and William Braddick, appear to have insisted that the estate was not entitled to his purchase, and many disputes took place between them.

Thomas Pring occupied the estate under a lease which had several years to run. The trustees gave him notice not to pay his rents to Acland, and indemnified him for not doing so. Acland proceeded to cause a distress to be levied. Pring brought an action of replevin, and obtained a verdict with damages and costs. Acland upon not only filed a bill in this Court (which was afterwards dismissed for want of prosecution), but proceeded to cause other distresses to be levied; and being resisted by force, he preferred an indictment, upon which three persons were found guilty of an assault; he afterwards himself committed an [489] assault, for which he was indicted, and on which he was found guilty.

It now appears, that all the legacies were paid in and before the year 1821; and in the year 1823 there was no charge upon the estate, unless the lien claimed by Robert Blackmore was to be considered as a charge.

In 1823 Acland again caused a distress to be levied, and Pring, at the instance of the trustees, again brought an action of replevin, and he recovered a verdict on the 24th of the Summer Assizes of 1823.

The Plaintiff alleges, that it appeared at the trial that all of the legacies were not paid, and that therefore the Judge was of opinion that the legal estate was vested in the trustees. The Defendant, Braddick, denies that it appeared in the action that the legacies were unpaid.

At the trial the trustee, Robert Blackmore, died, having made a will, whereof Edward Lutley and George Braddick were executors.

The Plaintiff's bill (filed in May 1824, after the death of Robert Blackmore, the trustee), notwithstanding some ambiguous statements, assumes that Joan Blackmore was the only unpaid legatee. The Defendant, William Braddick, the surviving trustee, though not very distinctly, does nevertheless appear to admit that all the

legacies were paid; and Joan Blackmore being made a party, as the only un-legatee, and having stated by her answer that the Plaintiff himself had paid her leg about seven or eight years before, disclaimed all interest in the estate.

[490] The right of the Plaintiff to his purchase was not disputed by the assignee John Blackmore, who had become insolvent; and the real contest seems to have been, whether Robert Blackmore had acquired a lien on the estate for what he paid in satisfaction of Smith's bond; but it is singular how little the claim is insisted upon in the pleadings. Braddick, who said that he had no interest in the question, states, that Robert Blackmore always contended that he was entitled to the leg of £150 paid to Smith, and he, Braddick, therefore submitted, whether the same was a charge; the executors of Robert Blackmore merely state their ignorance whether it was a charge, or ought to be raised under the trusts of the will.

Evidence in support of the alleged lien or charge was adduced, and the matter being heard in June 1830, it was ordered that the Defendant, William Braddick, should deliver up possession of the estate to the Plaintiff, Richard Acland, and the Master should take an account of the rents received by William Braddick and Robert Blackmore, deceased, or either of them, as trustees of the will of John Troake, and also by Edward Lutley and George Braddick; and in taking the accounts, the Master was to allow to William Braddick and Robert Blackmore sums of money paid by them on account of the legacies, together with interest at five per cent. per annum, and the amount thereof to be deducted from the amount of the rents received by William Braddick and Robert Blackmore, or either of them, the Defendants, Edward Lutley and George Braddick, or either of them; and the residue was to be handed over by William Braddick, Edward Lutley, and George Braddick, or some or one of them, to the Plaintiff, Acland. And, amongst other things, it was ordered, that William Braddick should convey or release the estate to [491] Acland. And it was referred to the Master to tax the Plaintiff and the Defendants, the Prings, their respective costs of the suit, and that such costs, taxed, should be paid by the Defendants, William Braddick, Edward Lutley, George Braddick, or some or one of them, to the Plaintiff and the Prings, or their respective solicitors or clerks in Court.

The decree charges Lutley and George Braddick *personally*, as if they had personally interested, and had personally acted in the several matters complained of; and on this account Lutley and George Braddick have presented their petition for the cause reheard.

In July 1831 William Braddick, the surviving trustee, took the benefit of the Insolvent Debtors Act. In January 1835 a supplemental bill was filed against Sturges, the assignee, and to his answer, which was filed on the 8th of May 1835, Sturges annexed an extract from the schedule filed by William Braddick in the Insolvent Debtors Court, from which it appeared, that William Braddick had received for rent three sums of £60, £115, 10s. 6d., and £127, being together £302, 10s. 6d., and various costs, amounting together to £168, 2s. 8d., in the actions against Acland. Three legacies of £10 each were paid out of the rents, but all the costs and the remainder of the rents are stated to have been paid to Mr. Clarke, the solicitor of William Braddick, in part discharge of his bills, leaving a balance due to him.

A decree was made in the supplemental cause in January 1836, and the Plaintiff made his report on the 22d of February 1836, and thereby found, that the amount of £302, 10s. 6d., the amount of rents (agreeing with the amount stated in the answer of Sturges), [492] had been received, as to £60, by William Braddick and Robert Blackmore, and as to the residue by William Braddick, and the legacies which they had paid, together with interest thereon, amounted to £8s. 2½d., which being deducted from the amount of rent received, left £361, 10s. 6d., which he found due to the Plaintiff, and to be paid in the manner by the Plaintiff directed. And he found that nothing had been received for rent by Lutley and George Braddick, or either of them.

On the 9th of July 1836 the cause and supplemental cause came on for judgment. An order was made for taking the account against Sturges, but the further directions in the original cause were reserved.

The Master reported the state of the account of Sturges on the 18th of July 1836.

37, and the cause being again brought on for further directions, the Defendants, Lutley and George Braddick, obtained leave to present a petition for liberty to present petition to rehear the cause, and such liberty being afterwards given, a petition of hearing has been presented.

And the Plaintiff Acland being apprehensive that the decree, in its present form, not be sustained, has presented this petition to be allowed to file a supplemental bill, to put in issue certain facts which he says he has lately discovered, and which, proved, would entitle him to a personal decree against Lutley and George Braddick.

And it is now alleged, first, that it appears by the answer of Sturges, and never appeared to the Plaintiff before, that the rents were in fact received by Clarke, the solicitor of William Braddick, and also the solicitor of Lutley and George Braddick, and paid by him [493] towards payment of his bill of costs; and the Petitioner now alleges, that such bill of costs was due not only from William Braddick, but also from Lutley and George Braddick. Secondly, that William Braddick and Robert Blackmore, and also Lutley and George Braddick fraudulently concealed the fact that the rents had been paid before the actions of replevin and trespass were brought. Thirdly, that the Defendants Lutley and George Braddick have fraudulently colluded with William Braddick to prevent the Plaintiff Acland from obtaining possession, by creating a lien on the estate for the money alleged to be due to Robert Blackmore. Fourthly, that Lutley and George Braddick personally interfered in the receipt of the rents of the property, and in the management and letting thereof, by indemnifying him, in July 1829, or refusing to pay the rent to the Plaintiff, and that Pring paid the rent to William Braddick at the desire of Lutley and George Braddick. Fifthly, that it was fraudulently arranged, between William Braddick and Lutley and George Braddick, after the decree, that William Braddick should charge himself with the debt, and then take the benefit of the Insolvent Debtors Act, so as to prevent the Plaintiff from recovering the amount. Sixthly, that Lutley and George Braddick conspired to prevent the Plaintiff from obtaining possession in March 1830. Seventhly, that Lutley admitted that he had offered to give up possession to the Plaintiff, on being paid his alleged lien, but having got possession himself would refuse to settle on the same terms.

The various facts which are involved in these allegations, appear to me to either without reproof, or to be immaterial, or else to have been so long known to the Plaintiff as to preclude him from making them the [494] foundation of the extraordinary relief which he now prays.

It appears to me, that throughout the cause, the only real difficulty with which the Plaintiff had to contend, arose from the claim, set up by Robert Blackmore and not abandoned by his executors, to a lien or charge on the land for the money paid on Robert's bond, and the Plaintiff appears to me to have known, from the beginning, that this was the cause of the opposition made to his taking possession of the estate.

The schedule to the answer of Sturges, which was filed in May 1835, does not appear to warrant the inference which is deduced from it by the Petitioner and Mr. Oxenham his solicitor, that the rents were, in part, applied in payment of bills due from Lutley and George Braddick. I find no evidence of any fraudulent concealment of the charges upon the estate being paid before the trial of the replevin. The lien was claimed by Robert Blackmore, and he and his co-trustees endeavoured to avail themselves of the legal estate, which was or was supposed to remain vested in them, to support that claim; but I find nothing, from which a fraudulent concealment of the payment of the legacies is to be inferred, and it is remarkable, that the Plaintiff who makes this allegation of fraudulent concealment, by the bill alleged that by one legacy was unpaid, and the fact appeared that one had been paid by the Plaintiff Acland himself some years before.

There can be no doubt but that Lutley and George Braddick assisted William Braddick to keep the Plaintiff out of possession, with a view to enforce the lien claimed, and this was perfectly well known to the Plaintiff Acland in the year 1829, and on the 25th of [495] March 1830, before the date of the decree, and at a time when it was not too late to bring the matter forward in a proper manner, if it had been thought material to do so: and it moreover appears, that an action of trespass was brought by the Plaintiff against Lutley, for the improper and illegal

interference concerning the possession of the estate, and that some proceedings in that action, or the reference which was made thereon, were pending in February 1836, when Mr. Oxenham made his affidavit. This proceeding shews, that Acland did not rely on the decree alone, but actively endeavoured to obtain at law, such redress as he conceived himself entitled to; and although Mr. Acland has stated his belief that the rents were received by William Braddick in fraudulent collusion with the other parties, for the purpose of defeating the Plaintiff's right, the allegation rests on the belief alone, without the proof of any fact to support it.

Considering, therefore, the nature of the suit, and the facts which were in issue between the parties, the facts now brought forward, and their materiality, as well as the time when they were known to the Plaintiff, and the way in which they are supported, and considering the action brought in relation to some of the matters complained of, I am of opinion that the Plaintiff is not entitled to file such supplemental bill as he desires, and that this petition must be dismissed with costs.

[496] MARSHALL v. MELLERSH. March 2, 1843.

An application to advance the hearing of exceptions should be made on notice, and not *ex parte*.

Exceptions were taken for impertinence and were referred to the Master, who found in the affirmative; and exceptions were thereupon taken to the Master's report.

Mr. Pemberton Leigh moved to advance these exceptions for immediate hearing on the ground, that they were in the nature of a dilatory. *Holmes v. The Corporation of Arundel* (3 Beav. 407).

No notice of this motion had been given to the other side.

THE MASTER OF THE ROLLS [Lord Langdale] held that the application ought to be made *ex parte*, but that notice of motion must be given.

[497] HOULDITCH v. COLLINS. Nov. 8, 1842.

A creditor recovered a judgment in this country, and obtained a charge on the debtor's lands, &c., under the 1 & 2 Vict. c. 110, s. 13. He afterwards arrested the debtor in Jersey upon *mesme process* for the same debt. Held, that the charge on the lands here was not thereby forfeited under the sixteenth section.

The bill stated that the Plaintiffs had, in 1840, obtained a judgment against the Defendant Collins in the Court of Exchequer at Westminster for £4931, and entered the minute, &c., under the 1 & 2 Vict. c. 110. That the Defendant Collins was entitled to certain hereditaments which were held by two of the Defendants in trust for him; and it insisted, that the judgment operated as a charge on the hereditaments to which the Defendant Collins was seised at the time the judgment was entered, and that the Plaintiffs were, under the thirteenth section of the above Act, entitled to the same remedies, in this Court, against the hereditaments, as if the Defendant Collins had agreed to charge the same. It prayed a declaration that the Plaintiffs were entitled by virtue of the judgment and Act of Parliament to be considered mortgagees of the property, and that the amount due might be raised and paid, for foreclosure.

To this bill two of the Defendants pleaded that, in May 1840, the Plaintiff arrested Collins, who was then in Jersey for another debt. That the Defendant believed, that while Collins was confined as a prisoner in the prison at St. Helier, under the writ, the Plaintiffs, on the 9th of September 1840, by Thomas Le Breton Esq., whom they appointed to be administrator of their goods in the said island, caused another writ, called an "*ordre provisoire*," to be issued in the island of Jersey by E. L. Bisson the bailiff (being a person duly authorized to issue such writs in the island), against the Defendant Collins, for the sum of £4931, 14s. 6d. sterling, being the amount, in respect of which the [498] Plaintiffs, on the 3rd of

ally 1840, recovered and entered up a final judgment in the Court of Exchequer of the year 1840, in an action against the Defendant Collins, as in the bill mentioned, and that such writ when duly translated into the English language, was to the tenor, purport, and effect following, that is to say:—"Thomas Le Breton, Esq., administrator of the goods of Messrs. John Houlditch and James Houlditch, is committed by justice to cause to be seised, arrested, put in execution, and also to sequester, if it is required, the most apparent property of their debtors in all places where such may be found, particularly upon that issuing from the premises, to be applied to the payment of what shall be found truly and justly due to him. As to strangers or persons expatriable, they may cause their goods, vessels, merchandizes, and effects, or themselves personally to be arrested, if they do not make good their engagements, written engagements, debts, or promises, or if they do not give sufficient bail to fulfil them, which shall be executed by the viscount or one of the denunciators, officers of justice, or the constable, or by one of the centeniers of the parish. Reasons reserved. Given at St. Heliers, on the 9th day of September 1840. Signed J. L. Bisson, Lieutenant Bailli."

That the Defendants believed, that the said writ was lodged on the 9th of September 1840 with Phillip Le Gallais the deputy viscount, being the proper officer of the said prison of St. Heliers aforesaid, and that Phillip Le Gallais, being the proper officer duly authorized to make a return to the said last-mentioned writ, made a return to the same writ, which return when duly translated into the English language was to the tenor, purport, or effect following, that is to say:—

[499] "This 9th of September 1840. In virtue of the order on the other side, I have seized and put in prison Christopher Gerard Rigbye Collins, Esq., at the instance of Thomas Le Breton, Esq., administrator of the goods of Messrs. John Houlditch and James Houlditch, to compel him to pay the sum of £4931, 14s. 10d. sterling, according to the course of exchange upon London, being the amount of a final judgment given by the Court of Exchequer of Pleas at Westminster in England, in favour of Messrs. Houlditch, against the said Mr. Collins, on the 27th day of July in the year 1840; also to compel him to pay the interest upon the same sum, from the 27th day of July 1840 till the day of payment, of which I have given due record."

The plea also alleged, that Collins was still confined in prison in Jersey, in respect of the judgment debt for £4931.

The plea therefore raised this point, that the Plaintiffs, by taking Collins in execution, had forfeited the charge under the 1 & 2 Vict. c. 110, s. 16, whereby it is enacted, "that if any judgment creditor, who, under the powers of this Act, shall have obtained any charge, or be entitled to the benefit of any security whatsoever, after the date of the said Act, and before the property so charged or secured shall have been converted into money or realised, and the produce thereof applied towards payment of the judgment debt, cause the person of the judgment debtor to be taken or charged in execution upon such judgment, then, and in such case, such judgment creditor shall be deemed and taken to have relinquished all right and title to the benefit of such charge or security, and shall forfeit the same accordingly."

[500] Mr. George Turner and Mr. Piggott, in support of the plea. The question was, whether it is competent for parties who have obtained a judgment in this country, to make it a charge upon the Defendant's lands, to go to Jersey and take their debtor in execution before they have realised their securities here.

The object of the Act was this, that the party should not be imprisoned for non-payment of a debt, while his creditor had a charge and lien upon his property which, of itself, would prevent a sale for the purpose of realising the money necessary for discharging the debt. By the sixteenth section, if the creditor "causes" the person of the debtor to be taken or charged in execution on the judgment, the charge upon the real estate is forfeited. If, therefore, the creditor adopts any course of proceeding upon the judgment which operates to imprison the debtor's person, the charge on the real estate is forfeited. If this construction be not put on the statute, a Defendant might be imprisoned for life, where he is unable to put in bail; for all his property is put out of his power of disposition by the charge.

Mr. Pemberton and Mr. Rolt, *contra*. The sixteenth section does not apply to a

case in which the taking in execution is upon a judgment obtained in a foreign Court after judgment here. Where a party (as in the present instance) withdraws himself from the jurisdiction of the Courts of this country, his creditor is entitled to avail himself of the assistance of a foreign tribunal to compel payment of his debt, and thereby obtain payment out of the property of his debtor in that country. In order to charge the debtor's lands in Jersey, it would be necessary to obtain judgment there.

[501] But here there has been no taking in execution upon the judgment; the proceedings shew that there has been no judgment in the Courts of Jersey, and the Collins has been merely arrested on *mesne process* upon the original debt. The judgment here cannot be used further than as evidence of the amount due, and even if he were taken in execution upon a judgment recovered in Jersey, the case would not come within the statute.

Mr. G. Turner, in reply. It is not alleged that Collins has any lands in Jersey; if he had, the Act created an equitable charge upon them; for by the 13th section, the judgment here operates as a charge on *all* lands, &c., of the debtor. Proceedings to charge the lands in Jersey were therefore unnecessary.

The object of the Act was to prevent cotemporaneous proceedings against the person and property of a debtor, and to impose a forfeiture of the charge upon a creditor imprisoning his debtor.

THE MASTER OF THE ROLLS [Lord Langdale]. The words of the Act of Parliament appear to me to be perfectly plain, and I have no authority to extend their operation.

The Plaintiffs in this cause are judgment creditors of the Defendant, and, under the authority of the Act, they are entitled to a charge upon the whole of his property. There is a clause in the Act (sect. 16), that if the judgment creditor having obtained a charge under the Act, "shall cause the person of the judgment debtor [502] to be taken and charged in execution upon such judgment, then and in such case, the judgment creditor shall be deemed and taken to have relinquished his right of title to the benefit of such charge and shall forfeit the same accordingly." The single question, therefore, in this case must be, whether the judgment creditors have caused the person of the judgment debtor to be taken and charged in execution upon the judgment; because if they have done so, then the charge is relinquished; if they have not done that, then the Act of Parliament does not apply.

What has been done in this case is to adopt proceedings in the Court at Jersey for the recovery of the same sum which was recovered by the judgment here. The documents, as they are set out in the plea, plainly, as it appears to me, indicate an execution upon the judgment (which of course could not be had in a foreign Court) but a proceeding to recover, by a new action, the amount of that which had been ascertained to be due by the judgment here. It is *mesne process*, and not a taking in execution upon the judgment; there is no taking upon the judgment.

Now, without considering whether such a proceeding would have been allowed by the Legislature, if the point had been particularly considered, it is sufficient for me to say, that this does not appear to me to be a case comprised within the terms of the sixteenth clause. If the point had been the subject of consideration, there would seem to be great reason for hesitating in enacting a clause prohibiting such a proceeding. For here the Defendant has withdrawn himself from this jurisdiction and placed himself in another, where he may or may not have property, but which property, if he has [503] it, can be followed by means of the authority of the Court there. This act of the Defendant may render it absolutely necessary for the Plaintiffs, for the purpose of maintaining their rights, to adopt another proceeding in that Court, and one of the first steps in that proceeding may be arrest in *mesne process*.

The plea must be disallowed, on the ground that the case as stated in the plea does not come within the meaning of the sixteenth clause of the Act of Parliament.

[503] MADEN v. VEEVERS. Nov. 10, 11, 14, 1842.

[S. C. 12 L. J. Ch. 38; 7 Beav. 489.]

husband seized in right of his wife concurred with the other tenants in common in a partition of estate and mines, but no fine was levied. He died in 1828; after which his widow acquiesced in the arrangement, and took the benefit of it. She and her leasee afterwards proceeded to get coal under the land awarded to other parties, and defended that proceeding, on the ground that the husband's acts were invalid, and that the parties were still tenants in common of the whole. The Court restrained her by injunction.

Her answer, the original bill was amended, and the Defendant obtained time to answer it; the Plaintiff then gave notice of motion for a special injunction, and filed affidavits in support of it. The motion coming on, the Defendant obtained time to answer the affidavits, and then filed both her answer and affidavits in opposition. Held, that the second answer must be treated as an affidavit, and that the affidavits in support of the motion might be used to qualify the second, but not the first answer.

This was a motion to restrain the Defendants, Mary Veevers and John Townend, from working coal mines under the lands of the Plaintiff in Reaps Moss.

The Plaintiff claimed to be entitled, in severalty, to certain lands which were merely part of Reaps Moss and Tooter Hill, and to the coal mines situate under the lands.

The Defendant, Mary Veevers, appeared to claim to be entitled, as one of several tenants in common, to an [504] undivided share of all the lands in Reaps Moss and coal which was under them. John Townend claimed, in her right, to be entitled to that coal under a demise from her.

It seemed that the common or waste lands called Tooter Hill and Reaps Moss were, in some way, appurtenant to four ancient freehold tenements, called Tonge, Lee, and Rochliffe. Those several tenements belonged, in different shares, to several persons. In the year 1812 the Plaintiff was entitled to a share of Tonge, and also to a share of Greaves. The Defendant, Mrs. Veevers, was entitled to a share of Tonge, the legal estate in which had descended to her from her grandfather, John Holden, subject to an obligation which had been entered into by Holden in her marriage, and the effect of which, in equity, was to limit her interest to an estate for life, with remainder to her children.

In this state of things, an intention was formed by the several owners and proprietors of the ancient tenements, to make partitions among them of Tooter Hill and Reaps Moss; and for the purpose of carrying such intention into effect, certain indentures, dated the 18th and 19th days of August 1812, were executed by several persons, recited to be entitled to the said common and waste lands in the shares therein mentioned. Sagar Veevers (the husband of the Defendant, Mrs. Veevers), and some others who were parties to the deed were recited to be entitled, in right of their respective wives. By the deed it was decreed, declared, and covenanted by and between those who were entitled in right of their wives covenanting for himself and wife, that the common lands should be divided by Gilbert Welch and Richard Roberts, who were appointed commissioners for the purpose of the intended inclosure and division, and for [505] setting out roads, and for bounding, hedging, and fencing the allotments; and that the award to be made by the commissioners should be final and conclusive upon all parties, immediately after the sealing and delivery of the deed. And for the purpose of ascertaining the interests of the several parties, the commissioners were empowered to examine and determine the right and interest which each party had; and for the purpose of completing the intended division, the deed purported to convey the property in the common and waste lands to Welch and Roberts. Sagar Veevers, and the other persons who were entitled in right of their wives, covenanted for themselves and their wives, to levy fines, to enure to the use of Welch and Roberts, for the intents and purposes of the deed.

It did not appear that any fine was levied in pursuance of these covenants, and, consequently, the conveyance was imperfect as to the interests of the married women; but Welch and Roberts, the commissioners appointed by the deed, proceeded to divide and allot the land, and on the 18th of February 1814 they made their award, and thereby set out a private or occupation road for the use of the several persons to whom allotments were made, to the Plaintiff, to the Defendant, Mrs. Veevers, to James Stanfield, John Chadwick, and the other owners, parties to the deed; and the several allotments were described and distinguished by reference to a map annexed to the award.

It did not appear that any conveyance was executed by Welch and Roberts for the purpose of carrying the award into effect; but it seemed, that in the month of April 1814, being very soon after the date of the award, John Chadwick, one of the persons entitled to an allotment, did (as Mrs. Veevers said) with his mortgagee [506] convey and release to Sagar Veevers, and his heirs, as well the share of the surface of the lands which had been divided, as also his undivided fourth part of the mines and minerals lying under the estate mentioned in her answer; and that in June 1814 George Stanfield and James Stanfield (James being one of the persons entitled to an allotment), conveyed their shares of the mines and minerals to Sagar Veevers in fee.

The answer of Mrs. Veevers was so expressed, as not clearly to shew what was the description of the lands or mines so conveyed to Sagar Veevers in fee in 1814; but the Court held on this application, that considering the part taken by Sagar Veevers in the transaction, and the covenant into which he had entered, it could not, upon the evidence now before it, consider that the interests conveyed to him by John Chadwick and James Stanfield were any other than the interests allotted by the award a few months before the date of the conveyances.

The roads were set out and made pursuant to the award. It was in controversy whether the different allotments were fenced off from each other: Mrs. Veevers said they were not.

Sagar Veevers lived till March 1828. During his life no question arose; he was owner, in right of his wife, of her share, and as purchaser from Stanfield and Chadwick, he was as the Court considered, owner of the shares which had been allotted to them. He made his will dated the 12th of June 1827, and thereby devised his estates, subject to certain charges, to the Defendant, Mrs. Veevers, for her life, with remainders over; and upon the death of her husband, the Defendant became [507] interested in the shares which had been purchased by him.

The Defendants were proceeding to get coal beyond the allotment of Mrs. Veevers and under the allotments in which the Plaintiff was interested, and the object of this motion was to restrain them.

Mrs. Veevers now said, that the deed of August 1812 having been executed, and the allotment and award having been made, during her coverture, she was bound at the death of her husband and was not now, in any way bound thereby; and further, that even if she were bound by the award, it would not affect the present question, because as she said, the agreement, the deed, the allotment and the award had reference only to the surface of the waste land and not to the mines.

On the other hand, the Plaintiff did not contend that Mrs. Veevers, as a married woman, was bound by the acts of her husband in reference to her land, or acquiescence in his lifetime; but he alleged, that the division and allotment were actually made and acted upon in her husband's lifetime with her knowledge, and that if she had intended to dispute them, she ought immediately, or in a reasonable time after his death, to have taken steps to assert her rights independent of the award, and that she was so far from doing this, that after her husband's death, and with knowledge of the circumstances, she claimed and acted upon the rights which might be entitled to under the award; and that having adopted and long acquiesced in the award, and having exercised an exclusive right to her own allotment under the award, she was not now entitled to dispute it, but ought to be compelled to give effect to it.

[508] Mr. Pemberton, Mr. Kindersley, and Mr. Rogers, in support of the motion.

Mr. G. Turner and Mr. Bacon, *contra*.

Mr. Pemberton, in reply.

Jefferys v. Smith (1 Jac. & W. 298) and *Morphett v. Jones* (19 Ves. 349) were cited. THE MASTER OF THE ROLLS reserved judgment.

Nov. 14. THE MASTER OF THE ROLLS [Lord Langdale]. It appears, that in the year 1828 when Sagar Veevers died, Abraham White was occupying tenant of a small farm called Hoyle Hey being part of the ancient Tonge tenement which belonged to Mrs. Veevers; and that James Maden, of Huttock Top, and his partners were occupying tenants of the coal mines under Hoyle Hey, and which also belonged to Mrs. Veevers.

James Maden by his affidavit states, that on the 10th of July 1828 he and his partners went to Mrs. Veevers to pay her a half-year's rent, and then told her, that the mines they were working were so nearly exhausted, that they would not last more than twelve months, whereupon Mrs. Veevers informed them, that she had no coal under Reaps Moss, which they might have at the same rent as they were then paying for the coals they were then working; that she produced a plan of the waste, with the allotments marked upon it, and particularly marked out her allotment with her name upon it; [509] she shewed the way in which she said the coals might be got without interfering with the other allotments, which she said were not to be meddled with. Maden and his partners then agreed to take the coal from Mrs. Veevers' allotment, and the plan was delivered to them as their guide for ascertaining the boundary in the working. This agreement, however, does not appear to have been acted upon, and after working the mines under the old tenement about two years longer, Maden and his partners quitted the mine.

This was about Midsummer 1830, and in October of that year Mrs. Veevers proposed to let her mines by ticket. Conditions of sale were drawn by Mr. Lovat, from the affidavits it appears, that she so expressed herself and so acted as to make it clear, that she claimed to be exclusively entitled to the coal under her own tenement, and not to be entitled to the coal under the adjoining allotments. Nothing took place at that time, and an offer made by the Defendant Townend was rejected; but soon afterwards Mrs. Veevers demised the mines to Townend, on a surety for nine years under the description (as I understand Townend's version), of the coals, mines, or seams of coal, called Hoyle Hey under the farm called Hoyle Hey and the adjoining ground, under which land the coals were supposed to belong to Mary Veevers. Some time after this letting, it is sworn by Abraham White the tenant of the farm, that on the occasion of paying his rent, in April 1832, he told Mrs. Veevers that he thought Townend could not get the coal, by reason of the water in the mine; that she then produced a plan of the allotments, pointing out her own and the occupation road, which had been made pursuant to the award, and explaining how she thought the coals could be gotten withstanding the water, and stated that a loose or drawing road could be made [510] under the occupation road, and that in that direction, the coals under her tenement might be gotten. White says, that, in the same conversation, he told Mrs. Veevers that he had heard that Townend could not get the coal under her tenement, without driving works through the allotments of the other landowners, which she answered, that she had let the coal to Townend, on the conditions which had been prepared for the letting by Lovat; and that if Townend got other people's coal he must answer for it.

Before the letting to Townend, the lord of the manor of Rochdale had commenced proceedings at law to recover possession of Tooter Hill and Reaps Moss, as parcel of the manor. There were several ejectments, one of which was against the Plaintiff in this cause (see *Doe dem. Dearden v. Maden*, 4 B. & Ad. 880), and the common title of the owners being involved, they made common cause, and the Plaintiff defended the ejectment brought against him, on behalf of himself and all the others. Mrs. Veevers authorized a Mr. Hoyle to act in that business as her agent; deposits of sums of money, which seem to have been proportioned to each owner's allotment, were made to defray the extra costs of the common defence, and Mrs. Veevers' contribution was £11, 5s. 5d. In the result, that sum was ascertained to be more than enough, and the sum of £3, 3s. was returned to Mrs. Veevers, and the accounts

of the transaction, which were signed by the agent of Mrs. Veevers, were headed, "Account of the expenses attending the trial relating to Tooter Hill and Reaps Moss. Dearden and Maden account of cash paid to the proprietors of Tooter Hill and Reaps Moss, to balance their respective deposits made in this suit, pro-[511] portioned according to their respective shares and allotments."

Under these circumstances, and in the present state of the evidence, without anticipating what may be the result of further investigation and more satisfactory proofs, it does now appear to me, that Mrs. Veevers was, upon the death of her husband, acquainted with the award and allotment:—that she considered the mine as well as the surface to be included:—that she acquiesced in it, not only by admitting that she was not entitled to encroach upon the allotments of others, but by exercising an exclusive right to let the coal under her own allotment for her separate benefit, and that she is not entitled, first to avail herself of the award, to exercise an exclusive right to get coal under her own allotment, and afterwards to reject the award, for the purpose of establishing a right to an undivided share of the coal under the whole district.

The circumstances of this case may possibly give rise to questions of law and equity, which may be attended with considerable difficulty, and which must nevertheless be decided, before the rights of these parties can be strictly determined. Upon those questions, I do not now give any opinion, but the weight of evidence now before me, though by no means so satisfactory as could be wished, appearing to me to be such as I have stated, I think, that until the matter can be fully considered, Mrs. Veevers and her tenant Townend ought not to be allowed to get coal under the Plaintiff's allotment.

Upon the fact that the Defendants are proceeding to get coal beyond the allotment of Mrs. Veevers, and under the allotments in which the Plaintiff is interested, [512] there seems to be no controversy, and therefore, it is unnecessary for me to refer particularly to the affidavits.

Let the Defendants Mrs. Veevers and John Townend be restrained from getting coal under any of the allotments in which the Plaintiff is interested.

In the course of the argument, a question was raised, whether the affidavits which had been filed for the purposes of this motion, ought any of them to be read, and so, to what extent. The circumstances affecting the question of affidavits were these:—No motion was made upon the original bill, which had been answered on the 3d of December 1841. The bill was amended in March 1842, and Townend's answer to the amended bill was filed in June 1842; but Mrs. Veevers having applied for an enlarged time to put in her answer, a notice of motion was given, and affidavits in support were filed in July 1842. Time being asked to answer the affidavits, the affidavits were, in fact, met not only by affidavits, but also by the answer of Mrs. Veevers to the amended bill on this point.

THE MASTER OF THE ROLLS in giving judgment said:—Under these circumstances it has appeared to me, that I ought to read the affidavits in support of the statement and charges made in the amended bill. I think that Mrs. Veevers could not, by obtaining indulgence for herself, deprive the Plaintiff of his right to move on the affidavits, and could not, by putting in her answer after obtaining time to answer the affidavits, place herself in a better position than she would have been, if the answer had been her affidavit. Her first answer was put in at a time which entitled her to the credit which is generally given to an answer, and I have intended so to treat qualifying [513] the credit given to her statement, and to her allegations of fact, only by the other statements contained in the same answer.

[513] THE EARL OF LICHFIELD v. BOND. Dec. 17, 1842.

Exceptions to an answer ought to specify, not only the cause, but the pleading to which the answer has been put in.

Exceptions to an answer to a bill for insufficiency, were headed "Exceptions taken by the said Complainant to the insufficient answer of the said Defendant." Held, that

this was insufficient, and that they ought to specify that the answer complained of was the answer to the bill.
 Exceptions are now matters of record.

This was an injunction case, and the Plaintiff had obtained the common injunction. The Defendant having put in his answer, exceptions were taken thereto, which were properly entitled in the cause, but were headed "Exceptions taken by the said complainant to the insufficient answer of the said Defendant," but they omitted to specify that the answer complained of was an answer "to the bill of complaint." (See *hinde*, 270, and 2 Van. Heyth. 133, 135.)

The Master declined proceeding with the exceptions, on the ground that they were not correctly headed.

A motion was now made, on behalf of the Plaintiff, that the Master might be directed to proceed with the exceptions, and that, if necessary, the same might be amended.

Mr. Pemberton and Mr. Willcock, in support of the motion, contended, that the heading was accurate. That the Master had no jurisdiction to entertain the objection, but ought to have proceeded to determine the matter in obedience to the order of reference; and that, if there was any error, the proper course was for the Defendant to move to take the exceptions off the file; *Williams v. Davies* (1 S. St. 426). They argued also that the objection was frivolous and useless.

[514] Mr. Turner and Mr. Toller, *contra*. The exceptions are used for the purpose of delay, and are in the nature of a mere dilatory to retain the injunction; they ought therefore to be dealt with strictly. The heading of the exceptions is incorrect, there is nothing to identify the exceptions with the bill. The exceptions should specify to what the pleading complained of is an answer; it might be an answer to another matter, as an answer to an examination under a decree.

THE MASTER OF THE ROLLS [Lord Langdale]. I do not think that the heading of these exceptions is strictly regular, but there cannot be any doubt that they were really exceptions to the answer "to the bill."

How far exceptions were formerly matters of record, seems to have been a question of doubt, but now the exceptions are regularly filed (5th Order, October 26, 1842, Ord. Can. 207), and have become of record. Being so, what does the record consist of? First we have a bill, and then an answer to the bill, and exceptions to the answer; these constitute the whole record, then comes the order of reference, which expressly refers to the answer. There cannot, therefore, be any reasonable doubt of what was meant in this case, but at the same time cases may occur in which an ambiguity might arise, and in which the objection might be material. I think that the strict rules of practice ought to be preserved. I will therefore give the Plaintiff liberty to amend his exceptions, and thereupon direct the Master to proceed upon them.

I can give no costs in such a case as this.

[515] TURNER v. CORNEY. Dec. 7, 1841.

Special decree in a bill for an account, where the accounts and vouchers were alleged, under special circumstances, to be beyond the control and power of the accounting party.

The Plaintiff conveyed his property to trustees for the benefit of his creditors. The trustees who were authorised to employ an agent, committed the management of the property to an agent. The agent rendered his accounts to the Defendants, and left England, taking with him the vouchers. The trustees being unable, from the absence of the documents, to furnish a satisfactory account, the Plaintiff asked that they might be charged for what, without their wilful default, they might have received. The Court, however, in the first instance, made a special decree ordering a general account; and if, in taking the account, it should appear that the Defendants could not render a satisfactory account by reason of the non-production of the documents and vouchers, it was referred to the Master to inquire, whether

it was by the neglect or default of the trustees that they were unable to render a better account, with liberty to state special circumstances.

In 1828 the Plaintiff Turner and his partner Dodgin executed a creditor's deed, by which they assigned to Corney and Barrett their stock-in-trade and debts, upon trust to collect, and after payment of the costs, to divide the produce proportionably between the scheduled creditors, and pay the surplus to the assignors. Corney and Barrett covenanted to perform those trusts, and keep and produce proper accounts. They were authorised to employ one or more person or persons to inspect and make out the accounts of the said partnership business, and to collect and get in the debts and effects.

The Plaintiff went abroad, where he remained ten years, and after his return he filed this bill, seeking to have an account of the receipts and payments of the trustees, and to charge them with an alleged surplus.

The Defendants stated that they did not take possession of the property, books, and accounts, but committed the entire active management and disposition of the trust premises to Mr. Willat, a perfectly competent person for that purpose, who was approved of by the Plaintiff as such agent. That Willat realised the property, and distributed the produce amongst the creditors, as set forth in his account (which was set out in a schedule to the answer), leaving, after payment in full of the debts, a balance of £58 due to the Defendants or their agent.

They stated that Mr. Willat relinquished business, and went to reside abroad some years ago, and was permanently resident abroad, and had left with the Defendants no papers, accounts, or books whatever relating to the said trust premises.

They set forth the account, and stated that they were unable to set forth a further account, and that they had not in their possession any papers, &c., relating to the accounts.

By amendment, the Plaintiff insisted that the accounts were defective and imperfect, and that credit was not given for the fair value of the stock and effects, and that such accounts did not include many of the credits of the partnership, and that many good debts were omitted.

The cause coming on for hearing,

Mr. Wilbraham, for the Plaintiff, asked for a decree of what without the willful default of the Defendants, the trustees, they might have received, and of the application thereof.

Mr. Tinney and Mr. Parry, *contra*, did not resist a general account, but insisted that the Plaintiff was not entitled to the particular decree asked.

[517] THE MASTER OF THE ROLLS [Lord Langdale]. The question is, whether the case now brought forward entitles the Plaintiff to the decree which he asks. It is very possible he may be entitled ultimately.

Where the books and documents relating to the account are, and whether the same can be produced does not appear, and the Defendants have not rendered a satisfactory account by their answer.

If I directed a common account, the Plaintiff would not have what he is entitled to. I think I am not at present in a situation either to charge the Defendants in the way asked, or to exonerate them. There must be some inquiry, if by the neglect or default of the trustees they cannot render a better account. Some caution must be used in drawing up the decree.

I must observe, that trustees who take on themselves the management of property for the benefit of others have no right to shift their duty on other persons; and if they employ an agent, they remain subject to responsibility towards their *cestui que trust*, for whom they have undertaken the duty.

ABSTRACT OF DECREE.—Refer it to the Master to take an account of the property assigned, and of the proceeds received by the Defendants, or by any person by their order, or for their use, and of the application thereof, and of all monies properly expended in and about the execution of the trusts; and if, in taking the account, it shall appear that the Defendants cannot render a satisfactory account, by reason of the non-production of the documents and [518] vouchers, refer it to the Master to

quire whether it is by the neglect or default of the trustees that they are unable to under a better account, with liberty to state special circumstances. (*N.B.*—The use was afterwards compromised, while in the Master's office.)

[518] ALEXANDER v. ALEXANDER. Dec. 6, 1842.

The testator, by his will, gave two-thirds of his residue to his eldest son, with a gift over in case he died under twenty-five and unmarried; and he gave the remaining one-third to his second son, in similar terms. By a codicil he revoked so much of his will as related to the distribution of his residue, and gave to his second son £20,000 sterling in lieu of his one-third of the residue, and he appointed his eldest son residuary legatee. Held, that the gift of the £20,000 was absolute, and not subject to the same limitations as the one-third of the residue.

The testator, by his will dated in 1836, gave his residuary estate to trustees, as to two-thirds in trust, until his son Caledon D. Alexander should attain twenty-five or marry, to apply such part of the interest as they should think fit in his maintenance, and to pay over the capital to him "when and immediately after he should have attained the age of twenty-five, or be married;" and in case of his death under twenty-five and unmarried, the testator gave the two-thirds upon the same trusts as were afterwards declared of the remaining one-third.

The testator then gave the remaining one-third upon trust, until the Plaintiff, his son, Josiah B. C. Alexander, should attain twenty-five or marry, to apply such part of the interest as they should think proper towards his maintenance, &c.; and the testator authorised the trustees to advance him any sum not exceeding £10,000, towards his advancement in the world, whether he [519] should or not have attained twenty-five or be married; and he directed them to pay over the capital, "when and immediately after he should attain his age of twenty-five years or marry." The one-third was given over in case of the death of the Plaintiff under the age of twenty-five and unmarried, upon the trusts declared concerning the other two-thirds of the residue.

In 1838 the testator made a codicil to his will, which was as follows:—"By this codicil to my last will and testament, made at Paris this 24th day of November 1838, I do hereby revoke so much of my said will as relates to the distribution of the residue of my estate. And I do hereby bequeath to my second son Josias a legacy of £20,000 sterling in lieu of his one-third share of the said residue, and do appoint my eldest son Caledon to be my sole residuary legatee."

The Plaintiff was still under the age of twenty-one, and by this bill he claimed to be entitled to the £20,000 absolutely, without any restriction.

Mr. Tinney and Mr. Beales, for the Plaintiff.

The testator has, by his codicil, given to the Plaintiff a legacy of £20,000 absolutely, in lieu of the one-third which was subject to certain restrictions. The Plaintiff is therefore absolutely entitled to this sum.

Mr. Pemberton and Mr. Gardner, for the executors.

Mr. Kindersley and the Honourable F. Bruce, for Caledon D. Alexander. The gift by the codicil is a substitution for that given by the will, and is therefore subject to the same incidents and limitations, so that in the event of the death of the Plaintiff under twenty-five unmarried the legacy will go over.

[520] It has been held that a legacy substituted for another shall be raised out of the same fund and be subject to the same conditions; *Crowder v. Clowes* (2 Ves. jun. 49). Thus, where annuities were given by will free of legacy duty and an annuity was given by a codicil in lieu of one given by the will, it was held that the substituted annuity, though not so expressed, was to be paid free of duty; *The Earl of Shaftesbury v. The Duke of Marlborough* (7 Sim. 237).

THE MASTER OF THE ROLLS [Lord Langdale]. There is no doubt that this is an absolute legacy. The testator has revoked so much of his will as relates to the distribution of the residue of his estate. The whole of this disposition is therefore

gone. He says, I have given the residue, subject to a contingency, I revoke the gift entirely, and in lieu I give an absolute interest in £20,000.(1)

[521] CROW v. CARLETON. March 20, 1843.

An allegation in the bill was admitted by one Defendant, A., and denied by another, B., and the Plaintiff who had not proved it proposed to waive his claim in respect of it, but this being opposed by A., an inquiry was directed as to the fact.

Mr. Whitehead, before his bankruptcy, carried on business in partnership with Carleton and Ackerman. He became a bankrupt in the month of May.

The Plaintiffs, who were Whitehead's assignees, contended, in this suit, that the business had been carried on from May to November for their joint benefit, jointly with Carleton and Ackerman.

Carleton denied that the business was so carried on from May to November, and insisted it was carried on for the benefit of Carleton and Ackerman alone.

Ackerman, on the other hand, admitted that it was carried on as alleged by the Plaintiffs.

When the cause came on for hearing, the Plaintiffs, who had not made out the allegation as to the business having been carried on as alleged by them, waived the account from May to November.

Mr. O. Anderdon and Mr. Beales, for the Plaintiffs.

Mr. J. Adams, for Ackerman, insisted that the Plaintiffs were not at liberty to waive the account, the result of which would be to permit the assignees to release themselves from their admitted liability in respect of the partnership-transactions subsequent to May.

Mr. Shebbeare, for Carleton.

[522] Mr. O. Anderdon, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. The Plaintiffs are the assignees of Whitehead, who, before his bankruptcy, carried on business with Carleton and Ackerman. It is alleged by the Plaintiffs, that after the bankruptcy and until November the business was carried on for the joint benefit of the three. Carleton denies this, and says it was carried on for the benefit of himself and Ackerman alone. Ackerman, on the other hand, says it was carried on for the benefit of the three until November. At a future stage of this cause, it will be necessary for me to direct the distribution of the partnership funds, and yet it is thought that I have no duty to see what the rights of the parties are. It is obviously necessary for me to ascertain the facts before I can determine the rights of the parties. Therefore, let the account be taken down to the time of the bankruptcy, with respect to which there is no dispute, and let there be an inquiry whether, after the bankruptcy, the business was carried on for the benefit of the three parties, or any and which of them.

[523] CLARKE v. YONGE. YOUNG v. YONGE. May 26, 28, July 22, 1842.

A confirmed award under the Tithe Commutation Act is final as between the tithe owners and tithe-payers, but does not exclude from further investigation a claim between the tithe-owners themselves, in which there was, before the award, a joint title to tithes, which by accident and mistake was not brought forward till after the award was made.

Thus, by an award, made with the concurrence of A., the patron, the whole rectorial charge was made payable to B. the rector, A. being at the time entitled to one-half.

(1) And see *Cooper v. Day*, 3 Mer. 154; *Martin v. Drinkwater*, 2 Beav. 215; *Overend v. Gurney*, 7 Sim. 128; *Burrows v. Cottrell*, 3 Sim. 375; *Chatteris v. Young*, 1 Mad. 30; 2 Russ. 183; *Day v. Croft*, 4 Beav. 561; and *Cookson v. Hancock*, 1 Keen, 817, and 2 Myl. & Cr. 606.

of the corn tithes, but ignorant of his rights. Held, that A. might have relief in this Court as against B.

A. and B. were entitled to tithes in equal moieties. B. under mistake received the whole, a bill by A. against B. for his moiety was dismissed with costs.

The principal question in this case arose out of the provisions of the Tithe Commutation Act. (1) The facts and evidence in the cause being very fully stated in judgment of the Court, it is merely necessary here to advert to them shortly.

The Plaintiffs in the first suit were entitled to the advowson of the Rectory of Aston, and were also entitled, as impropiators, to a portion of the corn tithes, but they were ignorant of their rights in respect of the latter.

The Defendant was, in 1838, appointed the rector of the parish, and, as such, was entitled to a portion of the corn tithes; but from the time of his collation he had received the whole.

In 1840 an agreement was entered into, under the authority of the Act, between the "landowners" and the Defendant, the rector of the parish, for the commutation of the tithes; and the Plaintiffs, as owners of the advowson, had consented thereto. The tithes were thereby commuted for a rent charge of £905, payable to the rector and successors. The agreement was afterwards confirmed by the Tithe Commissioners.

[24] The Plaintiffs, afterwards discovering their title to a portion of the corn tithes, filed this bill against the rector and other parties to have their right to a portion of the rent charge declared, &c. The first question was, as to the right of the Plaintiffs to any portion of the tithes before the commutation; and the second was, whether, by the terms of the Act, they were precluded from having any remedy in Court.

The Act in question had for its object to abolish the inconvenient practice of paying tithes in kind, and to substitute a determinate money payment by way of rent charge, varying, from time to time, in amount with the current price of corn. This was to be effected either by a voluntary agreement between the "landowners" and "tithe-owners" (sect. 17), or compulsorily by the Commissioners (sect. 36), and the Commissioners were empowered by the forty-fifth section, to hear and determine any question of right between the parties. The sections of the Act principally relied on in the argument were the twelfth, twenty-first, forty-fifth, fifty-second, sixty-first, and seventy-first.

Mr. Pemberton, Mr. Boteler, and Mr. Eagle, for the Plaintiffs, after discussing the question upon the evidence, proceeded to contend, as to the second point, that the Tithe Commutation Act was not intended, and did not in fact, bind the rights of the Plaintiffs, other than as between the tithe-owners and the landowners, except only in instances where questions had arisen which hindered the Commissioners making an award, and which had been "heard and determined" by them under the forty-fifth section of the Act. That here there had been a mistake as to the Plaintiffs' rights, and no question had ever arisen or been determined between the Plaintiffs and the Defendant.

[25] That the seventy-first section preserved to all persons having any interest in land subject to any tithes, or any charge or incumbrance on the tithes, their rights as to the substituted rent charge, and the Plaintiffs, in no way repudiating the commutation as between the "tithe-owner" and the "landowner," had a right to the jurisdiction of this Court to fix upon the rent charge an equity, which, through a mistake, the agreement had deprived them of.

Mr. Kindersley and Mr. E. Montague, for the Defendant the rector, after dealing with the first question, contended, as to the second question, that this Court had no jurisdiction to alter or modify the agreement confirmed under the seal of the Tithe Commissioners; that the Act made the award final, and precluded any such interference.

The forty-fifth section enacts, "That if any suit shall be pending touching the right to any tithes, or if there shall be any question as to the existence of any *modus*

(1) The 6 & 7 W. 4, c. 71, amended, &c., by the 7 W. 4 & 1 Vict. c. 69, the 1 & 2 Vict. c. 64, the 2 & 3 Vict. c. 62, and the 5 & 6 Vict. c. 54.

or composition real, or prescriptive or customary payment, or any claim of exemption from, or non-liability, under any circumstances, to the payment of any tithes, in respect of any lands, or any kind of produce, or touching the situation or boundaries of any lands, or if any difference shall arise, whereby the making of any such award by the Commissioners or Assistant Commissioner shall be hindered, it shall be lawful for the Commissioners or Assistant Commissioner to appoint a time and place in or near the parish, for hearing and determining the same; and the decision of the Commissioners or Assistant Commissioner shall be final and conclusive on all persons subject to the provisions hereinafter contained."

[526] The fifty-second section provides for the confirmation of the award, and proceeds, "and every such confirmed award shall be binding on all persons interested in the said lands or tithes."

The sixty-sixth section is positive, it provides, "That no confirmed agreement, award, or apportionment shall be impeached after the confirmation thereof, by reason of any mistake or informality therein, or in any proceeding relating thereunto."

They argued that the Act, therefore, made the award final, and that it could not be impeached "by reason of any mistake."

That the Plaintiffs claimed wholly by a title adverse to that of the Defendants, and that the case was not like one between a trustee and his *cestui que trust*.

Mr. Turner and Mr. P. L. Foster, for the Bishop of Norwich.

Mr. Pemberton, in reply. There is a marked difference between the rights of tithe-owners as amongst each other, and as against the tithe-payers. The Legislature never could have intended to defeat the rights of third parties where they were brought under the consideration of the Tithe Commissioners. By the seventh section two-thirds of the "landowners," and the tithe-owner may bind the party, and the term "tithe-owner" is explained by the interpretation clause (s. 12) to be "the party in actual possession," except, &c., "without regard to the real amount of interest," so that a party in possession with or without title is to be the assenting party to the commutation agreement. Could it have been intended that a mortgagor or trustee, or a tenant in common, or any other person having a limited interest, or party having no title at [527] all, being in possession, was to be enabled to obtain title as against the mortgagor, the *cestui que trust*, or the person rightfully and equitably entitled? Such could not have been the case, and the seventy-first section shews the contrary.

Hill v. Reardon (2 S. & St. 431, Jac. 84, and 2 Russ. 608) and *Lloyd v. Trimbleston* (4 Sim. 296) were cited.

July 22. THE MASTER OF THE ROLLS [Lord Langdale]. The Plaintiffs in this cause, being devisees under the will of Thomas Young deceased, claim to have been entitled to a moiety of the corn tithes arising in the parish of Necton; and as the rectory charge having, under the Tithe Commutation Act, been commuted for the redemption of the tithes, they have filed this bill against the rector of the parish and the Bishop of Norwich, praying that they may be declared to be entitled, in respect of their share of a moiety of the corn tithes, to a reasonable proportion of the annual rent charge; that in order to ascertain such proportion, the same annual rent charge may be apportioned between the Plaintiffs' lay moiety of corn tithes and the tithes belonging to the rectory, according to their respective values, and that the Plaintiffs' right to such proportion may be established and various accounts taken.

The Rev. Thomas Young, under whom the Plaintiffs claim to be entitled, was about forty-three years immediately preceding the time of his death, the rector of the rectory and parish church of Necton, which is a spiritual and presentative benefice, and was, for about twenty-eight years before his death, entitled in fee-[528] to the advowson of the same rectory, and the Plaintiffs allege, that he was entitled in fee-simple, as impropiator or portionist, of or to a portion of lay tithes arising within the same parish, consisting of a moiety of all the tithes of corn arising within the parish and the titheable places thereof. Thomas Young died on the 23d of September 1837, having made a will, whereby he devised all his interest in the great tithes of Necton, and his advowson to his brother William Young for life, with remainder, in case his said brother should die without issue, to the Plaintiffs, on trust to sell.

William Young, being of unsound mind, could not exercise his right of presentation, and the right having lapsed to the bishop of the diocese, the Defendant William Yonge was, on the 27th of March 1838, collated to the rectory, and soon afterwards (on the 3d of April), inducted into the same, and those who acted for the patron as well as for the Defendant William Yonge being unaware, or not noticing, that Thomas Young, and under his will William Young his brother, had any claim to a portion of tithes, the Defendant William Yonge was permitted to receive the whole of the tithes arising within the parish.

In the year 1839 meetings were held in the parish of Necton, for the purpose of making an agreement under the Tithe Commutation Act, and an agreement having been made, on the 3d of April 1839, between the landowners and the Defendant, the incumbent, as tithe-owner, Mr. Kitson was appointed by the Commissioners to act as substitute for the patron who was a lunatic, but before the transaction was completed, and on the 9th of February 1840, the patron died. Thereupon, the devise to the Plaintiffs took effect, and [529] soon afterwards, that is in March 1840, the Plaintiffs, as owners of the advowson, were applied to for their consent to the agreement, whereby a rent charge was substituted in lieu of the tithes payable to the rector.

The agreement was made between the owners of the lands in the parish, and the defendant, who was described to be the rector and the owner of all the tithes of the parish as well great as small, and it was agreed, that the annual sum of £905, by way of rent charge, should be paid to the Defendant as rector and to his successors, instead of all the tithes of the parish. On the 26th of March 1840 the Plaintiffs, as patrons of the rectory, certified their consent to the agreement, and soon afterwards, the agreement was duly confirmed by the Tithe Commissioners. The rent charge was then apportioned among the lands of the parish, the apportionment was confirmed, and thus the tithes were commuted under the authority of the Act.

Throughout the whole of this proceeding, the Defendant, as rector, was considered and dealt with as owner of all the tithes of the parish; any right or claim of the estate of Thomas Young to a portion of the tithes was entirely overlooked. But some time afterwards, and in December 1840, the Plaintiffs, having occasion to investigate the title of Thomas Young to the advowson, discovered, as they say, that he was entitled to a moiety of the corn tithes, and the Defendant William Young having refused to make any allowance in respect thereof, this bill was filed in March 1841. The Defendant scarcely denies that there was a portion of tithes distinct from the rectory, but he alleges, that if there was any such portion, and, if Thomas Young was entitled to it, there is no evidence what the portion was, and that the Plaintiffs, being unable to make out by [530] evidence what the portion to which they claim title consisted of, ought not to be allowed to receive anything in respect of it. He further contends, that even if the Plaintiffs had made out a title to a moiety of the corn tithes as a matter of fact, they are nevertheless entitled to no relief, the statute precluding any claim of adverse title.

The first question in the cause is, whether Thomas Young was entitled to the moiety of corn tithes which is claimed by the bill. The Plaintiffs say, that the portion of tithes in question was, at the time of the dissolution of the late Priory or Monastery of Westacre, parcel of the possessions thereof, and upon such dissolution, came into the possession of the Crown, and was afterwards duly granted by the Crown as a lay rectory, and by divers means conveyances, became and was vested in Thomas Young, and they think, that upon the evidence, it is proved, that at a very early period, the Priory of Westacre was entitled to a portion of tithes issuing out of the Rectory of Necton. In the taxation of Pope Nicholas, under the head "Necton," the portion of the Prior of Westacre in the same is stated to be five marks. In the document which is called the Norwich Doomsday Book, the portion of the Prior of Westacre is again stated to be five marks. In the Valor Ecclesiasticus of the 26 Hen. 8, in stating the worth of the possessions of the monastery or priory of canons at Westacre, the farm of five sheaves in Necton is stated to be 53s. 4d. annually. In the minister's account of the 31 Hen. 8, there is the account of Robert Hogan, occupier in Necton, and under the head "portion" it is said, "But he accounts for 53s. 4d. for the farm of a certain portion of tithes of Necton aforesaid, issuing out of the rectory there, so

occupied by the aforesaid Robert Hogan this year." In the 35th year of Hen. 8, the 1st of November, the king granted to Robert Hogan in fee, amongst other things "All that [531] portion of tithes issuing from and out of the Rectory of Necton, in the tenure or occupation of the said Robert Hogan, and lately belonging to the Monastery or Priory of Westacre;" and the same portion is, in the grant mentioned to be extended at the clear annual sum of 53s. 4d., and this grant is alluded to in the minister's account in the same year. I think, therefore, that there is sufficient evidence, that a portion of tithes issuing out of the Rectory of Necton was parcel of the possessions of the Monastery of Westacre when it was dissolved, and upon the dissolution of the monastery came to the hands of the Crown, and was by the Crown granted as a lay fee to Robert Hogan, and from the description in the *Visitation of Ecclesiastics*, I think that the portion consisted of tithes of titheable sheaves. The title to a portion of the tithes of sheaves being traced to Robert Hogan in the year of Hen. 8, the subsequent title seems to me, independently of the question as to what the portion consisted of, to be sufficiently deduced to the testator Thomas Young; and it is to be considered, whether it sufficiently appears what was the portion to which he was entitled.

In the document called the Norwich Domesday Book, to which I have before referred, it is stated, that the Rector of Necton had twenty-six acres of land with a manse, and that the vicar had a manse without any land. The estimation of the portion and vicarage tithe, twenty-six marks; the estimation of the vicarage of the same, five marks; the portion of the Prior of Westacre in the same, five marks. A comparison between the state of the rectory as shewn by this document and the state as subsisting in subsequent times, shews that very great changes have taken place; the history of those changes is not shewn, and no light is thrown on the subject till comparatively recent times.

[532] It appears from rate books of the parish, that in and for several years before the year 1717, the rectory, the portion, and the vicarage were rated equally, and that they continued to be so rated for many years afterwards. In December 1717 John Rolfe, the vicar, purchased the advowson and the portion. The portion was conveyed to him under the description of "all that portion of tithes issuing going out of the Rectory of Necton, to the late dissolved Monastery of Westacre, at that time belonging." William Delke was at that time rector of the parish. And under these circumstances Mr. Rolfe being patron, vicar, and owner of the portion, desirous, that when an opportunity offered, the vicarage should be reunited to the rectory, and on the 1st of January 1718 he granted the next presentation to the rectory and vicarage to Henry Wastell, who in that way became patron; and in the month of February 1718 a petition was presented to the Bishop of Norwich by Henry Wastell, stating himself to be patron of both Rectory and Vicarage of Necton, John Rolfe, stating himself to be vicar there, representing that the glebe, tithes, and profits belonging to the Church of Necton had been, from time immemorial, divided into three small parts or portions, and were claimed and enjoyed under three distinct titles, viz., first, a portion consisting of about half the corn tithes within the parish which formerly belonged to the Prior of Westacre, and since the dissolution of the monastery have been granted from the Crown into lay hands. Second, a representative, consisting of the remainder of the corn tithes arising within the parish which had been esteemed and taken for a benefice without cure, and the rector having no house or glebe have been generally non-resident, and have thrown their ministerial duties upon the possessor or incumbent of the [533] third part or portion of the church styled the vicarage, and praying that, by reason of the smallness of the provision for the incumbent, the vicarage might be dissolved and restored to the rectory. The truth of the statement made in the petition appears to have been attested by six clergymen, and several other persons living in the neighbourhood. In consequence of this petition, and on the 10th of July 1718, it was ordered by the bishop, as ordinary of the parish, that after the death or resignation of John Rolfe, the then present vicar, the clerk that should be instituted into the Rectory of Necton on the presentation of the lawful patron, or in case of lapse, upon the collation of the bishop or presentation of the Crown, should be both rector and vicar; and should have not only the tithes of corn and grain belonging to the presentative rectory,

to the glebe tithes and profits belonging to the vicarage, which vicarage was thereby consolidated with the rectory. Very soon afterwards Mr. Delke the rector died, and on his death, and on the presentation of Henry Wastell, Mr. Rolfe was instituted to the rectory.

We see, therefore, that the rectory and the portion were equally rated in the parish books, that the vicar, having become the owner of the portion and of the advowson of the rectory and vicarage, in a proceeding before the Ordinary in which was necessary to state the condition of the rectory and the vicarage, represented a portion to consist of about a moiety of the corn tithes, and the rectory to consist the remainder of the corn tithes, and upon that and the other statements in the petition, procured from the Ordinary an order for the consolidation of the rectory and a vicarage, and subsequently procured himself to be instituted into the rectory.

[534] Mr. Rolfe, being now incumbent of the consolidated rectory and vicarage, and being owner of the advowson and of the portion, in the month of August 1720, sold the advowson and portion to Benjamin Young, and in the conveyance the property conveyed is described, as "the advowson and also all that impropriation, being one moiety or half part of all that portion of tithes issuing and going out of the rectory of Necton, to the then late dissolved Monastery of Westacre sometime long, and all the tithes to the rectory impropriation or portion of tithes long, to hold the advowson, portion of tithes and premises to Benjamin Young in fee." In a subsequent deed, executed by Benjamin Young on the 10th of September 1723, the portion is described, as "all that impropriation, being one moiety or half part of the great tithes issuing or going out of the Rectory of Necton;" and the advowson and portion were afterwards, on the 16th of March 1735, limited to the use of Benjamin Young and Mary his wife, with remainder to the use of their youngest son William Young in fee.

Mr. Rolfe, the rector, lived till 1749, and upon the vacancy occasioned by his death, and on the presentation of Mary Young, Thomas Patrick Young was instituted to the rectory. He, by some means not stated, became patron for the next turn, and having resigned the incumbency, William Young was, on his presentation, instituted to the rectory on the 7th of October 1752. It is not shewn when William Young succeeded to the advowson and portion, but William Young and Ann, his wife, appear to have executed deeds, dated the 15th and 16th of January 1788, whereby the advowson and portion of tithes were limited, after the deaths of William Young and Ann, his wife, to Thomas Young in fee. In those last deeds the portion is described "the im-[535]propriation of Necton aforesaid, or portion of the tithes issuing and going out of the rectory to the late dissolved Monastery of Westacre sometime appertaining." The portion is not described as a moiety of the great tithes or corn tithes.

William Young, who became owner of the advowson and portion, continued to be rector from the year 1752 to the year 1794; and Thomas Young, who became owner of the advowson and portion in 1809, continued to be rector from the year 1794 to the year 1837; and under such circumstances, it could scarcely be expected to find evidence of usage to shew the relative rights of the rector and of the portionist. There were, indeed, intervals, when the rector was not owner of the portion, namely, a short time during the incumbency of Thomas Patrick Young, some time during the incumbency of William Young, when his mother was, or may have been owner of the portion; but from the relation between the parties and the circumstances of the case, direct evidence of payments and receipts could not reasonably be expected, and it is very improbable that there should have been a separate collection of tithes by the rector and the portionist.

For twenty-eight years before his death, Thomas Young was both rector and portionist, and claimed all the tithes in those two characters. Some of the occupiers having set up *modus*, he filed a bill against them for the recovery of tithes, and stated his title as rector and as impropriator of a portion, alleging that the portion consisted of a moiety or thereabouts of the tithes of corn, and also, that before the dissolution, the vicar had become entitled to all the tithes, except the tithes of corn, and that the tithes of corn belonged to the rector and to the portionist in moieties; and on the 28th of [536] June 1824 he obtained a decree for the tithes as claimed by his bill. Some accounts and books were tendered in evidence by the Plaintiffs, and

objected to by the Defendant. I allowed the entries to be read *de bene esse*, without determining whether they were strictly admissible; and on consideration of the other evidence, I do not think it necessary to decide the point.

It being, I think, established, that Thomas Young was entitled to a portion of the tithes of corn issuing out of the rectory, it appears to me evident, from the circumstances which I have stated, that the portion was a moiety. No other supposition consistent with the equal rating, the statement in the petition of 1718, and the conveyances of 1720 and 1723. In the petition, indeed, the portion is called a moiety, but the rating long before and long afterwards leads to the conclusion of equality of value; and notwithstanding the comments made on the deed of Aug. 1720, and which are very naturally suggested by the ambiguous expressions used, I am of opinion, that it can be rationally construed only as a description of a moiety of the rectoral or corn tithes; and there is nothing which affords the least reason for thinking that anything occurred to vary the rights of the rector and portionist, at any time after the deed of 1720; under these circumstances, I am of opinion, that Thomas Young in his lifetime was, and that the Plaintiffs under his will and upon the death of William Young, the lunatic, became entitled to a moiety of the corn tithes arising in this parish.

The Plaintiffs consented to the commutation, and the next question is, whether, by so doing, they lost all remedy. The Tithe Commutation Act (6 & 7 W. 4, c. 36), empowered the Commissioners to fix a rent charge upon the lands in lieu of tithes, and to apportion the rent charge among the lands subject to tithes, thereupon to discharge the lands from the future payment of tithes, and as to all questions which came before them, their decision was, by the terms of the Act, final. No confirmed agreement, award or apportionment is to be impeached or set aside, by reason of any mistake or informality therein, or in any proceeding relating thereto. (Sect. 66.) But the provisions of the Act relate especially to questions between tithe-owners and landowners; and the Plaintiffs in this case cannot raise any question as between either themselves or the Defendant Mr. Yonge and the landowners, or attempt, in any way, to impeach the confirmed agreement, award, or apportionment, as between the tithe-owners and landowners. What is to be considered is, whether the Act precludes all question between tithe-owners in the circumstances of these parties.

At the time of the agreement, and before any steps were taken towards commutation, Mr. Yonge was, under the circumstances which have been stated, in actual possession or receipt of the profits of all the tithes of the parish, and therefore, for the purposes of the Act, designated the tithe-owner, without regard to the real amount of his interest. From this it would seem to be clear, that the Commissioners were at liberty to proceed in the exercise of their authority without any investigation of the title as between the adverse claims of tithe-owners in cases where one person was actually in the possession or receipt of the rents and profits of the tithes; and it is afterwards provided by the seventy-first section, that any person having any interest or claim to any tithes before the passing of the Act, shall have the same right to or claim on the rent [538] charge for which the same have been commuted; and having regard to these provisions, I think that it cannot have been intended to exclude from further investigation a case, in which there was, before the award, a just title to tithes, which by accident and mistake was not brought forward till after the award was made. The rector has, in fact, obtained that which was the right of the Plaintiffs, and which they could have obtained if they had claimed it. There was no error of the Commissioners, for the Plaintiffs made no claim before them, and the award, as between the tithe-owners and the tithe-payers, with regard to the amount of the rent charge to be paid is final.

The case is attended with considerable difficulty, but on the best consideration which I have been able to give to the Act, I think that the Plaintiffs are precluded from seeking to establish, in this Court, a claim to a portion of the rent charge commensurate with the proportionate value of their portion of tithes, which was a part of the consideration for which the rent charge was given. I therefore think it right to declare, that the Plaintiffs were, previously to the award of the Commissioners, entitled in fee to one moiety of the corn tithes payable within

parish, and that they are now entitled to a share of the rent charge for which the whole tithes arising within the parish have been commuted, bearing such proportion to the whole rent charge, as the value of one moiety of the corn tithes, at the time of the commutation, bore to the value of all the tithes arising within the parish at the same time. Having regard to that declaration, refer it to the Master to ascertain what share of the said rent charge the Plaintiffs are entitled to, and let the Master take an account of the rent charge which has been received by the Defendant since the filing of the bill, and ascertain and state what [539] is due to the Plaintiffs for their share thereof. It appears to me that the Plaintiffs are not entitled to any further account.

There does not appear to be any foundation for the charge, that the Defendant had notice of the Plaintiffs' right before it was discovered by the Plaintiffs themselves, and the claim was actually made; and considering the circumstances under which the Defendant was put into possession of all the tithes and of the whole rent charge, I think that the Defendant was justified in requiring the claim to be established by a legal proceeding; and although it might have been wished that some of his means of defence had not been resorted to, yet, considering that the error and mistake was the Plaintiffs', that the necessity of coming here was entirely owing to their omission to look into their own title before they consented to the award, I am of opinion that they must pay the costs of this suit.

The Defendant, William Yonge, the rector, received the whole of the tithes from the time of his induction in April 1838, but never accounted to William Young, the appropriator, for his moiety of the corn tithes.

William Young died in February 1840.

The bill in the second suit of *Young v. Yonge*, was filed by the administrator of William Young to recover from the Defendant the value of the portion received by him in the lifetime of William Young, the lunatic.

The other circumstances sufficiently appear in the statement of the former case.

[540] Mr. Pemberton, Mr. Boteler, and Mr. Eagle, for the Plaintiff. William Young, the lunatic, and the Defendant were joint-tenants, and the Defendant, having received the whole tithe, is liable to account to William Young's executors. The scupier was not bound to divide the tithe, but merely to see it out. *Stileman v. Homer* (Litch, 228). "Debt sur 2 E. 6 per cinque parsons de Suitsom. Sont deux missionary priests, à les parishioners ont use per 40 ans de set out les several portions, mes ore de set out le Tithe generalment: si diens l'estatute; quia il lay out son Tithe ext, nient en severalty *Adjournatur*, per auter Report fuit adjudg, que parishioner nest lya a devide ceo en moyetyes: mes les parsons devidera enter eux memes," and the Defendant having taken more than his share, is accountable to the Plaintiff.

Mr. Kindersley and Mr. Montague, *contra*. The Plaintiff ought to go against the scupier, who if he has paid to a wrong hand, was not discharged by the payment, and still remains liable. A party cannot come into equity to recover back tithes paid to a stranger claiming under an adverse title, and who is not a trustee. *The Bishop of Exeter v. Asaph v. Williams* (Jacob, 349); *Drummond v. The Duke of St. Albans* (5 Ves. 432); *Allen v. Warren* (6 Ves. 73); *Edwards v. Morgan* (M'Clelland, 554). If the Plaintiff had any right against the Defendant, it is by action at law, not by suit in equity. The parties could not have taken as joint-tenants, because their interests did not vest at the same time. *Woodgate v. Unwin* (4 Sim. 129).

THE MASTER OF THE ROLLS [Lord Langdale] said he was of opinion that this bill ought to be dismissed with costs.

[541] BOUTCHER v. BRANSCOMBE. Nov. 3, 10, 1842.

The 17th Order of August 1841 does not require a number to be fixed to each separate interrogatory, but merely that they shall be divided as conveniently as may be.

Where a Defendant is called on to answer an interrogatory of a specified number, he must answer all the succeeding questions, until he comes to the next number.

Where the interrogatories are not properly numbered, the Court will stay proceedings until the General Order has been complied with.

This was an application to take an amended bill off the file for irregularity, in not complying with the 17th Order of August 1841. (Ord. Can. 169.) That order directed "that the interrogatories contained in the interrogating part of the bill shall be divided as conveniently as may be, from each other, and numbered consecutively 1, 2, 3, &c., and the interrogatories which each Defendant is required to answer shall be specified in a note at the foot of the bill, in the form or to the effect following," &c.

The bill, in this case, was filed against a single Defendant, and was of considerable length. The questions in the interrogating part were very numerous, but were divided into ten numbers only. Each number comprised very many distinct interrogatories, and in one instance included about forty folios, and about sixty questions.

Mr. Kindersley, in support of the motion. The Plaintiff has not complied with the directions of the 17th Order. The interrogatories "are to be divided as conveniently as may be from each other, and numbered consecutively 1, 2, 3." These interrogatories have not been divided as conveniently as might be, and have not been numbered consecutively 1, 2, 3, &c., for one number covers a long series of interrogatories. This is an attempt to evade the order; a [542] Defendant has a right to be distinctly informed what interrogatories he is required to answer; but if one number be prefixed to ten distinct questions, how can he know whether it is merely the first, or the whole series which he is required to answer?

The proper mode of objecting is to move to take the bill off the file.

Mr. Pemberton and Mr. Pryor, *contra*. The Plaintiff has complied with the order, and done more, for there being a sole Defendant, he need not have numbered the interrogatories at all.

The object of the General Order must not be lost sight of. It was made in order to limit a Defendant's answer to those portions only of the interrogatories which related to him, and in order that his office copy might not comprise interrogatories which the Plaintiff did not require him to answer. Where there is one Defendant only, the reason does not apply, as the Plaintiff interrogates only that part which he desires to have answered. He requires from a sole Defendant an answer to every interrogatory.

If there has not been a compliance with the order, it would not be the proper course to take the bill off the file.

Mr. Kindersley, in reply. There was another object in making this order, which was this, that the Plaintiff, in taking exceptions, might by referring to the number prefixed, conveniently specify the portion to which his objection related. He may say the Defendant has not fully answered the tenth interrogatory, but his object would be defeated if sixty questions were comprised in the tenth interrogatory, nine-tenths of which might have been fully answered by the Defendant.

THE MASTER OF THE ROLLS [Lord Langdale]. I shall enquire whether this point has occurred in any other branch of the Court. I must own, however, I was considerably surprised to find the way in which the case was put. It has been argued as if there was an order directing that every question should be separately and distinctly numbered; that the Plaintiff is not to be at liberty to insert in his interrogatories the word "whether," without having a corresponding number immediately preceding it. That is not the order. The order is that the interrogatories are to be divided "as conveniently as may be," and then numbered. What purpose was this to be done? Previously to these General Orders, a practice had arisen in drawing bills, to call upon each and every Defendant to answer all matters and interrogatories in the bill, whether such Defendants had or had not any interest in or knowledge of the subject of the allegations or interrogatories. The object no doubt of the order was to prevent that abuse, and to enable a Defendant to know distinctly what part of the bill he was required to answer. The order that he might be exempted from all charge of insufficiency when he paid regard to the interrogatories with which he was not concerned. That was the object of the 17th Order.

This is the case of a single Defendant. In words it may be included in the order, but I shall inquire whether this matter has been discussed or decided elsewhere, in order that there may be an uniform rule upon [544] the subject. I must, however,

now declare my opinion, that there is no rule of the Court requiring the Plaintiff, in drawing his bill, to add a number to every sentence of the interrogating part which is preceded by the word "whether." The division is to be made in as convenient manner may be, for the purpose of enabling each Defendant to see what it is necessary for him to answer.

I think also that when a Defendant is called upon by the bill to answer an interrogatory of a specified number, such number must, of necessity, comprise all the questions which follow, until you come to the next number.

I am called upon to assume, that the Plaintiff has inserted interrogatories in his bill for no purpose whatever; and because some of them are not immediately preceded by a number, therefore no answer at all is to be put in to them, notwithstanding the Plaintiff has put those particular questions to this one Defendant.

I must say, whatever may be the ultimate decision, the proposition to take the bill as the file seems perfectly extravagant; all I could do would be, to stay the proceedings until the Plaintiff amended his interrogatories by inserting the numbers that ought to be required.

Nov. 10. THE MASTER OF THE ROLLS [Lord Langdale]. Upon inquiry, I do find that the 17th Order of the 26th of August 1841 has been brought under the consideration of any of the Judges.

The complaint is, that each question comprised in all the interrogatories to an amended bill against a single [545] Defendant has not been separately numbered. Questions being very numerous, they are divided from each other by only ten numbers, each number being followed by many interrogatories, which are not separately numbered or divided from each other by numbers; and the Defendant complains, that he does not know whether he ought or ought not to answer more than the single and distinct interrogatory which follows each number.

The order directs, that the interrogatories shall be divided as conveniently as may be from each other and numbered consecutively.

The purpose was plainly to make it incumbent upon the Plaintiff to distinguish the particular interrogatories were to be answered by each one of several Defendants.

The mode of securing that object is, to direct the interrogatories to be consecutively numbered in every case. The numbers afford easy and certain means of making the required distinction, and the direction to make them without exception involves little, if any, additional trouble or expense, and may contribute to secure the diligent observance of the order.

In the case of a single Defendant the reason for making a distinction amongst the interrogatories does not apply. The objection appears to me to be frivolous. All interrogatories are to be answered by the same person, whether they are separately numbered or not; but as the order directs a form of which the numbers are a part, the question is, whether the direction to divide the interrogatories as conveniently as may be from each other has been observed. The principle of Order [546] which has been adopted in this particular case has been to distinguish separate numbers the new interrogatories from those which are amendments of old interrogatories, and the application of it must be convenient to the Defendant.

I am of opinion that the directions contained in the orders have been sufficiently observed, and that neither the orders nor the purpose for which the orders were made, require the Plaintiff to number the interrogatories any otherwise than he has done.

This motion appears to me to be unreasonable and vexatious, and I therefore refuse it with costs.

[546] BENSON v. HADFIELD. Nov. 9, 15, 26, 1842.

The Plaintiffs appointed A., B., and C. their foreign agents; A. retired, and the Plaintiffs then appointed B., C., and D. agents. The transactions being separate. Held, that a bill for an account of the two agencies was multifarious as regards A.; but *semble*, if the dealings had not been separate, but a mere continuation, the decision would have been otherwise.

W. D. assigned an exclusive trading privilege to a trustee for a company in consideration of receiving one-fifth of the clear profits. The directors were to have the exclusive management of the affairs of the company. Held, that W. D. was not a necessary party to a suit respecting the dealings between the directors and a third party.

A demurrer on two grounds failed as to one and succeeded as to the other. Notes were given.

This case came before the Court upon general demurrer to the whole bill.

The bill was filed by the four directors of the Bahia Steam Navigation Company, and the substance of it was as follows:—

In February 1838 William Duff was entitled to the exclusive privilege of navigation of certain parts of [547] Bahia, for ten years, under a grant obtained from the Government of Brazil, and also to the benefit of certain navigation costs entered into with that Government.

In June 1838 the four Plaintiffs and other persons established a company, the purpose of carrying on a system of steam navigation in the bay and waters of the province of Bahia, and elsewhere along the coast of Brazil, and which was called "The Bahia Steam Navigation Company."

By an indenture dated in September 1838, Duff assigned all his interest in the contracts and privileges to a trustee for the company. Duff, as a consideration, to receive £3000 from the company from the instalments on the shares, and a share of the net profits after payment of the dividends and other expenses.

The deed of settlement, which recited the assignment from Duff, contained usual clauses that the directors should have the exclusive management of the affairs of the company.

In 1838 four of the Defendants, William Hadfield, Charles G. Hadfield, Antonio J. Armando, and Robert W. Wood, carried on the business of merchants both at Liverpool and Bahia, under the firm, at Liverpool, of Hadfield, Wood & Co., and at Bahia, of Armando, Hadfield & Wood.

In September 1838 the directors of the company agreed with the Liverpool firm that the Bahia firm should be the agents of the company there, with a commission for their services.

[548] In April 1840 Wood retired, and the other two Defendants, Jose M. Braga and Manoel P. Rozas became partners with Messrs. Hadfields & Armando, and these five Defendants carried on the business together, under the same firm. In September 1841, when Braga and Rozas retired. From that period the business was carried on by the two Hadfields and Armando, under the firm of Hadfield, Armando at Liverpool, and Armando, Hadfield & Co. at Bahia.

By a letter, dated the 12th of August 1841, the company determined the agents to be Armando, Hadfield & Co., who, however, acted until October 1841, when the agents of the company commenced acting. The former agents, however, refused to deliver the property of the company in their possession.

The bill stated transactions of business, by means of which the parties in question became indebted to the Plaintiffs; but it was not very clearly stated in the bill whether the agencies and dealings between the Plaintiffs and the several firms had been separate and distinct, or mere continuations of the original arrangements. The Court, however (see 5 Beav. 554) (taking the statements most against the plaintiffs) held them separate, and it is therefore not necessary to detail the circumstances affecting that point.

The bill was filed against Wood and the other partners, and charged, that

Defendants ought to account for what they or any of them had received since their agency was determined. It prayed an account of all the dealings and transactions between the said Defendants, or any of them, as constituting the said firms of [549] Armando, Hadfields & Wood, and Armando, Hadfields & Co., as agents of the Bahia Navigation Company, and all sums of money possessed and received by the said Defendants respectively, or by any of them, &c.

The Defendant Wood put in a demurrer to this bill upon two grounds: 1st, for multifariousness; and, 2dly, because Mr. Duff had not been made a party.

Mr. Kindersley and Mr. Lewis, in support of the demurrer. This bill is multifarious. It seeks to have the accounts taken between the Plaintiffs and three distinct firms. Two agencies with different parties cannot be comprised in one bill, for the Defendants have no common interest; here, Wood has no interest whatever in the transactions which took place after his retirement in April 1840, between the Plaintiffs and the other Defendants.

Secondly, Duff is a necessary party: for though the directors may represent the company, they do not represent Duff, who has a material interest in the accounts to be taken in this suit.

Mr. Pemberton, Mr. G. Turner, and Mr. Piggott, *contra*. The rule of pleading as multifariousness does not require that every Defendant shall be interested in every part of the relief. In *Campbell v. Mackay* (1 Myl. & Cr. 603), A. and B. were trustees under one deed, C. and D. under a second, and A., B., and C. were trustees under a will. It was held that a bill, by the children entitled under the three instruments, against A., B., C., and D., for an account and administration of the property comprised in the two deeds and will was not multifarious.

It is always a question of convenience, and it would be most inconvenient to split up matters and make them the subject of three distinct suits. The agencies were distinct and separate appointments, but mere continuations of the first. It will be necessary, also, to ascertain what was due to the Plaintiffs at the dissolution of the firm, in order to see what is to be charged against the second, as from its commencement; so the balance handed over to the third can only be known by taking accounts of the second partnership. It is manifestly the most convenient, where other Defendants are interested in the whole accounts, to include the whole matter in one suit.

Duff was no party to the contract between the Plaintiffs and the Defendants; though entitled to a share in the clear profits, he is not a partner. To hold that he is a necessary party to this suit would be to lay down that he must be a party to litigation between the directors and every other person with whom they may have dealings.

Mr. Kindersley, in reply.

Nov. 26. THE MASTER OF THE ROLLS [Lord Langdale]. This case came on for a demurrer to the bill, filed by the Defendant Wood. He objects to the bill on two grounds, first, because he says there are not proper parties to the bill, and next because the bill is multifarious.

[551] Upon the question of parties, it seems, that a person of the name of William Duff is entitled to a certain share of the profits arising from carrying on the concern: by the agreement between him and the persons by whom this company was carried on, the profits arising from the general transactions of the trade were to be divided in such a manner that Mr. William Duff had an interest in a portion of those profits.

Mr. Duff was not to interfere with the business of the concern, for, according to an arrangement between the parties, the business was to be carried on by the directors, and according to the terms of their agreement they were to deal in such manner as they thought fit; and in short they were at liberty to deal like any other persons with other persons for the purpose of carrying on the business of the company.

In carrying on the business of the concern, they entered into a particular contract with one of the firm or partnership in which the Defendant was a partner. The nature of that proceeding is set forth in this bill. The firm of Armando & Co. was to represent the company upon all occasions, to promote and protect its interest, to advise and assist the officers and clerks, and all persons in their employ, and to be under the control of them, under such limitations and instructions as should, from time

to time, be transmitted by the directors; they were to distribute 2000 shares, reserved for the Brazils, amongst such persons as should be deemed most advantageous to the company; were to receive the deposits and instalments, and also to receive from the captains and superintendent the earnings of the vessels, and to remit all monies to the order of the directors. For these purposes they entered into particular contracts; and the question which arises here is simply this, whether the directors are to have an account of any of the dealings which they entered into with any persons in relation to the business [552], carried on, without Mr. Duff being a party to the account. It is said he has an interest in the profits. He has an interest in the ultimate general profits of the concern, but he has no interest in any particular transactions, otherwise than as they affect the general account on which the ultimate profits will be shewn. The proposition, however, is, that the directors of the company are to have no dealings with anybody, and no redress from this Court in respect of any dealings, unless they make party to the suit Mr. William Duff, who has contracted to give them the whole and sole management of the concern, the right to settle accounts and to carry on all the dealings of the concern. They are not, in short, to have any account from anybody in this Court without the participation of Mr. Duff. The argument must go further, and, on the other hand, the agents with whom the directors may have had any transactions are not to have a right to enforce their own contracts against the directors if such directors choose to object, that Mr. Duff is not a party. I am of opinion this Court has never gone such a length as to make it necessary for a person in the situation of Mr. Duff to be a party to a bill like the present. I think, therefore, that that part of the demurrer fails.

With respect to the other ground of demurrer, the case stands thus: a certain firm established at Bahia, became in the month of November 1838 the agents for the company. That firm consisted of four persons, William Hadfield, Robert Wood, Charles Hadfield, and Anthony Armando, and they continued to be the agents until the 25th of April 1840. Upon that day, Mr. Wood, who is here the demurring party, ceased to be a partner in that firm, and two other persons, named Braga and Rozas, then became partners. After the 25th of April 1840 the partners constituting the new [553] firm acted as agents, and they continued to do so until, I think, the month of October 1841, new agents having been appointed by the Plaintiffs by the letter of August 1841, who began to act in the month of October 1841. There was between August and October another change in the partnership firm of those agents, for on the 8th of September 1841 Braga and Rozas ceased to be partners.

Now considering the nature of this agency, as set forth in the bill, there is, as it appears to me, a very great probability that the agency transactions which had been commenced whilst the partnership was constituted in one particular mode, were, as to many of them, continued, from time to time, during the whole series of the dealings. And I can very well conceive a case properly stated, in which it would be quite necessary, and it may ultimately be quite necessary in this case, to continue any person who was a partner in one of these agency firms, a party to this cause by which these accounts are to be taken. The continuing partners, it is plain, have treated it as a matter of that sort, for from the statement of the bill, one account was rendered of the transactions that took place from November 1838 to the beginning of July 1839: that was agreed to be right by all parties, and must have been right, because during that time, no alteration took place in the firm; but after the alteration had taken place in the firm, and in the month of July 1841, there was an account rendered by Armando, who was a partner in both firms, though constituted of different sets of partners, which continued the transactions, as I understand the statement in this bill, from the beginning of July 1839 until the month of May 1841; that is, continuing it on through the time when the change had taken place in the month of April 1840. It seems to me therefore [554] probable, that there was such a continuation of transactions as would make it proper to have all these persons parties, and it was strongly argued to be so on the face of the bill.

At the time the demurrer was argued, I certainly had some considerable doubt with respect to the frame of the bill, how far it contained such allegations as appeared to render it necessary to continue as parties to the suit the different persons parties to the transactions. I have read the bill carefully for that purpose, and I think it does not

maintain such allegations; on the contrary I think the allegations (which ought to be taken strongly against the pleader) such, that if they were sustained, would shew that there was a separate dealing with one firm up to the 25th of April 1840, and a distinct dealing with the other after that time. The bill certainly does seek to charge all the parties, and among them Mr. Wood, with the separate transactions which commenced subsequently to the time when he ceased to be a partner. That being the nature of the allegations, I think, as regards Mr. Wood, it is multifarious as it now stands, and must allow the demurrer for multifariousness, giving to the Plaintiffs leave to amend.

The question of costs (Ord. Can. 17) having been mentioned, THE MASTER OF THE ROLLS said, that as one of the grounds of the demurrer had succeeded while the other had failed, he should give no costs. (*Davis v. Reid*, 5 Sim. 443.)

[555] BODDINGTON v. WOODLEY. (*Ex relatione.*) Nov. 11, 1842.

[S. C. 12 L. J. Ch. 15; 6 Jur. 960.]

An officer having half-pay amounting to £150 a year (which is not alienable) will not be allowed to proceed *in formâ pauperis*, and that notwithstanding he has taken the benefit of the Insolvent Act.

This was a motion to dispauper the Defendant. It appeared that the Defendant was a commander in the Navy, and entitled to half-pay, amounting to £150 a year. He was now, and had been since February 1841, a prisoner in the Fleet, and there were several attachments issued against him for sums amounting altogether to about £100. Being desirous of taking the benefit of the Insolvent Debtors Act, a vesting order of his estate and effects had been made on the 5th of June 1841. On the 2d of July his schedule was filed. It also appeared that since the Defendant had been in the Fleet, he had received from friends several hundred pounds as donations. He had a wife and seven children.

On the 5th of September 1842 the Defendant obtained an order to defend this *in formâ pauperis*, upon the usual affidavit that he was not worth £5 after payment of his just debts, his wearing apparel and the matters in question in the cause only excepted.

The Plaintiff now moved that the order of the 5th of September 1842 might be discharged.

Mr. Elderton, in support of the motion. The Defendant is still entitled to his half-pay, of which he cannot by charge or assignment deprive himself: being in possession and receipt of this income, he ought not to be permitted to defend *in formâ pauperis*.

[556] Mr. Torriano, *contra*. The 1 & 2 Vict. c. 110 gives to the Court for Relief of Insolvent Debtors a power, with the consent of the Admiralty, to take an insolvent's half-pay, or part of it, to satisfy his creditors, and therefore the half-pay to which this Defendant is entitled is not at his own disposal, and his affidavit in which he stated that he was not worth £5 is strictly true. He cited from *Whitelock v. Baker* (13 Ves. 321) an expression of Lord Eldon as to dispaupering the Plaintiff: "The Court says so, and I hope always will be, tender upon that." *Romilly v. Grint* (2 Beav. 125) was also cited.

THE MASTER OF THE ROLLS [Lord Langdale] (without hearing a reply) said, this was a very distressing case, and there are circumstances which the Plaintiff might properly take into consideration: but what I have to consider is, whether an officer receiving half-pay is justified in making an affidavit that he is not worth £5. I am of opinion that he is not, because half-pay is given without power to dispose of it, in order to enable him, whenever the Government may call upon him, to be prepared to go to his country. The Admiralty may, it is true, apply a portion of his half-pay to satisfy the creditors under his insolvency; but it would not be consistent with the policy of the Admiralty to deprive him of his half-pay to such an extent as to enable him to say that he is not worth £5. The case seems very distressing, but I must discharge the order with costs.

[557] STURCH v. YOUNG. Nov. 25, 1842.

[S. C. 12 L. J. Ch. 56.]

A mortgagee having the legal estate is not entitled to a receiver appointed by the Court, although the tenants may be numerous, and the rents difficult to collect. Where a notice of motion embraces two objects, and the principal one fails, the part moving must pay the costs of the motion.

This was a motion on behalf of the Plaintiff for the production of documents, and for a receiver. It was stated that the Plaintiff was a mortgagee, having the legal estate vested in him, and the grounds on which the receiver was asked were, that the tenants were very numerous, and that there was a difficulty in collecting the rents.

Mr. Renshaw, for the Plaintiff, argued, that under these circumstances, a mortgagee, if he took possession, would be entitled to appoint a receiver, and charge the expenses against the mortgagor, and that, therefore, it would be more satisfactory to have the security of a receiver appointed under the Court.

Mr. Pemberton, for Mrs. Young, who was entitled to an annuity subject to the charge, did not oppose.

Mr. Younge, *contra*. I do not resist the production of the documents, but as to the other part of the motion, a legal mortgagee has no right to come here for a receiver. He is at liberty, if he pleases, to take possession.

(THE MASTER OF THE ROLLS. I think you are right on that point.)

Then the Plaintiff, having joined two objects in his notice of motion, and having failed in the principal one, ought to pay the costs of the application.

THE MASTER OF THE ROLLS [Lord Langdale], on that ground, thought the Plaintiff ought to pay the costs. (1)

[558] BYNG v. LORD STRAFFORD. Nov. 19, 21, 22, 23, 1842; Jan. 12, 1843.

[S. C. 12 L. J. Ch. 169; affirmed on appeal, sub nom. *Hoare v. Byng*, 10 Cl. & F. 508; 8 E. R. 835; 8 Jur. 563. See *In re Percy*, 1883, 24 Ch. D. 616.]

A testator gave his personal and landed estates to A. for life, and afterwards to B. for life, and then to the eldest son of C., and afterwards to his second, third, or later sons he might have by D., and then to the eldest son and other sons successively of E.; but all these to be subject to the outpayments and legacies following. The testator declared, "that if the legacies and conditions of his will were not complied with exactly, then he left all the advantages of it to the next person in succession, subject to those legacies, and so on, unless they were discharged." He gave many legacies and annuities by thirteen codicils, which, if not paid, the persons who were to inherit his personal estate were to be subject to the penalties in his will, and his personal estate was to go to the next he had entailed it on. C. had several sons. Held, that subject to the prior life-estates, the eldest son of C. took the personal estate absolutely.

It is the duty of the Court to give effect to the intention of testators, as far as the rules of law will permit; but if a testator uses words, which by their plain import give an absolute estate, the circumstance of his giving the same absolute estate to a succession of legatees, in a manner incompatible and inconsistent with the enjoyment of the property plainly given to the first, will not authorise the Court to alter the effect of the words by which that property is given.

The first legatee of a *quasi* estate tail in personality takes the absolute interest notwithstanding a manifest and avowed intention to give a succession of limited interests.

(1) See *Bonithon v. Hockmore*, 1 Vern. 316; *Godfrey v. Watson*, 3 Atk. 518; *Dunlop v. Duncanson*, 3 Mad. 170; *Berney v. Sewell*, 1 Jac. & W. 647.

an absolute interest be given upon an express condition, which may be lawful in itself but is incompatible with the free enjoyment of the property, the Court does not modify the absolute interest, for the purpose of giving effect to the condition, but declares the condition void for the purpose of supporting the absolute interest. Where the condition intended to be annexed to a gift is inconsistent with and repugnant to the gift itself, the condition is held to be wholly void.

a testator were to give all his real estate to A. in fee, and then to B. in fee, and afterwards to C. in fee, or to give all his personal estate to A., and then to B., and afterwards to C., there is no rule of construction authorising the Court to restrict the estate given to A. to a life interest for the purpose of giving effect to the gifts to B. and C.

has been established, that the words of a will must be construed with reference to the subject-matter, and that the same words, even in the same sentence, may have one effect in their application to real estate, and another effect in their application to personal estate.

The question in this case was, whether upon the true construction of the will and codicils of the testator, the Plaintiff George Byng was entitled to the residuary personal estate of the testator for life, or absolutely.

The Right Honourable William Earl of Strafford made his will dated the 25th of October 1774, which, so [559] far as is material, was as follows:—"I William Earl of Strafford find it necessary to make a new will instead of the last will made in 1759, by the death of many friends and relations, and the ingratitude and misbehaviour of others of them. I leave to my dear wife, Anne Countess of Strafford, all my personal estate whatsoever, except the furniture of Wentworth Castle, for her life, subject to the following outpayments and legacies. I also leave to my wife, Anne Countess of Strafford, all my houses, gardens, parks and woods, and all my landed estates for her life, and afterwards all my personal and landed estates to my eldest sister, Lady Anne Mollis, for her life, and then to the eldest son of George Byng, Esq., of Wrotham Park, and afterwards to his second, third, or any later sons he may have by my niece Anne, Mrs. Byng, and then to the eldest son, and other sons successively, of the Earl of Buckingham, by my niece Caroline. But all these to be subject to the following outpayments and legacies. I leave to my dear wife, Anne Countess of Strafford, the sum of £15,000, to dispose of for ever as she pleases," &c. &c. The testator then gave certain legacies and annuities for life, and proceeded as follows:—"If the legacies and annuities of this my will is not complied with exactly, then I leave all the advantages of it to the next person in succession, subject to these legacies and so on, unless they are discharged."

The testator appointed four executors "to that his last will, as they were so honest and able to see it justly executed."

The testator afterwards made thirteen codicils to his will.

[560] By the first codicil, after giving pecuniary legacies and annuities, he provided:—"If these legacies are not paid punctually, those that inherit my personal estate are subject to the penalties in my will."

By the second codicil, he gave some legacies and annuities, "to be paid on the same conditions as the other annuities he had left."

By the third codicil he appointed Lord Thurlow a trustee and executor, "as his wisdom's great abilities and integrity will make it give him little trouble, and secure me the fulfilling what I think is just and right;" and he gave further legacies and annuities, and proceeded:—"If these legacies are not exactly paid, those that have my personal estate are to be subject to the penalty in my will."

By the fourth codicil he gave an annuity to his coachman, and proceeded:—"I mean this legacy to be secured to him the same as the others I have left, and that my trustees and executors will see it performed."

By the sixth codicil he gave legacies, "to be faithfully paid under the same restraints as the others in my will and codicils."

By the seventh codicil he gave annuities and legacies, and proceeded:—"On failure of my heirs to my personal estate doing this, they are to be subject to the same penalties in my will for not paying the other legacies and annuities. I leave to

Frederick William Wentworth, Esq., of Dorsetshire, the sum of £5000, and to Mrs. Wentworth his wife the sum of £2000. My heirs, on failure of this payment, to be subject to the penal-[561]-ties in my will: provided the said Frederick William Wentworth, Esq., never turns out or raises the rent, and lets them have leases of twenty-one years to any person that ever was my domestic servant, and has any farm belonging to my estate about Wentworth Castle or Wakefield in Yorkshire. On failure of this condition, his and his wife's legacy to be void."

By the eighth, he expressed himself as follows:—"I William Earl of Strafford write this codicil to be added to the other codicil of my last will, that I would have all the conditions and legacies in my will and codicils exactly executed as I have directed, with the penalty of any failure as I have directed." He then proceeded to give two pecuniary legacies, and devised a real estate.

By the ninth, he gave annuities and proceeded:—"My heir to be subject to all former penalties relating to my legacies, if these are not regularly paid."

By the tenth, he gave further legacies and annuities, and proceeded:—"These legacies to be exactly paid by whoever has my personal estate, or else my personal estate to go on the same conditions to the next I have entailed it to."

The twelfth, he commenced as follows:—"I add this codicil to my will, which is to be fulfilled by my heir to my personal estate, or else he is to forfeit to the next person I make my heir all I have left him," and he then proceeded to give further legacies and annuities.

The testator's wife died in 1785.

The testator died in 1791.

[562] George Byng of Wrotham Park, in the said will named, had four sons, namely, the Plaintiff, George Byng his eldest son, and John Byng, William Byng and Robert Byng, who were all living at the death of the testator.

Immediately after the testator's death a suit was instituted for the administration of his estate, and many proceedings were had therein, which it is not necessary to state. (See *Howe v. Earl of Dartmouth*, 7 Ves. 137.) The fund was brought into Court, and the interest was paid to Lady Anne Conolly for life.

Lady Anne Conolly died in 1797, and the dividends were thereupon ordered to be paid to the Plaintiff George Byng during his life, without prejudice to his claim to the capital.

In 1841 the Plaintiff filed his bill of revivor and supplement, praying a declaration that he was absolutely entitled to the clear residuary personal estate of the testator and which now consisted of about £375,000 consols remaining in Court.

The next of kin of the testator resisted the claim, contending that the seven persons to whom, in succession, the testator's personal estate had been bequeathed after the death of Lady Anne Conolly, were entitled only to life interests therein; and that subject to such life interests, the testator's personal estate was undisposed of by his will, and had devolved upon the testator's next of kin.

The cause now came on for hearing, together with a petition for payment of the fund to the Plaintiff.

[563] Mr. Pemberton and Mr. Romilly, for the Plaintiff.

Mr. Kindersley and Mr. E. F. Smith, Sir C. Wetherell, Mr. Hodgson and Mr. Sidebottom, Mr. Turner and Mr. Lovat, Mr. Teed and Mr. Hoare, Mr. Purvis, Mr. Harwood, and Mr. Craig, for the Defendants.

Mr. Pemberton, in reply.

The arguments are noticed in the judgment, and the authorities referred to were the following:—

2 Pow. Dev. (Jarman) (p. 411, et seq.), *Chorlton v. Taylor* (3 Ves. & B. 160), *Doe v. Gregory* (10 Sim. 393), *Elton v. Shephard* (1 B. C. C. 532), *Adams v. Arnold* (19 Ves. 416), *Stretch v. Watkins* (1 Mad. 253), *Page v. Leapingwell* (18 Ves. 45), *Gilbert on Devises* (ii. 21), *Henvell v. Whitaker* (3 Russ. 343), *Doe dem. Bowes v. Black* (Cowp. 235), *Newland v. Marjoribanks* (5 Taunt. 268), *Doe dem. Lean v. Lean* (1 Ad. E. (N. C.), 229), *The Countess of Bridgewater v. The Duke of Bolton* (6 Mod. 106), *Hadley v. Mawbey* (1 Ves. jun. 143), *Jeffery v. Honeywood* (4 Mad. 398), *Vaughan v. The Mayor of Headfort* (10 Sim. 639), *Horseman v. Abbey* (1 Jac. & W. 381), *Legwood v. Burn* (Roll. Abr. 836), *Fearne on Conting. Rem.* (p. 333), *Beard v. Westcott* (5 Taunt. 393).

Daintry v. Daintry (6 T. R. 307), *Newman v. Nightingale* (1 Cox, 341), *Garden v. Pulleney* (2 Eden, 323), *Hayes v. Hayes* (4 Russ. 311), *Goodtitle v. Edmonds* (7 T. R. 635).

[564] *Jas. 12. THE MASTER OF THE ROLLS* [Lord Langdale]. In this cause, the question is whether the Plaintiff Mr. Byng is entitled, absolutely or for life only, to the residuary personal estate of the Earl of Strafford, who died in March 1791.

The estate was administered under a decree of the Court, and the right of Mr. Byng, to a life interest at least, being clear, an order, dated 2d July 1807, was made for the payment to him of the interest during his life. That order was, however, expressly made without prejudice to such claim as he might have to the capital; and the question as to his right to the capital being thus left open, is now, for the first time, brought on for adjudication.

The question depends upon the construction of the Earl of Strafford's will, which was dated the 25th day of October 1774, and was followed by thirteen codicils, the first of them dated on the 26th of January 1778, and the last on the 9th of January 1791, about two months before the testator's death.

All the instruments are inartificially expressed, and were probably drawn without professional advice or assistance.

The words "all my personal and landed estates," which in this will are employed to describe the subject of the gift, are sufficiently large to include the whole interest which the testator was entitled. He has, by using those words, indicated an intention to dispose of all that he had; and it further appears, that intending to dispose of his whole estate, real and personal, he also intended his legatees, the objects of his bounty, to enjoy his estate in succession.

[565] The first person intended to take was the countess, who died in the testator's lifetime. Certain absolute gifts were made to her, but that which, in effect, was the residuary estate, was given to her expressly for her life. The next person intended to take was Lady Anne Conolly, and the estate is also given to her expressly for her life.

Thus far the will provides distinctly a succession of life-estates, and it is plain, that when the testator clearly contemplated the gift of life interests, he understood that words were proper to be used for the purpose of giving effect to his intention.

But the will, being to this extent clear, proceeds in the manner which gives rise to the question raised in this cause.

The words immediately following the gift to "Lady Anne Conolly for her life" are, "and then to the eldest son of George Byng, Esquire, of Wrotham Park, and afterwards to his second, third, or any later sons he may have by my niece, Anne, late Byng, and then to the eldest son and other sons successively of the Earl of Buckinghamshire by my niece, Caroline. But all these to be subject to the following payments and legacies."

The Plaintiff is the eldest son of the George Byng named in this clause, and is therefore the first legatee in the order of succession here indicated.

The subject of the gift is the whole interest of the testator. There are no words directly limiting the extent of interest which the legatee is to take; but the testator had in view a succession of legatees or interests after the first in the series.

[566] Under these circumstances the Plaintiff claims to be entitled to the absolute interest in the personal estate. First, because the testator was disposing of his whole interest. Secondly, because the gift to the Plaintiff is not limited by the words "for life," or any equivalent words, and therefore should, according to the ordinary rule, be deemed to be absolute. Thirdly, because the interests given are charged with the payment of various gross sums of money and annuities. And, fourthly, because although the testator might contemplate an enjoyment by a succession of persons, yet, as he has used words which give the absolute interest to the first in the series of successors, whose interests are not limited, that first has a right to the absolute interest, if it be not perfectly clear, from the words of the gift or from other parts of his will and codicils, that a restriction was intended.

That the testator contemplated a succession of enjoyment by devolution of property appears from the will and several of the codicils; and for the next of kin, it has been argued, that for the purpose of giving effect to the intended succession, his will ought to be so construed, as in some manner to restrict the interest of Mr.

Byng, and those who were to succeed him. Some restriction, they say, must be put upon the words importing an absolute gift, and as there is no indication of any intention to create estates tail, the restriction must be to successive estates for life.

It is undoubtedly the duty of the Court to give effect to the intention of testator, as far as the rules of law will permit; but if a testator uses words, which by their plain import give an absolute estate, the circumstance of his giving the same absolute estate to a succession of legatees in a manner incompatible and inconsistent with [567] the property plainly given to the first, will not authorise the Court to alter the effect of the words by which that property is given.

The first legatee of a *quasi* estate tail in personalty has the absolute interest, notwithstanding a manifest and avowed intention to give a succession of limited interests. If an absolute interest be given upon an express condition, which may be lawful in itself but is incompatible with the free enjoyment of the property, the Court does not modify the absolute interest, for the purpose of giving effect to the condition, but declares the condition void, for the purpose of supporting the absolute interest. Where the condition intended to be annexed to a gift is inconsistent with, and repugnant to the gift itself, the condition is held to be wholly void. *Bradley v. Peizoto* (3 Ves. 324); *Ross v. Ross* (1 Jac. & W. 154).

If a testator devise to one in fee, and if he dies without any heir to a stranger in fee, this is said to be an attempt to mount a fee upon a fee, and the devise over is void in law. *Tilbury v. Barbut* (3 Atk. 617).

And if a testator were to give all his real estate to A. in fee, and then to B. in fee, and afterwards to C. in fee, or to give all his personal estate to A., and then to B., and afterwards to C., there is no rule of construction authorising the Court to restrict the estate given to A. to a life interest, for the purpose of giving effect to the gifts to B. and C.

The construction, which, in cases of this kind, disregards the gifts over or the intended succession, is always [568] open to objection in argument, on the ground that the words of limitation over are rejected, and the answer to the objection is (*Pickering v. Tower*, 1 Eden. 142), that the words are not rejected against the rule that every word in a will shall, if possible, have a meaning, but because the testator has attempted to do what the law will not permit, or has made dispositions of property which are inconsistent with each other.

It has further been contended, for the next of kin, that the testator intended the real and personal estates to go together, that the words are not sufficient to give the inheritance of the real estate to Mr. Byng, and that consequently the personal estate intended to go with the real estate, was not intended to belong to Mr. Byng absolutely.

I conceive, indeed, that in the endeavour to discover the intention, it is necessary to look at all the dispositions he has made by his will, and to consider the effect of them, and that the circumstance of his giving the real and personal estates together and intending them to go together, is not to be disregarded. But it has been established, that the words of a will must be construed with reference to the subject matter, and that the same words, even in the same sentence, may have one effect in their application to real estate, and another effect in their application to personal estate; and upon this occasion, I cannot presume, either that the inheritance of the real estate did not pass to Mr. Byng, or that if it did not, he would be excluded from the absolute interest in the personal estate.

Another argument urged for the next of kin is, that the words "afterwards" and "then" must be con-[569]-strued to mean "after the life," or "upon the death" of the immediately preceding legatee. For this argument no authority was produced, and I think that the more natural meaning, and that which is most consonant to the context of the will is:—"after or upon the determination of the interest" given to the legatee just before named.

The testator had given all his personal estate and all his landed estates to his wife for life, and *afterwards* to Lady Anne Conolly for her life, and *then* to Mr. Byng, and so on. On these occasions the words "afterwards" and "then" follow immediately after the words "for life," and the testator, in using the words "afterwards" and "then," cannot have supposed that the words themselves implied that the immediately preceding gift was the gift of a life interest only, for if he had done so, he need not

we added the words "for her life" to the gifts to the countess and Lady Anne only; and when he proceeds, in continuation of the same sentence, to make a gift to the eldest son of George Byng, and afterwards to his second, third, or any later son he may have, and then to another, it can hardly be held, that the words "afterwards" and "then" were considered by the testator to have a different effect, but to have, of themselves, sufficient force to limit the interest given to the eldest son to a mere life interest.

The gift of a series of successive interests is however principally relied upon by the next of kin, to shew that the testator cannot be understood to have given all to George Byng, because he has actually expressed an intention to give an estate to others in succession to Mr. Byng; but to this in addition to the argument before adverted to, that a limitation over [570] annexed to an absolute gift is void, it is answered, in this case, from the general scope and effect of the will and codicils, it appears, that the testator intended to subject the gift of his estate to a personal condition on the legatee to pay the charges to which the estate was made liable, and that he has created successive interests, for the purpose of enforcing that condition.

It appears from the provisions contained in the will and codicils, that the testator, notwithstanding his having appointed executors "whom he considered honest and to see his will justly executed," and notwithstanding his having by the third will of the 18th of March 1782, appointed Lord Thurlow executor, with a view to shew to the testator himself "the fulfilling what he thought just and right," nevertheless intended, in some way, to subject his residuary legatees, or some of them, to an obligation to pay the charges and legacies, which were, by his will and codicils, directed to be paid:—to impose such obligation as a condition upon the enjoyment of the gift, and to visit the non-performance of the condition with a penalty or forfeiture. In the will he says, "If the legacies and conditions of this my will is not complied with exactly, then I leave all the advantages of it to the next person in succession, and so on, unless they are discharged." In the first codicil, having given certain legacies, he adds, "If the legacies are not paid punctually, those that inherit my personal estate are subject to the penalties in my will." By the second codicil, he gives several annuities, each of them to be paid "on the same conditions as the other legacies he had left." In the third codicil, after giving legacies, he adds, "If these legacies are not exactly paid, those that have my personal estate are to be subject to the penalty in my will." By the fourth codicil, he gives one legacy, and adds, "I direct this [571] legacy to be secured the same as the others I have left, and that my executors and executors will see it performed." By the sixth codicil, he directs the legacies thereby given to be faithfully paid, under the same restraints as the others in his will and codicils. In the seventh codicil, he has not less than three times directed, that in failure of payment of legacies and annuities, his heirs or his heirs of the personal estate are to be subject to the penalties in his will, or to the penalties as they are to be subject to in not paying his other legacies and annuities. And in the eighth, ninth, tenth, twelfth and thirteenth codicils are like provisions referring to conditions, penalties, or forfeiture imposed by the will, or to the penalties as his heir was subjected by the will. In the tenth codicil the expression is, "the legacies to be exactly paid by *whoever has* my personal estate, or else my personal estate to go on the same conditions to the next." All these expressions tend to shew, that in the testator's view or intention, the general or residuary legatee of the personal estate, was to have the personal estate, and was to be subjected to loss of annuities and legacies were not duly paid, and they therefore tend to shew, that in the testator's view and intention, the general or residuary legatee was to have the means of paying, or, in other words, was to have for his own use, subject to the payment, the estate out of which the payment was to be made.

It was argued, that these provisions for penalty or forfeiture were not meant to have any substantial effect; that the testator must have well known that it was the duty of the executors to secure payment of the legacies and annuities; but conceiving that the general or residuary legatees might have it in their power to create some obstacle or difficulty in the payment, the testator [572] thought proper, merely in warning and as a warning, to deter them from adopting that course, by holding out the threat of penalty or forfeiture.

It may be admitted, that the language used by the testator is not to be reconciled with an accurate legal knowledge of the interests he was creating. He probably did not accurately understand the duties imposed by law upon the executors, the mode of administering his assets which might be enforced in this Court, or the mode which, without resorting to this Court, he might have enabled his executors to fulfil his intentions by their own authority, without being subject to any claim of the legatees, except for an account. But in these circumstances, and from the provisions made in his will and codicils, it appears to me, that the testator considered that particular legatees and annuitants would be dependent on the residuary given to the legatees, for the exact and punctual payment of the annuities and legacies, and considered that there might be a real infliction of the penalty, for the enforcement of which he relied on his executors.

The mode in which the testator regarded the subject of legacy and forfeiture may perhaps receive some illustration from the legacies given to Mr. and Mrs. Wentworth, in the seventh codicil. "I leave to Frederick W. Wentworth, Esq. of Dorsetshire, the sum of £5000, and to Mrs. Wentworth, his wife, the sum of £2000. My heirs, on failure of this payment, to be subject to the penalties in my will provided the said Frederick W. Wentworth, Esq., never turns out or raises the said sum, and lets them have leases of twenty-one years to any person that ever was a domestic servant, and has any farm belonging to my estate about Wentworth Castle, or Wakefield in Yorkshire. On failure of this condition, his and his wife's legacy to be void."

Without saying anything of the legal effect of these words, or of the manner in which this Court would have dealt with them, or have administered the estate in reference to them, they appear to me to shew that the testator contemplated the possibility of legacies being given absolutely and being paid, and yet becoming afterwards void or forfeited, by the non-performance, at a future time, of the condition which he imposed; and after the best consideration which I have been able to give to the will and the codicils, that notion appears to me to prevail throughout the whole of his testamentary dispositions, made at successive times during a period of many years.

I do not think that the testator intended the interest given to Mr. Byng to be indefeasible, he appears to me to have contemplated events, by which as he thought that interest might be forfeited; but I think that the will and codicils do not contain words indicating any intention to limit the interest of Mr. Byng to a life interest only; and I am therefore of opinion, that Mr. Byng is now absolutely entitled to the residuary personal estate, subject to any annuities or charges which may be subsisting. (NOTE.—The case was heard on appeal by the House of Lords, on the 26th and 27th of February 1844; and the decree was affirmed without calling on Respondents.)

[574] THE DEAN AND CHAPTER OF ELY v. BLISS. Feb. 22, May 10, 1842.

[S. C. 11 L. J. Ch. 351. Reversed on appeal, 2 De G. M. & G. 459; 43 E. R. 10. See *Esdaile v. Payne*, 1883, 32 W. R. 286; *Irish Land Commission v. Great Western Railway Co.*, 10 App. Cas. 24.]

The right to tithes, as against an ecclesiastical corporation aggregate, is barred by the 3 & 4 W. 4, c. 27 by non-payment for twenty years.

To a bill by a dean and chapter for tithes accrued within twenty years, and to a decree in 1813, establishing the right, but not alleging that tithes had been accounted for under it, and stating that the Plaintiffs had, in 1831, granted a lease of the tithes of the rectory which existed till 1837, but not alleging that the lease was granted with a view to the tithes in question, or that the lessee paid any annuity on account of them, a plea of the statute of 3 & 4 W. 4, c. 27, averring that the right of suit did not first accrue within twenty years, and that the Plaintiffs had not been in possession within twenty years, was allowed.

A suit was instituted for the tithes of a particular district in a parish. The tithes of that parish had been demised by general words, but it was not suggested

that the lease had been granted with a view to the tithes claimed by the bill, or that the lessee had paid or received anything on account of them. Held, that the outstanding lease did not prevent the operation of the Statute of Limitations running, as regarded the particular tithes claimed.

This was a plea to a bill for tithes.

The Plaintiffs stated themselves to be grantees under letters patent, dated the 10th September, 33 Hen. 8, of the Rectory or Parsonage of Lakenheath, and of the tithes therein arising. That within the titheable places of the parish of Lakenheath, there was a district called Lakenheath Fen, which was formerly uninclosed and unproductive; but that the lands therein were afterwards drained, and, under an Act of the 8 Geo. 3, the drainage of Lakenheath Fen was improved, and by the means of it, the said Lakenheath Fen, which had previously been unproductive, or had produced titheable matters and things of very inconsiderable value, became fit for cultivation, and about fifty years ago, was brought into a state of cultivation, and had been used and cultivated as arable, meadow, and pasture land, and had produced titheable matters of considerable value, the tithes of which, since the 21st of December 1837, ought to have been rendered to the Plaintiffs. That the Defendant, amongst others, was an occupier of land within the district, and had, in every year since the 21st of December 1837, taken titheable matters without setting out any tithes to the Plaintiffs, and that he refused to do so.

[176] The bill charged that the lands were not exempted from payment; that in former times they were frequently under water, and were not, till about fifty years ago, brought into regular cultivation, and did not produce any corn or grain, or not produce a considerable quantity; but that the tithes of lamb and wool of sheep fed thereon were paid to the Plaintiffs or their lessees, and other tithes were paid to the vicar.

The bill, by way of evidence that the lands were not exempt or discharged from payment of tithes, charged that, in 1808, the lessees of the Plaintiffs filed a bill against certain occupiers of land, part of Lakenheath Fen, for the tithes of corn, wheat, lamb, and wool; that the answer, amongst other things, stated that the tithes of Lakenheath and the Rectory of Lakenheath were parcels of the Monastery of Peter and St. Ethelred at Ely, and that Lakenheath Fen was, for the reasons stated in the answer, exonerated from the payment of tithes, and that, notwithstanding such defence, an account of the tithes claimed by the bill, was, on the 16th of December 1813, decreed to be taken as against the Defendants to the bill.

The bill stated that the Defendant pretended, that no tithes, in respect of the titheable matters by the bill claimed, had at any time within sixty years last been rendered, and that by reason thereof, under the Act of the 3 & 4 W. 4, c. 27, the right of the Plaintiffs had become extinct; whereas the Plaintiffs charged the contrary, and that on the 4th of March 1831 the Plaintiffs demised the tithes belonging to the Rectory of Lakenheath (which they said included the tithes claimed by the bill), to Robert Evans; that the lease was subsisting at the time when the Act took effect, and was not surrendered till the 21st day of December 1837.

[176] The bill prayed an account of the tithes which had been so subtracted by the Defendant from the Plaintiffs, of such titheable matters as aforesaid, since the 21st of December 1837, and for payment.

To this bill the Defendant Cash pleaded, in Bar, the statute of the 3 & 4 W. 4, c. 27. The plea set out the first section, enacting that the word "land" shall, in its legal meaning, extend to tithes "other than tithes belonging to a spiritual or eleemosynary corporation sole." It then set out the second, twenty-fourth, and thirty-fourth sections, and proceeded as follows:—"And this Defendant for further plea saith, that the said Complainants ever had any right to make an entry or distress, or bring an action or suit to recover the tithes of the tract of land called Lakenheath Fen, which the Defendant in no wise admits, such right to make such entry or distress, or to bring such action or suit, did not first accrue to the said Complainants, or to any person through whom they claim, within twenty years next before the institution of the said suit; and that neither the said Complainants, nor any persons or person through whom they claim, have or hath, in respect of the estate or interest claimed by the said Complainants, been in possession or in receipt of the profits of the said tithes,

or any of them, within twenty years next before the institution of this suit; and that no acknowledgment of the title (if any) of the said Complainants to the said tithes, any of them, hath been given to the said Complainants, or their agent, in writing signed by this Defendant, nor, to his knowledge or belief, by any other persons person in possession, or in receipt of the profits of the said tithes, within twenty years next before the institution of this suit."

Mr. Kindersley and Mr. Eagle, in support of the plea. The Act of the 3 & 4 W. 4, c. 27, affords a valid defence against the claim now made by the Plaintiffs, and if [577] plea be true in fact, it is an answer to the demand made by this bill.

By the interpretation clause (sect 1) the word land extends "to tithes, other tithes belonging to a spiritual or eleemosynary corporation sole." The Plaintiffs, being a corporation sole, but a corporation aggregate, come within the operation of the statute.

By the second section no person is to bring an action for any rent (tithes), if the right shall not have accrued within twenty years. This is extended to equity by the twenty-fourth section, and by the thirty-fourth section the right becomes, at determination of that period, extinguished.

Mr. Pemberton and Mr. Lloyd, in support of the bill. The statute pleaded, the 3 & 4 W. 4, c. 27, does not apply to the present case, in which the Defendant a bill for the arrears of tithes, claims an entire exemption from their payment. A claim must be grounded on the Act of the previous session, namely, the 2 & 3 W. 4, c. 100, which requires sixty years' exemption to be proved to sustain a prescription or claim to an exemption from tithes; otherwise it must be held that the Act of the 2 & 3 W. 4 (though recognised as unrepealed by the subsequent Act of the 4 & 5 W. 4, c. 83) has been repealed by the Act of the 3 & 4 W. 4, the provisions of which are utterly inapplicable to the provisions of the former Act. The consequence must be that the sixty years mentioned in the Act of 1832 will be cut down to twenty years by the Act of 1833.

Secondly, the plea is informal in not properly meeting the Plaintiffs' case. The bill is for tithes accrued within five years, and the plea to meet it is that the right did not accrue within twenty years, and that Plaintiffs have not been in possession of the tithes within twenty years: the plea should affirm that the right in question and the right of action or suit did not accrue within twenty years. The tithes demanded have accrued within the twenty years, and it is the very complaint of the Plaintiffs that the Defendant has not allowed them to take possession.

Thirdly, the statements in the bill, which are not denied by the plea, must, on this argument, be taken to be true. Now, according to the allegations of the bill, the Plaintiffs established their right in this Court, and obtained a decree in 1813.

Fourthly, in 1831 the Plaintiffs granted a lease of the tithes, and therefore, at the passing of the Act their estate was a reversion only, which only came into possession upon the surrender in 1837, at which time, therefore, their right, by the fifth section, first accrued. (See *Chadwick v. Broadwood*, 3 Beavan, 308.)

The plea also states, that the Plaintiffs, and those through whom they claim, have not been in possession within twenty years; it should have stated that the Plaintiffs and those who claim through them (viz., the lessee), have not been in possession within that time.

Mr. Kindersley, in reply.

Salkeld v. Johnston (1 Hare, 196), *Fellowes v. Clay* (Queen's Bench, Feb. 10, 1837), and the twenty-ninth section of the 3 & 4 W. 4, c. 27, were referred to.

[579] May 10. THE MASTER OF THE ROLLS [Lord Langdale]. The Plaintiffs claim themselves to be grantees, under letters patent, dated 10th of September, 33 H. 8, of the Rectory or Parsonage of Lakenheath, and of the tithes therein arising. Within the titheable places of the parish of Lakenheath, there is a district called Lakenheath Fen, which was formerly uninclosed and unproductive, but that the land therein were afterwards drained, and about fifty years ago, were brought into a state of cultivation, and have since been used and cultivated as arable, meadow, or pasture land, and have produced titheable matters of considerable value, the tithes of which, since the 21st of December 1837, ought to have been rendered to the Plaintiffs. That the Defendant, amongst others, is an occupier of land within the district,

as, in every year since the 21st of December 1837, taken titheable matters, without stinting out any tithes to the Plaintiffs, and that he refuses to do so. The bill charges that the lands are not exempted from payment; that in former times they were frequently under water, and were not, till about fifty years ago, brought into regular cultivation, and did not produce any corn or grain, or not any considerable quantity, so that the tithes of lamb and wool of sheep fed thereon was paid to the Plaintiffs and their lessees, and other tithes were paid to the vicar. And by way of evidence, that the land was not exempt from payment of tithes, it is charged, that in 1808 the mesne of the Plaintiffs filed their bill in this Court against certain occupiers of land, situated to be within the district, for an account of tithes; that the Defendants to that bill alleged an exemption, but that, nevertheless, on the 16th of December 1813, an account of tithes was decreed; and it is further charged, that under an indenture, dated the 4th of March 1831, the rectory and tithes of Lakenheath were demised to lessee for a term of years, which was sur-[580]-rendered on the 21st of December 1837, from which day the account of tithes is claimed.

To this bill, the Defendant Roper Cash has pleaded the statute of the 3 & 4 W. c. 27, and that neither the Plaintiffs, nor any person through whom they claim, have or hath been in possession or receipt of the profits of the tithes of Lakenheath man, or any of them, within twenty years next before the institution of this suit; and that no acknowledgment of the title (if any) of the Plaintiffs to the tithes, or any of them, has ever been given to the Plaintiffs or their agent, in writing signed by the Defendant, nor, to his knowledge or belief, by any other persons in possession or receipt of the profits of the tithes, within twenty years next before the institution of this suit.

The case, therefore, as it appears upon the bill and the plea, is, that the Plaintiffs are entitled generally to the rectorial tithes arising within the Rectory and Parsonage of Lakenheath; that, within the rectory, there is a particular tract of land called Lakenheath Fen, that the Defendant is an occupier of land within that tract, and has taken titheable matters therein arising; but that within twenty years before the institution of this suit, the Plaintiffs have not received any tithes arising from Lakenheath Fen, and no acknowledgment of their right has been given or made.

The question is, whether the Plaintiffs' right, if any they had, is extinguished, or whether they are barred of their right or remedy by the statute 3 & 4 W. 4, c. 27. In the first section of that Act, it is enacted, that the word "land" shall in its meaning extend to tithes, other than tithes belonging to a spiritual or eleemosynary corporation sole. The second section enacts, that, after the 31st of December 1833, no person shall bring [581] an action to recover land, but within twenty years next after the right to bring such action first accrued to the person bringing the same. The third section defines the time when the right to bring an action shall be deemed to have accrued, in the particular cases therein specified. (*James v. Satter*, 3 Bing. C. 553.) The twenty-fourth section enacts, that no suit in equity shall be brought after the period, when the Plaintiffs, if entitled at law, might have brought an action. The thirty-fourth enacts, that at the end of the period of limitation, the right of a party out of possession shall be extinguished.

The tithes sought to be recovered by this bill, not being tithes belonging to a spiritual or eleemosynary corporation sole, come within the meaning of the word "land" as employed in this Act of Parliament; and the question arises, not as to all tithes arising within the Rectory or Parsonage of Lakenheath, but only as to such tithes as arise in the district within the rectory, which, in the bill, is distinguished by the name of Lakenheath Fen. Upon this occasion, I must consider the Plaintiffs to be entitled generally to the tithes arising within the rectory, and independently of the date, and of special circumstances, the Plaintiffs would have had a right of action, from the time of their original grant, and therefore the question seems to be, whether there are, in this case, any particular circumstances to prevent the operation of the Act.

It is, in the first place, said, that the effect which by the plea is imputed to the Act 3 & 4 W. 4, c. 27, would entirely subvert the Act 2 & 3 W. 4, c. 100, passed in the preceding year, for shortening the time required in claims of exemption from, or discharge of tithes. I [582] think that it has been correctly observed upon the two

Acts, that they have different objects; but it appears to me to be a sufficient answer to the objection to say, that if two inconsistent Acts be passed at different times, the last is to be obeyed, and if obedience cannot be observed without derogating from the first, it is the first which must give way. Every Act of Parliament must be considered with reference to the state of the law subsisting when it came into operation, and when it is to be applied; it cannot otherwise be rationally construed. Every Act made, either for the purpose of making a change in the law, or for the purpose of better declaring the law, and its operation is not to be impeded by the mere fact that it is inconsistent with some previous enactment.

The next objection is, that the tithes now sought are demanded in respect of titheable matters which were not produced till within twenty years before the filing of the bill; that no right of action could arise, nor could the statute have any operation in such a case, and that the plea ought to have alleged, that the titheable matters, in respect of which the tithes are demanded, were produced more than twenty years ago, and consequently that the right of action, in respect of such tithes, accrued more than twenty years ago.

The plea should be adapted to the bill, and this bill, after requiring the Defendant to set out an account of the corn, grain, lambs and wool, and of all other titheable matters and things, which have arisen upon the lands of the Defendant, and have been taken by him in each year since December 1837, prays, that an account may be taken under the decree of the Court, of the tithes of such titheable matters, which have been subtracted by the Defendant. The bill therefore prays, [583] generally, an account of all the tithes of all titheable matters, which have been produced since the 21st of December 1837, not at all distinguishing such tithes as have arisen from the titheable matters, which were not produced till within the last twenty years, and in the stating part of the bill, it is not alleged, that the titheable matters, in respect of which the tithes are sought, were not produced till within twenty years before the bill was filed; but on the contrary, it is stated, that under an Act passed in the eighth year of George the Third, Lakenheath Fen was improved, and by the means aforesaid, Lakenheath Fen, which had previously been unproductive, or had produced titheable matters of very inconsiderable value, became fit for cultivation; and about fifty years ago the lands forming Lakenheath Fen were brought into a state of cultivation, and have since been used and cultivated as arable, meadow, and pasture land, and have produced titheable matters and things of considerable value. Upon this bill therefore cannot, even on the view taken of the subject by the Plaintiffs, be contended, that the right of action did not accrue more than twenty years ago.

But then the bill, by way of evidence that the lands are not exempt or discharged from payment of tithes, charges, that in 1808 the lessees of the Plaintiffs filed a bill against certain occupiers of land, part of Lakenheath Fen, for the tithes of corn, grain, lamb, and wool; that the answer, amongst other things, stated that the Manor of Lakenheath and the Rectory of Lakenheath were parcels of the Monastery of St. Peter and St. Ethelred at Ely, and that Lakenheath Fen was, for the reasons stated in the answer, exonerated from the payment of tithes, and that, notwithstanding the defence, an account of the tithes claimed by the bill was, on the 16th of December 1813, decreed to be taken as against [584] the Defendants. Supposing the decree to have established that lands in the occupation of the Defendants to that suit, or even the same lands which are now in the occupation of the Defendant to this suit, were not exempt from the payment of tithes, on the grounds of defence which were relied on in that cause, there is nothing inconsistent with this plea in the fact. The plea claiming the benefit of the statute is consistent with the allegation, that before the Act came into operation the lands were not exempt from the payment of tithes, and the bill does not allege that tithes were ever received or accounted for under the decree.

The bill further alleges, that on the 4th of March 1831 the Plaintiffs demanded the tithes belonging to the Rectory of Lakenheath (which they say included the tithes claimed by the bill) to Hugh Robert Evans; that the lease was subsisting at the time when the Act took effect, and was not surrendered till the 21st day of December 1837; and it was thereupon argued that the Plaintiffs' right of action did not accrue till that time. (*Chadwick v. Broadwood*, 3 Beavan, 308.) But it is not suggested

at the lease was granted with a view to these tithes, or that the lessee paid or saved anything on account of these tithes.

Upon the bill and the plea it seems to me to stand thus :—that the Plaintiffs being, anything that appears to the contrary, entitled to the tithes now in question, and having a right to bring actions in respect of them, did, during the twenty years and without special reference to these particular tithes, but by general words which would have included them, if payable, grant a lease which was in force at the time when the Act passed, and it not appearing that anything was paid or [585] received, or intended to be so, in respect of the tithes now in question, either before the lease was made or afterwards, I think that the existence of that lease does not prevent the operation of the Act, and, on the whole, I think that this plea must be allowed; but the Plaintiffs, if they desire it, may have leave to amend the bill.

[585] EZART v. LISTER. EZART v. GOODILL. Nov. 4, 24, 1842.

[S. C. 12 L. J. Ch. 10. See *In re Dangar's Trusts*, 1889, 41 Ch. D. 187.]

Ability of a party acting as a solicitor in a proceeding in which funds are wrongfully obtained out of Court.

A solicitor knowing that money in Court belongs to one person, presents a petition and obtains payment to another, he is personally responsible. The principle applies if he has merely a knowledge of circumstances which, if duly considered, would lead to a knowledge of the fact.

Patty Goodill was entitled, for life, to an annuity of £20, payable out of the assets of the testator in the cause. The assets were administered in this Court, and provision was made for the payment of this annuity by setting apart a sum of £666, 8d. consols for the purpose. By the decree on further directions, in 1810, the assets in Court were apportioned, and the residue was ordered to be paid to William Goodill, who also was entitled to the £666, 6s. 8d., subject to the life interest of Patty Goodill.

It was afterwards ascertained that the Plaintiffs, the trustees, had a charge of £3 against the assets, for expenses incurred by them, and by an order made in Feb. 1815, it was referred to the Master to tax all parties their costs; and it was ordered that £108, 4s. 11d. annuities then in Court, together with a sum of £4, 7s. 9d., should be applied in payment (so far as those sums would extend) of the costs; and it was declared that the sum of £263, which had been reported due to the Plaintiffs, was a charge upon the sum of £666, 13s. 4d. 3 per cent. annuities, set apart to answer Patty Goodill's [586] annuity of £20. Liberty was given to the Plaintiffs to apply on the death of Patty Goodill.

No stop order was obtained by the Plaintiffs.

The costs were not taxed, and the sum of £108, 4s. 11d. stock and £4, 7s. 9d. cash remained in Court.

Patty Goodill died in January 1842, and in May following William Goodill presented a petition, stating the proceedings in the cause up to the order of 1810, but stating that of 1815. An order was made on that petition in May 1842, whereby a sum of £108, 4s. 11d. Reduced annuities, and a sum of £94, 14s. 9d. cash, which had arisen from the dividends thereon, and also the sum of £666, 13s. 4d., were ordered to be paid to William Goodill.

Messrs. A. & B. were not solicitors in the cause, but they acted as the solicitors of William Goodill, in the matter of the petition.

A petition was now presented by the personal representative of the surviving wife, praying either that William Goodill and Messrs. A. & B. might be ordered to tender into Court the sums obtained out of Court in May 1842, and that the same should be applied in payment of the costs directed to be paid by the order of March 1815, together with interest and the costs of the application, or that William Goodill and Messrs. A. & B. might be ordered to pay those costs, &c.

Mr. Pemberton, in support of the petition.

Mr. Kindersley and Mr. Heberden, *contra*, on behalf of Messrs. A. & B. William Goodill did not appear.

[587] THE MASTER OF THE ROLLS [Lord Langdale]. I am of opinion that under the circumstances I cannot grant the order which is now asked. There is no doubt of the principle, that if a solicitor, knowing that money which is in Court belongs to one person, presents a petition in the name of another, and obtains payment, he is personally chargeable with the amount. I go further, if he has not the knowledge of the fact, but has knowledge of circumstances which, if duly considered, would lead to knowledge of the fact, he must be made personally answerable for that loss, which by want of due consideration has occasioned. It is very rarely, that such cases come before the Court. I only recollect one which came before Sir William Grant, who said that the solicitor had better pay the money at once, and it was done.

In this case there are several peculiar circumstances which have been necessarily commented upon.

HIS LORDSHIP (after detailing the circumstances of the case, and the grounds on which the Petitioner rested this claim as against Messrs. A. & B.) said—The question is, whether, under the circumstances, I am to impute to the solicitors such knowledge of the charge upon the fund in Court, or of circumstances, which, if duly considered, would have led to a knowledge of that charge, as ought to induce me to say that they must be charged with the loss. I do not think that I have before me sufficient evidence of established facts to compel me to impute to these gentlemen such a knowledge of the circumstances, as to require me to say that they are personally liable. On the whole I do not think I can make them personally liable, although these funds ought never to have been paid out in the way they have been.

[588] The order which is asked for against William Goodill must be granted, and the petition must be dismissed as against Messrs. A. & B. without costs.

[588] LANGLEY v. FISHER. Dec. 8, 15, 1842.

When the Plaintiff obtains an unconditional order to enlarge publication, the Defendant can neither set down the cause, nor serve a *subpoena* to hear judgment until the time has expired. Having contravened this rule, an order was made to quash the *subpoena*, and to strike the cause out of the cause paper.

The bill was filed in November 1836, and after great delay on the part of the Plaintiff, the cause was at issue in Easter term 1841. The Defendant then proceeded in the cause, and in Michaelmas term 1841 he gave rules to produce witnesses, and in Easter term gave rules to pass publication.

The Plaintiff, afterwards, made four several applications to the Master to enlarge publication. On the first and third occasions the Master granted that indulgence, on the terms of the Plaintiff undertaking to set down the cause for hearing within a given time (which terms were not complied with by the Plaintiff); he imposed terms by the second and fourth orders.

The fourth order of the Master enlarged publication until Hilary term 1843. The Defendant before that time had expired, and on the 1st of December 1842, set down the cause, and served *subpoenas* to hear judgment.

The Plaintiff now moved to quash the *subpoena* to hear judgment, and to strike the cause out of the cause paper.

Mr. Pemberton and Mr. Romilly, in support of the motion.

[589] The proceeding of the Defendant is quite irregular; publication being enlarged, the cause cannot be set down without special permission. They cited *R. v. King* (4 Mad. 126) in support of the form of the application.

Mr. G. Turner, *contra*. Under the old practice, where a party obtained an order to enlarge publication, that did not prevent the other party setting down the cause, and the practice, in this respect, has not been altered. The usual order, on obtaining an enlargement of publication, provides that the indulgence shall not obstruct the other party from setting down the cause (see *Hinde*, 384); and it is the opinion of the Master's office that this course is regular.

The Plaintiff has not complied with the conditions of the 1st and 3d orders, and not been relieved therefrom, he has therefore no right to complain.

THE MASTER OF THE ROLLS said that his present impression was in favour of the Plaintiff; but he should inquire as to the practice.

Sec. 15. THE MASTER OF THE ROLLS [Lord Langdale]. It was alleged that the taken in this case by the Defendant was not according to the understood practice of the Court, and I reserved the case for the purpose of making inquiry upon the subject.

The case was this: The bill being filed in November 1836, and the answer being filed in February 1837, the Plaintiff lingered in his proceedings very much, and, notwithstanding the exertions which were used on the [590] part of the Defendant, a *subpoena* to rejoin was served until Easter term 1841. The Defendant took the management of the cause, and obtained rules for passing publication. The Plaintiff had four times successively to the Master to enlarge publication. It has not been asked of me on what principle it was that these orders were made in the form in which they were; for it appears that the first and third orders put the Plaintiff under the necessity of setting down the cause, and that the second and the fourth were made without such terms. Pending the last of these four orders to enlarge publication, the Plaintiff set down the cause for hearing, and served a *subpoena* to hear judgment. I was certainly very much surprised at such a course being adopted—it was clearly in conformity with the old practice of the Court. Since orders for enlarging publication have been made by the Master, it was possible that some new understanding might have arisen, and I therefore thought it right to make enquiries on the subject.

The old practice appears clear, and free from doubt. If the Plaintiff obtained an order to enlarge publication, it was considered that he was causing a delay to himself, and terms were imposed upon him, and the Defendant was not at liberty, pending the order to enlarge publication, to set down the cause for hearing; if the Defendant did so, the consequence was that the *subpoena* would be quashed, and the cause struck out of the paper. On the other hand, if the Defendant applied for an order to enlarge publication, he was delaying the Plaintiff; and if he obtained the order, there was no objection to it a direction that it should not hinder the Plaintiff setting down the cause.

Now the very form of that order shews that, pending the order to enlarge publication, the opposite party was not at liberty to set down the cause, without an order for that purpose [591] expressly given by the order. I apprehend, therefore, that the present course of proceeding had been adopted under the old practice, the Plaintiff would have been in error.

I have endeavoured to ascertain what the practice is now that the Act of 1833 empowers the Master to enlarge publication. It may be doubted whether the Master has authority to add any terms or conditions to the order to enlarge publication; it has been done on some occasions, as in two out of four in the present case, and I have found other instances in which terms have been added; but in by far the greater number there have been no such terms imposed. In this state of the law it has been conceived that where the Plaintiff has delayed the passing publication, the Defendant would be without the means of getting rid of the suit, or of bringing it pending the Plaintiff's delay, unless he has power to set down the cause. But this is not so; because under such circumstances the Defendant might apply to the Court for leave to set down the cause; and on such application the Court might be enabled to judge of the delay which had taken place, on the part of the Plaintiff. I find an understanding has grown up in the Master's office that a Plaintiff is at liberty to do that which has been done in the present case, and the Defendant has, no doubt, acted upon that understanding; but I am of opinion that the understanding in the office was erroneous, and that the Defendant has no right, without the leave of the Court, to set down the cause pending the order to enlarge publication.

Under these circumstances I must grant this application, so far as it asks that the *subpoena* may be quashed, and the cause struck out of the paper; but I cannot give any costs of the motion; in the first place, because the Plaintiff has obtained an order upon terms which he has not complied with, and next, because I think the

course which has been adopted by the Defendant has been founded upon an erroneous impression entertained in the Master's office.

[592] ALDEN v. FOSTER. Dec. 15, 1842.

If a mortgagee receives rents after the Master's report and before the day appointed for payment, there must be a further reference and account, and a new day appointed for payment.

Mr. Pemberton and Mr. Toller, moved to make absolute a decree for foreclosure. Mr. Bacon, *contrà*. Since the day appointed by the Master for payment the mortgagee has received rents, and the balance due has thus undergone a variation. The mortgagee is not therefore entitled to a foreclosure.

THE MASTER OF THE ROLLS. I have already had occasion to consider this question (*Garlick v. Jackson*, 4 Beavan, 154; and see *Geldard v. Hornby*, 1 Hare, 251.) If a certain sum is found to be due on a particular day, and payment of that sum is directed to be then made, and in default the party is to be foreclosed. The mortgagee having in the *interim* varied the account, there must be a new reference to the Master and a new day fixed by him for payment.

NOTE.—The Master of the Rolls, in a subsequent case, upon the motion of the mortgagee, made a new order of reference. See *Ellis v. Griffiths*, *post*.

[593] LOOKER v. BRADLEY. Dec. 21, 23, 1842.

A testator gave specific legacies to three of his nieces (daughters of his sister, name, and the residue to his sister and her husband for their lives, subject to an annuity to A., and after the death of the parents and A., he directed the residue to be "divided equally between the daughters of his said sister," and which he bequeathed "to his said nieces." There was a gift over, if no daughter of his sister should be *then* living.

The sister had four daughters born at the date of the will, and another born after the testator's death. Some only survived the tenants for life.

Held, that the residue was divisible among *all* the nieces, and that they took their interests, subject to be divested in an event which had not happened.

The testator James Bradley, by his will dated in February 1793, directed that the interest arising from his three shares in the tontine of 1789, on the lives of his nieces, Frances Rosalia Dyne, Elizabeth Dyne, and Mary Dyne (daughters of Andrew Hawes Dyne and Frances his wife), to be respectively applied by the executors towards the maintenance, &c., of each of his said nieces; and he bequeathed to each of his said nieces one share when they should separately arrive at the age of twenty-one years, to be also transferred to each of them when they attained that age. He directed his residuary property to be invested in the names of his executors in trust, which he declared as follows:—"After deducting the aforesaid £200 I have directed to be paid to the aforesaid Margaret Jack, and after deducting the aforesaid £100 a year directed to be paid to the said Frances Dyne aforesaid, and after deducting the produce of the three tontine shares aforesaid, and also after deducting any other legacy or legacies which I may give in this my last will, or by any will annexed or added thereto, then I give and bequeath the remaining interest of the said tontine to my said sister Frances Dyne and her husband Andrew Hawes Dyne, for and during their joint lives, and for the life of the survivor of them. And further I direct, that after the said Margaret Jack and my said sister Frances Dyne, and her husband Andrew Hawes Dyne shall all be dead, the principal of the interest of [594] which I have bequeathed to them in the manner before mentioned shall be divided equally between the daughters of the said Frances Dyne, my said sister, and which I give and bequeath to them my said nieces, to be divided equally

amongst them, share and share alike. And if no daughter of my said sister should be living, then and in that case, I give and bequeath to my nephews, the sons of my said sister Frances Dyne, what would otherwise have been divided amongst her daughters."

At the date of the testator's will, Andrew H. Bradley and Frances his wife had three children, namely, the three daughters named in his will, and Frances Dyne and Frances Dyne, all of whom were living at the testator's death. Andrew Hayes Bradley and Frances his wife, had another child Margaret, born on the 24th of June 1796, at the date of the testator's will, but in his lifetime. There were no other children.

Andrew Hawes Bradley died in December 1820, and Margaret Jack died in July 24, and Frances Bradley died in August 1842.

Of the nieces some had died in the lifetime of the tenants for life, and some survived them.

The first question was, whether the shares vested in the daughters, so as to be referable to their personal representatives in the event of their dying in the lifetime of the tenants for life, and,

Secondly, whether the whole vested in the three nieces named in the will alone, or was divisible between them and the other daughters of the testator's sister.

[595] Mr. Pemberton and Mr. Renshaw contended, that the gift to the nieces was vested, and that the shares of such as died in the life of the tenants for life passed to their representatives. *Hallifax v. Wilson* (16 Ves. 168), *Skey v. Barnes* (Mer. 335), *Harrison v. Foreman* (5 Ves. 206). That the gift over was, if no niece then living, an event which had not happened, and that, therefore, the vested gift was unaffected. *Sturgess v. Pearson* (4 Mad. 411).

Secondly, that the residue was given "to my said nieces," which meant those specially named, and consequently that it was divisible amongst those only to whom the tontine shares had been previously given.

Mr. G. Turner and Mr. Busk, for Mrs. Morgan, the daughter born after the date of the will, contended, that the nieces did not take vested interests, and that the residue was divisible amongst such only of the class as were living at the period of distribution.

They cited *Batsford v. Kebbell* (3 Ves. 363), in which a testatrix gave to A. the dividends of £500 stock till he should attain the age of thirty-two, at which time she directed her executors to transfer the principal to him. It was held that the legacy did not vest till the age of thirty-two. They cited also *1 Roper on Legacies*, 507, *Levesse v. Liege* (3 B. P. C. 365, 373), and *Stonor v. Curwen* (5 Sim. 264).

Secondly, they contended that all the nieces living at the death of the previous tenants for life were entitled to share, and that the gift was not limited to those specially named in the will. The Court, they argued, [596] favoured the construction which would admit all the daughters to take, and the words "said nieces" referred to the last antecedent, namely, "the daughters of my sister," where the word daughters was used generally, and included all daughters, and that the gift was, if no daughters should be then living, shewed, by implication, that all were to take.

Mr. Kindersley and Mr. W. T. S. Daniel, for Bradley.

Mr. Pemberton, in reply.

THE MASTER OF THE ROLLS reserved judgment.

Dec. 23. THE MASTER OF THE ROLLS [Lord Langdale]. I have read this will, and it appears to me that the testator has used the words "nieces" and "daughters" interchangeably. Any ambiguity which might arise in the expression, "my said nieces," is removed by the generality of the gift over, which is, "in case no daughter should then living."

I think that all the nieces are included in the residuary gift, and I do not find in the will any words, which appear to me to indicate an intention that the gift to the nieces should be contingent.

I think they take vested interests, subject to be divested in an event which has not happened.

The property is, therefore, divisible in fifths.

[597] JOHNSTON v. TODD. Feb. 14, 15, 20, 1843.

Observations on traditionary evidence in pedigree cases, and its fallibility. It is to be wholly rejected because error is proved as to part.

The veracity, or even accuracy, of an ignorant and illiterate person, is not to be conclusively tested by comparing an affidavit made by him, with his oral testimony; discrepancies between them is not conclusive against his testimony.

Observations on the value of testimony given by affidavit. When the witness is illiterate and ignorant, the language is not his own, but that of the person preparing the affidavit; being taken *ex parte*, it is almost always incomplete, and often inaccurate.

Where on an issue, the evidence is fairly before the jury, and the Judge is satisfied there is great difficulty in supporting a motion for a new trial on the ground that the verdict is not supported by the evidence; but the Court will, nevertheless, entertain the motion, and attend to the course of the trial, the issue having been directed for its satisfaction.

This case has been several times before the Court. (See 3 Beavan, 218; 5 Beav. 394.) It now came on upon a motion for a new trial of an issue directed to the Court.

The facts are sufficiently stated in the judgment of the Court.

Mr. Kindersley and Mr. Parry, in support of the motion.

Mr. Turner, in the same interest.

Mr. S. Wortley, Mr. J. Anderson, and Mr. Monteath, *contra*.

THE MASTER OF THE ROLLS [Lord Langdale]. An issue having been directed to try whether Peter, the son of John Marshall of Longformacus was the next of kin to Robert Marshall the testator, at the time of his death, and the jury having found the affirmative, a motion is now made for a new trial.

There is not, on this occasion, any complaint that evidence has been improperly rejected or admitted; it is [598] not alleged that any new evidence has been discovered, or that all parties did not come fully prepared for the trial, or that the true state of facts, as appearing by evidence, was not duly presented to the jury, and though some observations were made on the summing-up of the Judge, in which it may be collected that the Defendants considered that some things might have been more favourably stated for them, no allegation is made that the jury was misled by any misdirection.

The sole ground of the application is the allegation that the verdict is not supported by the evidence.

The evidence having been fairly before the jury, and the Judge having expressed his satisfaction with the verdict, there must, on that account, be great difficulty in supporting the motion; but undoubtedly the issue was directed to be tried for the satisfaction of this Court, and the course of the trial must be attended to here.

The testator, Robert Marshall, was about eighty years of age when he died in Jamaica, in the year 1820. His father, William Marshall, married Elizabeth Jeffrey of Stitchell Mill in 1734, and he was baptized in 1740, and went to Jamaica when a boy. So far the facts are not subject to controversy. The testator was the son of William Marshall who married Elizabeth Jeffrey of Stitchell Mill, and he went to Jamaica early in life.

On the other hand, John Marshall of Longformacus died in November 1788, a very old man. He was married to Margaret Marshall, at Longformacus, in June 1750, and by that marriage had two sons Peter and Robert, and three daughters Ann Giles and Jean and Margaret Marshall. The widow of John died in August [599] 1792. Of these facts there does not appear to be any reasonable doubt.

But the Plaintiff in the issue alleges that John Marshall of Longformacus, prior to his marriage in 1750, had married another Margaret Marshall, by whom he had a son William, who was the father of the testator. The Plaintiff's allegation is that William Marshall, the testator's father, was the son of John Marshall of Long-

formacus, and the half brother of the children of that John, who were the issue of the marriage which took place in 1750.

Whether William Marshall was so connected with John and his family is the question to be determined. If he was, it is not disputed that Peter, the son of John, was next of kin of the testator at the time of his death.

When, in cases of this kind, we speak of evidence and proof, we must be understood to mean such evidence and proof as the law allows, and as the nature of the case admits of. In cases where the whole evidence is traditionary, when it consists entirely of family reputation or of statements of declarations made by persons who died long ago, it must be taken with such allowances, and also with such suspicions, as ought reasonably to be attached to it. When family reputation, or declarations of kindred made in a family, are the subject of evidence, and the reputation is of long standing, or the declarations are of old date, the memory as to the source of the reputation, or as to the persons who made the declarations, can rarely be characterised by perfect accuracy. What is true may become blended with, and scarcely distinguishable from, something that is erroneous; the detection of error in any part of the statement necessarily throws doubt upon the whole statement, and yet all [600] that is material to the case may be perfectly true; and if the whole be rejected as false because error in some part is proved, the greatest injustice may be done. All testimony is subject to such errors, and testimony of this kind is more particularly so; and however difficult it may be to discover the truth, in cases where there can be no demonstration and where every conclusion which may be drawn is subject to some doubt or uncertainty, or to some opposing probabilities, the Courts are bound to adopt the conclusion which appears to rest on the most solid foundation.

On the late trial, the Plaintiff examined five witnesses to prove the kindred. Four of them were children of Robert Marshall, the son of John. The fifth was William Jeffrey. They had all of them made affidavits in the Master's office, and all of them had been examined on the former trial, so that the Defendants were fully prepared to cross-examine them, and to bring, with full effect, before the Judge and the jury, any inconsistent statement in the evidence given by them on different occasions.

It appears that in the evidence of the children of Robert Marshall there are very considerable discrepancies, discrepancies as to the members of the family from whom the information is alleged to have been received, discrepancies also as to some facts which are distinctly stated to be within the knowledge of the witnesses.

I do not think that the veracity or even the accuracy of an ignorant and illiterate person is to be conclusively tested by comparing an affidavit, which he has made, with his testimony given upon an oral examination in open Court. We have too much experience of the [601] great infirmity of affidavit evidence. When the witness is illiterate and ignorant, the language presented to the Court is not his: it is, and must be, the language of the person who prepares the affidavit; and it may be, and too often is, the expression of that person's erroneous inference as to the meaning of the language used by the witness himself; and however carefully the affidavit may be read over to the witness, he may not understand what is said in language so different from that which he is accustomed to use. Having expressed his meaning in his own language, and finding it translated by a person on whom he relies into language not his own, and which he does not perfectly understand, he is too apt to acquiesce; and testimony not intended by him is brought before the Court as his. Again, evidence taken on affidavit, being taken *ex parte*, is almost always incomplete and often inaccurate, sometimes from partial suggestions, and sometimes from the want of suggestions and inquiries, without the aid of which the witness may be unable to recall the connected collateral circumstances necessary for the correction of the first suggestions of his memory, and for his accurate recollection of all that belongs to the subject. For these and other reasons, I do not think that discrepancies between the affidavit and the oral testimony of a witness are conclusive against the testimony of the witness.

It is further to be observed, that witnesses, and particularly ignorant and illiterate witnesses, must always be liable to give imperfect or erroneous evidence, even when orally examined in open Court. The novelty of the situation, the agitation and

hurry which accompanies it, the cajolery or intimidation to which the witness may be subjected, the want of questions calculated to excite those recollections which might clear up every difficulty, and the confusion occasioned by cross-examination as [602] it is too often conducted, may give rise to important errors and omissions, and the truth is to be elicited not by giving equal weight to every word the witness may have uttered, but by considering all the words with reference to the particular occasion of saying them, and to the personal demeanour and deportment of the witness during the examination.

All the discrepancies which occur, and all that the witness says in respect to them, are to be carefully attended to, and the result, according to the special circumstances of each case, may be, either that the testimony must be altogether rejected on the ground that the witness has said that which is untrue, either wilfully under self-delusion, so strong as to invalidate all that he has said, or else the result must be, that the testimony must, as to the main purpose, be admitted, notwithstanding discrepancies which may have arisen from innocent mistake, extending to collateral matters, but perhaps not affecting the main question in any important degree.

One of the reasons which induced me to grant a new trial on the former occasion was, that the discrepancies between the affidavits and the oral testimony on the last trial might, if possible, be explained, or, at all events, that the discrepancies might be distinctly brought under the consideration of the Judge and of the jury.

This has now been done; the evidence given by affidavit, the evidence given on the first trial, and the evidence orally given on the last trial have been compared and contrasted. Looking at the statement of what passed, as it appears on paper, I own that I find nothing which I consider to be satisfactory as an explanation of the differences; but having regard to the [603] nature of the testimony, seeing that the demeanour of the witnesses during the examination and cross-examination to which they were subjected, was under the observation of the Judge and of the Jury, and that the Judge is satisfied with the verdict, I do not think that the discrepancies in the evidence of the Marshalls afford a sufficient reason for granting a new trial in this case.

The evidence of William Jeffrey is subject to much less observation. In his affidavit there was an admitted mistake, which was afterwards amended, but neither affidavit did he state what he subsequently stated he had heard from Robert the brother of Peter Marshall, or from the family of the Jeffreys. I am asked to attribute the evidence subsequently given of Robert's declaration to the supposed efficacy of *ex vivo* examination, but to suppose that the whole statement is untrue because it was not stated in the affidavit; and I am desired to consider the whole of his evidence incredible, either for the same reason, or because it so strongly supports the case of the Plaintiff at law; and, undoubtedly, if the evidence of William Jeffrey be true, and the jury must have so considered it, the case of the Plaintiff must be deemed to be established, unless other facts be shewn, leading decisively to another conclusion.

The Plaintiff at law had, on former occasions, alleged, that John Marshall Longformacus was baptized at Torpichen on the 21st of February 1697, and if this had been made out, it would have appeared that he was not far from ninety-four years old at the time of his death, that he was eighty-eight years old in 1783, thirty-seven years old when his alleged son married Elizabeth Jeffrey, in May 1741, and only sixteen or seventeen years old when he was married in 1713.

[604] I do not find that the Plaintiff succeeded in shewing that John Marshall Longformacus was baptized at Torpichen in 1697; and on the last trial no evidence was given as to his origin or family connections.

But a statement, in which it was implied that he had himself married at the age of sixteen or seventeen years, that he had a son married when he was himself thirty-seven years old, was sufficient to excite attention; and one of the grounds on which a new trial was granted on the former occasion was, that the Defendants discovered evidence, by which it was said to be proved, that John Marshall of Longformacus was born in 1705, and consequently was only twenty-nine years old when his alleged son was married, and was only eight years old at the time when he himself was alleged to have been first married.

In order to establish this fact, the Defendants produced in evidence certain proceedings which were had before the Sheriff-Depute of Berwickshire in the year 1785, for the purpose of procuring John Marshall to be admitted on the poor's roll of the parish of Longformacus, and afterwards in the year 1787 for an increase of aliment.

In these proceedings, John Marshall's petition and replication, signed by William Marshall as his procurator, represented him to be eighty years old, and to have been born in the parish of Ecclesmachan in the year 1705; but I am of opinion that these statements, though proper to be considered, do not afford anything like proof, either that John Marshall was born at Ecclesmachan, or that his age did not exceed eighty

[605] It does not appear that he was baptized at Torpichen, and he may have been born and baptized at Ecclesmachan; but there is no reason to suppose that any entry of baptism, before the year 1716, was in existence in the year 1785. The reference to the sessions book of Ecclesmachan, for the purpose of shewing that John Marshall was born in 1705, seems to have been made at random, and the date of 1705 seems to have been obtained merely by computation of the assumed age of eighty in the year 1785. I do not think that such a statement, under such circumstances, is to be in any degree relied on as shewing the exact age of John at the time.

There are circumstances in the case which are involved in considerable obscurity. The Plaintiff has given no account of the origin of John Marshall. The Defendants have not only given no account of the origin of William Marshall, who is alleged by the Plaintiff to have been the son of John, but they have adduced no evidence of any connection respecting him in the family of Jeffreys. It is singular that the testator, who was baptized in 1740, and is alleged to have gone to Jamaica when a boy, should not be shewn to have made any inquiry about his relations till the year 1810; and that his inquiry at that time should extend only to the descendants of Robert Jeffrey Mitchell Mill. He makes no allusion to any connection of his father's, and his will, in subsequent date, makes no reference to any member of his father's family. The Defendants consider this circumstance as proving that the testator knew that he had no relation on the father's side. The circumstance is, no doubt, very fit to be considered, and it was brought distinctly before the jury. If it be true, as William Jeffrey states, that his father George gave the testator money to enable him to go to Jamaica, it seems singular that an act of such kindness should not have [606] been remembered, and have induced some notice in the inquiry made in 1810, but still the fact itself may be true.

On the whole of the case, although there are many obscurities which have not been explained, although the principal fact does not admit of demonstration, and it therefore be for ever subject to the degree of doubt which is attached to every case in which opposing probabilities are to be contrasted and balanced against each other, in which you have something perhaps to suspect, and something to make allowance for, in the testimony of almost every witness, yet, as it is necessary to give effect to that conclusion, which, upon a careful examination of the whole, appears to be best supported, as upon the trial the whole evidence has been fully sifted, and the issues have been called upon to answer for the differences in the evidence before the jury, and in the presence of the Judge, who is satisfied and would himself have acted in the verdict if he had been upon the jury, as no new evidence has been discovered, and there seems to be no reasonable prospect of obtaining any better conclusion, or any greater satisfaction upon a new trial, I think it right to refuse this application.

[607] TUCKER v. BOSWELL. Feb. 21, 1843.

The testator directed his residuary personal estate to be invested in land from time to time and at all convenient opportunities, and in the meantime to be accumulated. He held, that the tenant for life of the land was entitled to the interest of the invested personalty, as from a year from the testator's death.

In the same case the testator gave £400 a year to his wife if she recovered her mental faculties, otherwise £200 a year, and to be paid out of his Government stock; and he directed as soon as conveniently might be after her death, the

investment of the stock out of which the annuity was payable, in land to be conveyed in strict settlement. The wife did not recover. Held, that the extra £200 a year became part of the residue to be invested, and did not belong to the tenant for life.

The testator gave the residue of his personal estate to trustees, upon trust to pay his wife an annuity of £400 a year for life, if she should recover her mental faculties; and until that event, upon trust to apply for her use an annuity of £200 a year; the said annuity of £400 or £200 (as the case might be) to be paid out of the dividends on the Government stock standing in his name at the Bank of England; and as to directing his leaseholds to be sold, he directed that the purchase-money for the leasehold premises, together with the residue of his personal estate not disposed of or applied for the purposes thereinbefore mentioned, should be laid out and invested from time to time, and at all convenient opportunities, by his trustees in the purchase of lands and hereditaments in England of freehold tenure, which should be conveyed and assured unto his trustees and their heirs, upon the like trusts as were then before declared with respect to his freehold estates; and upon further trust that the trustees should, as conveniently as might be after the decease of his said wife, lay out and invest the stock, out of the dividends of which her said annuity should have been payable, in the purchase of freehold lands and hereditaments in England, to be conveyed and assured upon the like trusts as were directed with respect to the leaseholds to be purchased; and until proper and eligible purchases could be made, directed his trustees to lay out the [608] produce of the sale of his said leasehold house, together with any other trust monies in their or his hands not produced by interest, in their names in Government stocks or funds of Great Britain; and as to the residue of the said stock, until such purchases of freehold property should have been made as aforesaid, to lay out and invest the interest, dividends and annual produce of his residuary personal estate, as and when the same interest, dividends and produce should be received, and accumulate the same in the nature of compound interest.

The real estates were devised to one for life, with remainders over.

The testator died in 1826.

His widow died in 1835 without having recovered, so that only £200 a year had been applied to her use.

The questions were, first, whether the tenant for life of the freeholds was entitled to the income of the personal estate uninvested, as from twelve months from the testator's death, or whether it ought to be accumulated, so as to form part of the capital to be invested; and, secondly, whether the £200 a year (being the annual produce of the fund set apart to answer the wife's annuity, after payment for her part of the annuity of £200 a year), formed part of the income of the tenant for life, or part of the capital to be invested.

Mr. Pemberton and Mr. Rogers, for the Plaintiff.

Mr. Tinney and Mr. A. Austen, for the tenant for life, argued, that the tenant for life was, upon the authorities, entitled to the income as from twelve months from the testator's death; *Kilvington v. Gray* (2 Sim. & Stu. 396), where a testator directed his residuary estate to be laid out in the purchase of land, as soon as a convenient purchase could be found producing $3\frac{1}{2}$ per cent., and in the meantime the interest to be accumulated; it was held that the tenant for life was entitled to the interest of the residuary estate from the end of one year after the testator's death until it had been laid out. *Parry v. Warrington* (6 Mad. 155), *Sitwell v. Bernard* (Ves. 520), *Entwistle v. Markland* (6 Ves. 528, n.), and *Vigor v. Harwood* (12 Sim. 134).

Secondly, that the particular object of the testator in directing the investment to continue in the funds, was for securing to the widow the annuity to which she was entitled under the will; but that the general object was to invest the available residuary estate in land for the benefit of the tenant for life, and the remainder. That, consequently, when the particular object had been satisfied, the remainder of the fund must be considered invested, and the interest would belong to the tenant for life.

Mr. Romilly and Mr. Willcock, for the other parties.

THE MASTER OF THE ROLLS [Lord Langdale] held, that the tenant for life

entitled to the income of the uninvested personalty as from one year from the testator's death: but that the £200 a year became part of the general residue to be invested, and that the tenant for life was entitled to the income only of it.

[610] HAY v. BOWEN. Dec. 22, 23, 1842.

[8. C. 12 L. J. Ch. 78; 6 Jur. 1119. See *Seaton v. Grant*, 1867, 36 L. J. Ch. 642.]

bill was filed for the administration of the testator's estate, by a party entitled to a contingent reversionary interest, and a decree for an account was obtained. Before the report, the Plaintiff's interest wholly failed. Held, that the Plaintiff was not entitled to his costs of suit either as against the Defendants or the fund, and a petition for the purpose was dismissed with costs. sole Plaintiff whose interest failed pending a reference to take the accounts, was restrained from proceeding further in the suit.

In 1835 Alfred Farr became insolvent, and the Plaintiff Hay was appointed his assignee. At the time of his insolvency, he was entitled, in right of his wife, to a contingent reversionary interest in the real and personal estate of the testator, and which the Defendant Bowen (the testator's widow and executrix), was entitled to bring her widowhood.

In 1835 the assignee, under the authority of the creditors and the Insolvent Debtors Court, filed his bill against the executrix, and against Farr, his wife and other persons interested in the property, for the administration of the estate, and charge the widow with a breach of trust. In 1839 a decree was made for taking a usual accounts; the Master was to inquire if any and what advances had been made to the husband, and if any and what settlement had been made on the marriage of Farr and wife, with liberty to state special circumstances.

While the proceedings were going on in the Master's office Farr died, whereby all interest of the Plaintiff ceased. The Plaintiff, nevertheless, continued prosecuting the accounts, and a petition was, in consequence, presented by the Defendants to stay proceedings. A cross-petition was thereupon presented by the Plaintiff, for payment to him of the costs of the suit, either by Mrs. Bowen personally, or out of the assets.

Mr. Kindersley and Mr. Hubback, for the Plaintiff. This suit was properly instituted and conducted; it was for the benefit of all parties that the accounts [611] should be taken, and the estate protected by this Court. The fund, at least, should, according to the established principles, bear the costs of the administration, and if it, they should be paid by Mrs. Bowen, who appears by the proceedings in the Master's office to be a defaulter.

It was settled by the decree in this cause, that the Plaintiff, though his interest was contingent on Farr surviving the wife, had a sufficient interest to maintain the bill. Though legacies are contingent, the legatees "have such an interest, as entitles them to know what debts the testator owed." *Andrew v. Wrigley* (4 Bro. C. C. 135). In *Stidholme v. Hodgson* (3 P. W. 300), the bill was filed by a party who could only come entitled in the event of the death of certain parties without children; it was rejected that the Plaintiff had no present right, and might possibly never have any, and the Court said, "As to what has been objected concerning the costs, these ought not to be paid out of the assets of the testator, who, by his will, has occasioned the difficulties. Here is a possibility, at least, of a right's coming to this contingent issue, and it is reasonable that all rights, such as they are, whether vested or contingent, should be preserved. On the death of Mary Hodgson the mother, it will be determined whether this right will ever vest or not, which has been adjudged not too remote a distance of time. If the Defendants were not to be called to an account in their lifetime, they might waste and embezzle everything, and that estate, which at present may be easily accounted for, in process of time (viz.), at the death of the defendant Mary Hodgson, may be impossible to be discovered, by which means the issue over may be deprived of his right, and the intentions of the [612] testator defeated, and though there may be these inconveniences on the one side, I for my

part am able to foresee none on the other. In the case of *Maddox v. Staines* (3 Wms. 421), where the bill was for securing a like contingent right, the Master of the Rolls made a decree of this nature which was affirmed by the Lord Chancellor King and his Lordship's decree affirmed in Parliament.

Again, the decree operates for the benefit of all the parties, Plaintiff and Defendants; after decree any of the Defendants can prosecute the suit, and revive if necessary. Here the Defendants have claimed the benefit of the suit by the answer, and have adopted it; it is but reasonable, that taking the benefit, they should pay the costs of it.

Mr. Pemberton and Mr. Steere, *contra*. The Plaintiff has instituted this suit at his own risk, taking the chance of the insolvent surviving his wife. The effect of his death, is not to shew that all the Plaintiff's interest has ceased, but to prove he never had any. On what principle then is a party, who has not and never had any interest, to be indemnified his costs out of a fund belonging to other persons?

The Plaintiff's proceedings have wholly failed, he has no right to bring the suit for further directions; it must not be assumed that, if it were so brought on, he would be entitled to the costs, he, on the contrary, might be ordered to pay them. That point cannot be decided on petition without hearing the cause, and with going fully into the merits.

[613] The suit, it is said, was for the benefit of the parties; far from it, it deprecates the litigation, no advantage has resulted from it, and they have themselves incurred expenses which they must bear. They have unwillingly been made parties to this litigation.

THE MASTER OF THE ROLLS [Lord Langdale]. I confess I do not see any reason for doubting what order ought to be made on this petition. There is no apprehend, nothing more clear than this, that to enable a Plaintiff to obtain relief which he asks by his bill, the interest which supports it, must be continuing at the time of the decree. If the interest has ceased to exist before the cause is brought on for hearing, it is utterly impossible for the Court to make any decree in his favour. I will not say that a case might not exist, but it must be a very extraordinary and special case indeed, in which the Court could make any order, upon the application of a person who clearly has no interest in the subject of litigation.

In this case the bill is filed by the assignee of the insolvent husband of a married woman, who, in right of his wife, had a reversionary interest in the testator's estate. The Plaintiff's interest therefore, would entirely cease upon the death of the husband in the lifetime of the wife. The testator having by his will given the interest to his wife, the Plaintiff, the assignee of the husband sought by his bill to establish a claim against the estate of the wife. The cause proceeds to a hearing, and at the hearing, one or more points are decided, and an account is directed. At the hearing the Plaintiff had the same contingent and terminable interest which he had when he filed his bill, and an account was directed. The account proceeds to a certain extent but pending the proceedings in the Master's office [614] when the Master was preparing his report, the husband died, leaving his wife surviving him; there was consequently an entire cessation of all interest on the part of the Plaintiff. I do not understand why he should have thought it fit to proceed in the Master's office when the interest in respect of which he instituted the suit had ceased, nor how it was that the Master who had been informed of the state of things, permitted the Plaintiff to proceed or take any steps in the cause. It has been stated at the Bar, and I do not doubt with truth, that the Plaintiff's object in proceeding was, in some way or other (though not in a regular mode), to obtain his costs of the suit; he however made it necessary for the Defendants to apply to the Court to stay the proceedings.

I am by no means satisfied that the Defendants, finding the suit prosecuted by a person who had no interest, might not have made an application of another kind. The application they made (which they were entitled to) was to restrain the proceedings of a person who had ceased to have any interest whatever in the subject of the suit.

The question having arisen whether the Plaintiff was entitled to his costs, he brought it before the Court by petition. Just consider how the case would have stood if the Plaintiff had been permitted to pursue the course he was adopting.

he parties had not intercepted him. Suppose he had brought the cause on for saving on further directions; there would have been a Plaintiff without any interest whatever in the matter, and I do not know what could have been done, but to dismiss the bill. I do not see what right the Plaintiff could have had to claim costs up to the hearing of the cause, when confessedly he had no right whatever to any relief. The Plaintiff having no interest whatever, and [615] the sole object of the bill being to secure an interest which he expected to have, could not be entitled to costs. It is as well that such a course was not adopted, and that a petition which is much shorter and less expensive mode of obtaining the decision of the Court on his question, was presented.

The Plaintiff says that there are special circumstances in this case, and, that for that reason, he ought to have the costs. Now I will not deny that cases may possibly be found, in which, having regard to the interests of infants—of unascertained persons of various kinds—and other special circumstances, the Court has not thought fit to give to other persons the substantial benefit of the proceedings, without giving to the person whose interest has ceased the costs which he has incurred in securing the benefit to others. (See *Thomason v. Moses*, 5 Beav. 77.) There may possibly be such cases, but what the Plaintiff says is, first, that the suit was for the administration of assets, and that it must, therefore, be assumed that such a suit must be beneficial to all persons interested in the estate. Secondly, that whether this be true as a general rule or not, yet I must assume it to be so in this particular case, because the Defendants who are interested in the assets, finding this bill in prosecution, have by their answers claimed rights of their own, saying, if any relief be granted to the Plaintiff, we, the Defendants, desire to have a particular benefit resulting from it for ourselves; and, thirdly, it is said that the proceedings have succeeded in the Master's office so far as to charge the executrix.

I am of opinion that none of these circumstances entitle the Plaintiff to any order in respect of his costs. [616] In the first place, I do not agree that a bill filed for the administration of assets must, of necessity, be beneficial for all persons interested in the estate. It often turns out to be very much the contrary. I believe a bill for the administration of assets is, in a sense, generally beneficial for the executor, for he can get a complete exoneration in that way, and in no other. (*Knatchbull v. Fearnhead*, 3 Myl. & Cr. 122; *Low v. Carter*, 1 Beavan, 426; *Hill v. Lomme*, 1 Beavan, 540); but if it be a benefit which the executor does not want, I do not think a suit for administration must necessarily be for the benefit of all persons interested in the assets; on the contrary, it may occasion much delay, expense, and vexation to them, in various ways, and notwithstanding the accurate mode in which the account is taken, it may be extremely prejudicial. In the next place, where a bill is filed by a person who desires to have an account of assets taken, charging the accounting parties with various defaults and breaches of trust, and the persons beneficially interested in the estate claim, by their answer, such benefit as they may be entitled to, I do not think that such a claim is to be considered such an approbation of the suit, or such an adoption of the proceedings as to subject either the assets or the executors to the costs of the suit. Thirdly, as to the personal charge against the executrix in the Master's office, I have no evidence whatever before me; I find the persons who would be entitled to the benefit of this charge joining in the petition to stay the proceedings, and there is nothing in the former part of the proceedings which pledges them to an adoption of the suit, come of it what may.

Looking at the case altogether, I think that the Plaintiff did file his bill, at the risk and upon the chance [617] of his continuing to have at the hearing of the cause that right, which he very fairly alleged he had at the commencement. I must add, that I do not think it is by any means clear that if he had brought the cause to a hearing while his interest continued, he would have been entitled to costs; it does not appear to me to be clear, it is possible that he might, but that would depend upon circumstances, the evidence and the report; these are matters upon which I cannot now form a proper opinion.

The Plaintiff's interest having altogether ceased, and there being no special circumstances in this case, which in my opinion, entitle him to be reimbursed, by the

other party, those costs which were incurred for his own benefit, I must refuse this application with costs. The other petition to stay proceedings does not ask for costs, and I must simply make an order according to the prayer of it.

[617] EGREMONT v. COWELL. Jan. 11, 18, 1843.

A demurrer is considered as set down, from the time when the order for setting it down is carried into the registrar's office, and not from the time of its entry in the registrar's book.

The question in this cause arose under the 34th Order of August 1841. (Ord. Can. 174.)

The twelve days limited by that order for the Plaintiff to set down the demurrer, expired on the 1st of January 1843, which was on Sunday; and it being in the Vacation, the Plaintiff, on the following day (Monday the 2d of January), left the order for setting down the demurrer [618] with a clerk in the registrar's office, but the demurrer was not actually set down in the registrar's book until Tuesday the 3d.

By the order in question it is ordered, "That where the Defendant shall file a demurrer to the whole bill, the demurrer shall be held sufficient, and the Plaintiff be held to have submitted thereto, unless the Plaintiff shall, within twelve days from the expiration of the time allowed to the Defendant for filing such demurrer, cause the same to be set down for argument."

Mr. Pemberton and Mr. Beavan moved, that the demurrer having been submitted to, the costs of the suit might be taxed and paid by the Plaintiff.

They argued that there had not been a setting down of the demurrer within the time, and that under the 34th Order the Plaintiff must be considered to have submitted thereto, unless, upon a special application to be made by him, the Court should think fit to relieve him from the effect of the 34th Order.

That the order required the Plaintiff, "to cause the demurrer to be set down, and it therefore became the duty of the Plaintiff's solicitor, not only to take the order into the registrar's office, but to see that the demurrer was actually set down in the book, and which he had not done in this case.

They referred to *Charlton v. Richmond* (4 Beav. 397) decided as shewing that the twelve days did not mean office days.

[619] Mr. Koe and Mr. Shea, for the Plaintiff, were not heard by

THE MASTER OF THE ROLLS who said, he would make enquiry as to what had really taken place, for there appeared some inconsistency on the affidavits.

Jan. 18. THE MASTER OF THE ROLLS [Lord Langdale], after stating the facts as ascertained by him from the officers of the Court said,

The whole is reduced to this, whether a Plaintiff who obtains an order for setting down a demurrer, and leaves it within the limited time at the registrar's office has not complied with the order.

I am clearly of opinion that he has. I must consider this demurrer as set down from the time when the order was delivered to the clerk at the registrar's office, and as there was no surprise or prejudice to the Defendant, I must refuse the motion with costs.

It appeared in the course of this motion, that it was the practice of the registrar's office not to allow an inspection of the book of causes until the commencement of the term; so that it could not be ascertained what causes, &c., had been set down between the two terms, or when they had been entered.

THE MASTER OF THE ROLLS disapproved of the practice and expressed a wish that it might be altered, so that the public and the suitors of the Court might not be excluded from the opportunity of ascertaining the real state of the cause book.

[620] EGREMONT v. COWELL. Jan. 21, 1843.

statement "that the Defendant alleges and the Plaintiff believes the fact to be," is not a sufficient allegation of a material fact. A bill was, at the hearing, held defective for want of parties, and stood over. Another bill was filed, stating that at the hearing the sole Plaintiff was dead, and stating circumstances intended to remove the objection for want of parties, and praying the discharge of the former order and a revivor. A demurrer for want of parties was sustained.

The original cause is reported in a former volume (1 Beav. 529). It was a suit by a pauper for foreclosure and redemption, and one of the mortgages having been made to Greenwood and Bollond, and the latter being dead, it was objected that his personal representatives were necessary parties, on the ground that they were tenants in common of the mortgage money. The objection was allowed, and it was ordered, that the case should stand over with liberty to the Plaintiff to amend, by adding parties with apt words to charge them, and bring on the case to a hearing as she should be advised."

It turned out, that at the former hearing, Mrs. Vickers the sole Plaintiff had been dead nearly a twelvemonth.

A new bill was now filed by the representative of the Plaintiff, which stated, that at the former hearing the sole Plaintiff was dead, and alleged that the order then made was irregular.

The bill then went on to state that Greenwood and Bollond were trustees of a matrimonial settlement of a sum of £6000, "and that the Defendant Greenwood alleged, and the Plaintiff believed the fact to be," that the sum of money lent on mortgage was part of the trust funds comprised in the settlement, and that Greenwood and Bollond were jointly interested in the mortgage money, and that the Plaintiff was advised that the mort-[621]-gage money survived to Greenwood, and submitted that Bollond's representatives were not necessary parties.

The bill prayed that the suit might be revived, and that the order made on the previous hearing might be discharged, &c.

The Defendant Cowell demurred, on the ground that Bollond's representatives had not been made parties.

Mr. Pemberton and Mr. Beavan, in support of the demurrer, contended that there was no sufficient allegation that Greenwood and Bollond were joint-tenants of the mortgage money; for the statement was, that Greenwood stated, and the Plaintiff believed the facts to be so; but this was a mere statement by Greenwood in his own favour, and of the belief of the Plaintiff therein; that this was not a distinct allegation of the fact, and in cases of this kind the statement was to be taken most strongly against the pleader; *Balls v. Margrave* (3 Beav. 284).

Mr. Koe and Mr. Shea, *contra*, contended that the allegation of fact, being one relating to the Defendant's case was sufficiently alleged; and, secondly, that a Defendant could not demur to a bill of revivor for want of parties, the object of which species of bill was to place the pleadings in the same state as they were at the time of the abatement; *Metcalf v. Metcalf* (1 Keen, 74).

THE MASTER OF THE ROLLS [Lord Langdale]. When it was ascertained that this suit had abated before the hearing, the first and proper thing to be done was to revive the suit, and then to consider what was to be done as to the objection for want of parties.

[622] When this cause came on for hearing, an objection was made for want of parties, which was sustained because the mortgage was made to two, and it did not appear that each was not interested in the mortgage money; it is quite clear that a suit could not proceed in that state. It was ordered to stand over, with liberty to add parties. The usual order made in such cases is, that the Plaintiff shall add parties or shew that they are not necessary; the latter clause was not inserted in the order on this occasion, though it would have been if the order had been drawn up carefully.

If it had, nothing would have been more simple than to have revived the suit, and then to apply for leave to amend to shew that it was not necessary to add parties.

We have this singular proceeding; the bill now filed states the abatement, states that the case came on for hearing, that an objection was then made for want of parties, and was allowed, and that it was afterwards discovered that there had been a complete abatement by the death of the sole Plaintiff, and that the order then made was not regular; and it states, by way of supplement certain matters by which the conclusion is attempted to be drawn, that the personal representatives of Bollond are not necessary or proper parties. To this it is said by the Plaintiff that this is not done with reference to that part of the prayer of the bill which asks that the Plaintiff may have the full benefit of all the proceedings in the suit up to the death of Mrs. Vickers, but with reference to the statement that the personal representatives of Bollond are not necessary parties according to the statements in this supplemental bill.

This is not a case of simple abatement with a right to revive, but is one mixed up with circumstances now for the first time introduced, and which brings [623] forward facts shewing that it is not necessary to make these persons parties who by original bill were not made parties.

It is not a sufficient allegation to say that one Defendant alleges, and the Plaintiff believes a statement to be true, the Defendant may allege that which is quite false and the Plaintiff may believe it to be true, but this is not a sufficient allegation on the part of the Plaintiff of that fact.

The demurrer must be allowed with costs, and liberty must be given to amend.

[623] ALTREE v. HORDERN. Dec. 15, 22, 1842.

[S. C. 12 L. J. Ch. 76. See *Cook v. Hathway*, 1869, L. R. 8 Eq. 617.]

After answer, and after liberty to amend had been refused, a suit abated by the death of the Plaintiff. The executors filed an original bill of a similar nature. The Court stayed the proceedings in the second suit, until the costs in the first had been paid.

The original bill was filed by two Plaintiffs in 1836 to set aside a purchase, alleged to have been made by a trustee, thirty years ago. After all the answers had been filed, a special application was made to amend, which was refused. Both the Plaintiffs died, and the suit having thereby become abated, the executors of the last surviving Plaintiff, instead of reviving the suit, filed a new bill in respect of the same matters.

It was now, in effect, moved by the Defendants in the second suit, that the second bill might be taken off the file for irregularity, or that the proceedings in the second suit might be stayed until the Plaintiffs had paid the costs of the first suit. The notice of motion, however, was considered by the Court, as unnecessarily long and complicated.

[624] The first suit was attached to the Court of the Vice-Chancellor of England, and the second was attached to the Rolls.

Mr. Pemberton and Mr. Craig, in support of the motion. There having been no decree, the Plaintiffs alone have the right of reviving the original suit. If they adopt their testator's right of suit, they must follow up his proceedings; they cannot seek the same relief by a second independent suit, without abandoning the former proceedings, and paying the costs of the abandoned suit. Defendants are not to be vexed with two suits for the same cause. They cited *Chowick v. Dimes* (3 Beavan, 290; and see *Dryden v. Walford*, 1 Y. & C. (N. C.), 625, and *Lee v. Lee*, 1 Hare, 617).

Mr. Kindersley and Mr. S. Jones, *contra*. The Defendants are not entitled to what they ask. They ought to have applied to the Vice-Chancellor of England in the first suit, for an order similar to that made in *Chowick v. Dimes*.

It does not follow that if the first suit had been prosecuted to a hearing, the Defendants would have been found entitled to the costs of it. It cannot therefore, on this application, be assumed that they are entitled to them. Another objection

that the Plaintiffs in the second suit, sue not only as representatives of their ancestor, but in another character.

THE MASTER OF THE ROLLS [Lord Langdale]. This is a motion, made on the part of four of the Defendants, that the bill may be taken off the file of this Court, with costs to be paid by the Plaintiffs, or that all proceedings in the cause against the four De-[625]-fendants may be stayed until the Plaintiffs shall have paid to the Defendants their costs of the first suit.

The first bill was filed on the 22d of November 1836 by James Altree and Edward Stephen Altree. The answers of all the Defendants, except one, were filed in 1837, and the answer of the remaining Defendant was obtained on the 19th of January 1838. In July 1839, upon a motion made before His Honor the Vice-Chancellor of England, leave was given to the Plaintiffs to amend their bill. That order was afterwards discharged by the Lord Chancellor upon appeal, so that the Plaintiffs not being at liberty to amend their bill, were under the necessity either of proceeding with the bill as it then stood, or of filing a new bill, which they could only do, as I apprehend, by dismissing the first bill with costs. What they, however, did, under the circumstances, was to obtain leave, by an order of course, to amend the bill by joining parties, and they made that amendment.

In that state of things, James Altree, one of the Plaintiffs, died, and the suit was then sustained by the single remaining Plaintiff, Edward Stephen Altree. After the death of James Altree the answer of the new Defendants was, on the 24th of January 1840, put in, and on the 17th of March 1842 the surviving Plaintiff Edward Stephen Altree died. The suit therefore became wholly abated. According to my understanding of the practice of the Court (as to which, however, I ought to speak with deference, because I understand there are different opinions upon the point), it was at that time competent for the Defendants to move, as against the executors of the surviving Plaintiff, that the bill might be revived within a limited time, or that the bill might be dismissed. I do not think they would have obtained a more favourable answer. They did not [626] take that course, but seem to have waited to see what answer would be adopted by those who succeeded to the interest of the deceased Plaintiff.

On the 17th of November 1842 the executors of the surviving Plaintiff filed a new bill, and I think that I can only treat it as such a bill as might have resulted from an amendment of the original bill; for the transaction, in respect of which the relief is sought by the second bill, is precisely the same, and although there are other different portions of relief which are sought by it, yet, generally speaking, the relief is of the same sort as that asked by the first bill. It has not, in any way, been stated to me, that the second bill differs from a bill which might have resulted from an amendment of the original bill.

The second bill having been filed on the 17th of November last, the present application is made, and the question is, what ought now to be done. Considering the second bill to be such a bill as might have resulted from an amendment of the former bill if permission to amend had not been refused, it cannot surely be contended that those who are seeking to have the benefit of the former proceedings, and who founded their allegations in the second bill upon the statements made in the answer to the first bill, are entitled to all the benefit of the former proceedings, and, at the same time, to lay them aside, in such a manner as to deprive the Defendants of the opportunity of applying, in any stage of the cause, for relief in respect of the costs to which they have been subjected: nor can it be contended that the Plaintiffs are to be at liberty to adopt the former proceedings for their benefit:—that they are to come in and subject themselves to the jurisdiction of the Court, and seek its exercise as against the De-[627]-fendants, and yet that they are not to be subject to the costs of anything that has hitherto been done. I confess nothing appears to me to be more reasonable than to ask that the Plaintiffs may not be allowed to prosecute this new suit until they have paid the costs of the former suit; and unless I find some difficulty which I am not now aware of, I think there is in this Court sufficient jurisdiction to say that these Plaintiffs shall not be at liberty to prosecute this suit, founded as it is upon the former suit, and seeking, though not precisely the same relief, yet relief founded on the same transaction, without first

relieving the Defendants from the costs which have been incurred in the former suit. I think it is no answer to say, that if that former suit had been prosecuted, the Defendants might not have obtained costs—very possibly it might be so. That suit might, after a simple bill of revivor, have been brought to a hearing, and the Defendants might not have obtained costs; on the contrary, they might have had to pay the costs; nevertheless I think that the Plaintiffs, who alone have the power of prosecuting the original suit, are not to be permitted to adopt these proceedings for their own benefit, and at the same time to abandon them to the detriment of the Defendants in such a manner as to deprive them of every opportunity of bringing under the consideration of the Court their right to the costs.

The order will be according to the first part of the notice of motion, which is that proceedings in the second cause may be stayed until the costs of the first are paid; but, though I think it is very probable that no direct authorities can be found on the point, I shall suspend my opinion for a little while as to the other part of the notice of motion.

[628] I think that the form of the notice of motion is too complicated, and on that ground no costs of the motion ought to be given.

Dec. 22. Mr. Pemberton having asked for judgment in this cause,

THE MASTER OF THE ROLLS [Lord Langdale] said, my opinion remains the same. Upon the best consideration I can give the matter I think the Defendants are entitled to have the second suit stayed till the costs of the first are paid. I consider the matter in the same light as if the Plaintiffs in the original cause had filed an original bill to take advantage of all the proceedings in the first suit in which leave to amend had been refused, and had thereby abandoned the first suit, without paying the costs of it. I think in such a state of things the Defendants would have been entitled to stay the proceedings in the second suit until the costs of the first had been paid. I think this is the minor relief the Defendants are entitled to, for I will not say the Defendants may not hereafter be entitled to have the second bill taken off the file.

I give no costs in consequence of the complication of the notice of motion. (1)

[629] HARE v. HARE. April 4, 1843.

[S. C. 12 L. J. Ch. 344; 7 Jur. 337.]

The testator appointed his widow and two other persons guardians of his child.

By a codicil, he "left their care, charge, and education" to his widow. Held, that the appointment by the will of guardians was not revoked by the codicil. Practice in a suit to establish a will where one of the witnesses is abroad.

By his will, dated in August 1839, the testator nominated and appointed John Charles Hare and Marcus Theodore Hare executors of that his will, and, jointly with his wife, guardians of all his children except his son Augustus.

By a codicil, dated in January 1842, the testator left the care, charge, and education of his three eldest children Francis George Hare, William Robert Hare, and Anna Frances Maria Louisa Hare, to his wife Anne Frances Hare, and he begged the executors named in his said will to pay the said Anne Frances Hare such sum of money, from time to time, as they should think necessary for the purposes aforesaid. As to his fourth child Augustus Hare, he placed him entirely under the joint management of the widow of his late brother Augustus William Hare, and of his brother Rev. Julius Charles Hare.

The bill, amongst other things, sought to establish the will as to the real estate. One of the witnesses was residing out of the jurisdiction. His handwriting

(1) See *Pickett v. Loggon*, 5 Ves. 702; *Holbrooke v. Cracroft*, 5 Ves. 706, n.; *Wild v. Hobson*, 2 Ves. & B. 105; *Beames on Costs*, 219, 369 (1st edit.); *Spires v. Sewell*, 10 Sim. 193; *Onge v. Truelock*, 2 Molloy, 41; *Corbett v. Corbett*, 16 Ves. 410; *Cole v. Rooth*, 4 Y. & Coll. 515; *Bowyer v. M'Evoy*, 1 Ball & B. 562; *Baldwyn v. Maltby*, 1 Anstr. 835.

proved, as was also the fact of his being out of the jurisdiction, and the execution of the will was proved by the other witness.

The questions were, first, whether the will was sufficiently proved; and, secondly, whether, under the codicil, the wife had the sole guardianship of the three children.

[630] Mr. Kindersley and Mr. Hull, for the Plaintiff.

Mr. Tinney suggested the proper mode was, not to declare the will well proved, but to enter the evidence as read, and direct the trusts of the will to be carried into execution.

Mr. R. W. E. Forster, for the widow.

Mr. Rolt, for another party.

THE MASTER OF THE ROLLS [Lord Langdale] thought that such was the proper mode, and said he was of opinion the appointment of guardian by the will was not asked by the direction in the codicil, that the widow should have the care, charge, and education of the three children.(1)

[630] HANBURY v. SPOONER. June 13, 1843.

[S. C. 12 L. J. Ch. 434. See *Lewis v. Mathews*, 1869, L. R. 8 Eq. 281.]

aged executor, who was incapable by bodily and mental infirmity of proving the will: Held, not entitled to a legacy given by the testator's will to him as executor.

The testator appointed Mr. Ireland and three other persons the executors of his will, and he gave to each of them the sum of £500."

The testator died in March 1839.

With respect to Mr. Ireland the Master by his report found as follows:—"Ireland died in 1841 in his eighty-second year, without having proved the testator's will, having been, during the whole period which intervened [631] between the time of the said testator's death and his own death, from mental as well as bodily infirmity, wholly incapable of undertaking the duty of executor to the said testator."

The question was, whether Mr. Ireland was, under the circumstances, entitled to the legacy of £500.

Mr. James Parker, in support of the claim. To disentitle an executor, he must be able to prove the will; the fact of not having obtained probate is not, of itself, sufficient. The rule is thus stated in *Piggott v. Green* (6 Sim. 74): "Where a legacy is given to an executor, *prima facie* it is given to him for his trouble, and if he refuses to execute the office, he is not entitled to it." Probate alone will not entitle an executor; see *Jard v. Browning* (1 Cox, 302). Though one only of several executors proves, the others must be joined in an action at law. This shews that at law they all sustain the character of executors.

There is another principle which applies to this case; where a condition is imposed on a party, which, by the act of God he is unable to perform, the party is excused: see *Payne's case* (1 Coke's Rep. 97); 3 Com. Dig. Condition, 125. He also cited *Harrison v. Wyley* (4 Ves. 212); *Brydges v. Wotton* (1 Ves. & B. 134).

Mr. Pemberton Leigh, Mr. G. Turner, Mr. Simons, Mr. Chapman, Mr. Chandless, Mr. Lewin, for other parties, were not called on by

THE MASTER OF THE ROLLS [Lord Langdale], who was of opinion that this legacy was not payable. (See *Calvert v. Sebbon*, 4 Beavan, 222, and the cases cited in the notes.)

(1) See *Bootle v. Blundell*, 19 Ves. 494. *Lord Carrington v. Payne*, 5 Ves. 404. *Payne v. Stane*, 8 Price, 613. *Binsfield v. Lambert*, 1 Dick. 337. *Fitzherbert v. Fitzherbert*, 4 B. C. C. 230. *Pullan v. Rawlins*, 4 Beavan, 142, and the notes.

Reports of CASES in CHANCERY ARGUED and
DETERMINED in the ROLLS COURT during
the time of LORD LANGDALE, Master of the
Rolls. 1842, 1843. By CHARLES BEAVER
Esqr., M.A., Barrister-at-Law. Vol. VI. 1845.

[1] CHARLES DUKE OF BRUNSWICK *v.* THE KING OF HANOVER
Nov. 15, 20, 21, 22, 23, 1843; Jan. 13, 1844.

[S. C. 13 L. J. Ch. 107; 8 Jur. 253; 2 H. L. C. 1; 9 E. R. 993. See *Mayor, de London v. Cox*, 1867, L. R. 2 H. L. 262; *Smith v. Wequelin*, 1869, L. R. 8 Eq. 2; *The Parlement Belge*, 1880, 5 P. D. 207; *Hettihewage Siman Appu v. The Queen Advocate*, 1884, 9 App. Cas. 588; *Mighell v. Sultan of Johore* [1894], 1 Q. B. 413; *South African Republic v. Le Compagnie Franco-Belge du chemin de fer du nord* [1899], 1 Ch. 195.]

Discussion of the question whether a sovereign prince is liable to the jurisdiction of the Courts of a foreign country, in which he happens to be resident, and as to his liability to suit of one who unites in himself the characters both of an independent foreign sovereign and a subject.

A sovereign prince, resident in the dominions of another, is ordinarily exempt from the jurisdiction of the Courts there.

A foreign sovereign may sue in this country, both at law and in equity; and, if he sues in equity, he submits himself to the jurisdiction, and a cross-bill may be filed against him, which he must answer on oath; but a foreign sovereign does not submit to filing a bill in Chancery against A., making himself liable to be sued in that Court for an independent matter by B.

The King of Hanover, after his accession, renewed his oath of allegiance to the Queen of England, and claimed the rights of an English peer. Held, that he was exempt from the jurisdiction of the English Courts for acts done by him as a sovereign prince, but was liable to be sued in those Courts in respect of matters done by him as a subject. Held, also, that the sovereign character prevailed where the acts were done abroad, and also where it was doubtful in which of the characters they had been done.

A foreign sovereign prince, who was also an English peer, was made a Defendant in a suit and served with a letter missive. The Lord Chancellor refused to receive the bill. The Defendant then appeared, and filed a demurrer for want of jurisdiction. Held, first, that the Lord Chancellor had not decided that the Defendant was liable to the jurisdiction of the Court; and, secondly, that the Defendant had not, by appearing, waived any defence to the bill.

A bill, filed by Charles, ex-Duke of Brunswick, against the King of Hanover (a subject of this realm), stated, that by a decree of the Germanic Diet, followed by a declaration of his Agnati, he had been deposed, and his brother appointed successor, and that by an instrument signed by the reigning duke and by William the First

and his brothers, the Duke of Cambridge had been appointed guardian, of the Plaintiff's fortune, and the guardianship "was to be legally established in Brunswick, where it was to have its locality." That on the death of William the Fourth, the King of Hanover was appointed guardian, and possessed himself of the private property of the Plaintiff. The bill alleged that the instrument was void, and prayed a declaration to that effect, and for an account. Held, that the alleged acts under the instrument, were not such as rendered the Defendant liable to be sued or subject to the jurisdiction of this Court.

It is also, that the instrument complained of was, under the circumstances stated in the bill, connected with political and State transactions, and was a State document. In a suit against a sovereign prince, who is also a subject, the bill ought, upon the face of it, to shew a case rendering the sovereign prince liable to be sued as a subject.

A simple allegation that a foreign instrument depending on foreign law is null and void, is too vague.

This case came on upon general demurrer to the bill filed by Charles Duke of Brunswick against the King of Hanover.

[2] The bill stated that in September 1830 the Plaintiff was the Sovereign reigning Duke of Brunswick; that, in his private capacity, the Plaintiff was possessed of real and personal property in England and elsewhere to a very considerable amount.

That, on the 6th of September 1830, a revolutionary movement took place at Brunswick, in the course of which the Government was overthrown. That a decree of the Germanic Diet of Confederation was made, on the 2d of December 1830, whereby the Plaintiff's brother, William Duke of Brunswick, was invited to take upon himself, provisionally, the Government of the said duchy, and the Diet left it to the legitimate *agnati* of the Plaintiff to provide for the future Government of the said duchy.

That in February 1831 His late Majesty King William the Fourth and the said William Duke of Brunswick, claiming to be the legitimate *agnati* of the Plaintiff, caused to be published a declaration whereby they purported to depose the Plaintiff from the throne of the said duchy, and declared that the throne had passed to the said William Duke of Brunswick; and that, in consequence, the Plaintiff's brother had ever since exercised [3] the rights, powers, and authorities of Sovereign Duke of Brunswick.

That, in the year 1833, the following instrument in writing, signed by King William the Fourth and William Duke of Brunswick, was promulgated by them:—We, William the Fourth, by the grace of God King of the United Kingdom of Great Britain and of Ireland and of Hanover, Duke of Brunswick and of Lunebourg, and we, William, by the grace of God Duke of Brunswick and of Lunebourg, make known what follows:—Moved by the interests of our house, whose well-being is dear to us, and yielding to a painful but inevitable necessity, have thought it necessary to consider what measures the interests (rightly understood) of His Highness the Duke of Brunswick, the preservation of the fortune now in his hands, the safety and illegality of the enterprises pursued by the said duke, and lastly, the honour and dignity of our house may require; and after having heard the advice of a commission charged by us with the examination into this affair, and after having weighed and exactly balanced all points of fact and law; and whereas, after the dissolution of the German Empire, the powers of supreme guardianship over the affairs of the empire, which, up to that period, had appertained to the emperor, devolved to the heads of sovereign states; we, taking into consideration the laws and customs, and by virtue of the rights unto us belonging, in quality of heads of the two houses of our house, have decreed as follows:—

"Article the first. Certain facts, either notorious or sufficiently proved, have led us to arrive at the conviction that His Highness Duke Charles is, at this time, squandering the fortune which he possesses in enterprises alike impossible and dangerous to himself and [4] other persons, and is seeking to damage the just claims which persons interested now or hereafter may legally have upon his property; we

have consequently considered that the only method of preserving the fortune of His Highness Duke Charles from total ruin, is to appoint a guardian over him.

"Article the 2d. In consequence of this conviction, we decree that Charles Duke of Brunswick shall be deprived of the management and administration of his fortune. A guardian shall be appointed, whom we shall choose by mutual consent from among the very noble or noble male ascendants of our house, although the right of choice belongs to the legitimate Sovereign of the Duchy of Brunswick in virtue of his title alone.

"Article the 3d. His Royal Highness the Duke of Cambridge, Viceroy of Hanover, having declared that he will willingly accept such guardianship, we confer the same to His Royal Highness by the present decree, which he will be pleased to consider as constituting his title to such guardianship.

"Article the 4th. As His Royal Highness the Duke of Cambridge cannot, reason of his position, by himself alone, exercise the functions of guardian; he is authorised to limit himself to the functions of supreme guardian, and to substitute for the management and administration of the property, one or more persons, who, under oath, will proceed in their own name and on their own personal responsibility to make an inventory of the same, and to take measures for the preservation and administration of the fortune placed under the guardianship of His Royal Highness the supreme guardian, who is to be at liberty to grant to them fees proportionate to their duties.

[5] "Article the 5th. The administrators shall render an annual account of the management to His Royal Highness the supreme guardian, who shall be asked to transmit the same to us, that we may cause the same to be settled and approved. Our confirmation shall be applied for, in all cases wherein the laws require the consent of the supreme guardian.

"Article the 6th. The guardianship is to be considered as legally established in Brunswick, where it is to have its locality.

"Article the 7th. The present decree shall be published in the bulletins of the laws of the kingdom, in accordance with the usual forms, and all whom the same concern are bound to render obedience thereto. Given at our Palace of St. James the 6th of February 1833, and at Brunswick the 14th of March 1833. We have signed with our proper hands and have placed our seal.

"WILLIAM (L. S.).

"WILLIAM, DUKE (L. S.).

"The Baron Ompteda de Schleinitz."

That at the foot of the said instrument was a note signed by the Defendant (the Duke of Cumberland), and by the Dukes of Sussex and Cambridge, which was as follows:—"The undersigned have acknowledged, with gratitude, the foregoing arrangement, adopted by His Majesty in accordance with His Highness the reigning Duke of Brunswick, in the interests, well advised, of His Highness the Duke of Brunswick, for the preservation of the fortune remaining in his hands, for the maintenance of the public peace in the Duchy of Brunswick and in the Kingdom of Hanover, and for the honour and dignity of the great house of [6] Brunswick-Lüneburg, another proof of the foresight of His Majesty and of His Highness for the well-being of that house. We solemnly attest this declaration by these present signed with our hand, and to which we have placed our seals. London, 6th February 1833, ERNEST (L. S.); Kensington, 3d February 1833, AUGUSTUS FREDERICK (L. S.); Hanover, 13th February 1833, ADOLPHE (L. S.)."

The bill then stated, that the Plaintiff was advised, as the fact was, that the instrument was absolutely void and of no effect, but that nevertheless the Duke of Cambridge accepted the appointment of supreme guardian of the Plaintiff's fortune and property; that he took possession of the real estates to which the Plaintiff was entitled in his private capacity, at Brunswick, and took possession of all such part of the Plaintiff's property in Brunswick and elsewhere of a personal nature, as he could discover, and to the amount of several hundred thousand pounds in the whole; that he sold and converted several parts thereof into money, and made certain payments on account of the Plaintiff and of his property; but that after allowing for such payments there remained in his hands a very large surplus unaccounted for. That the

William the Fourth died on the 20th of June 1837; and thereupon, the present Defendant became King of Hanover; and the Duke of Cambridge having resigned his pointment of guardian, by some instrument in writing to which the Defendant was party, and which was signed by him and by William Duke of Brunswick, the Defendant was purported to be appointed guardian of the Plaintiff, and of his fortune and property, in the place of the Duke of Cambridge, under the instrument of the 6th of February, and the 14th of March 1833, and with all the same powers and authorities were thereby purported to be conferred on the Duke of Cambridge; that the Duke of Cambridge accounted for [7] his receipts and payments to the Defendant, and paid the balance; that the Defendant took possession of the Plaintiff's property, and received large sums of money on account thereof, and had thereout made some payments on account of the Plaintiff, but that a very large balance or surplus, to the amount of several hundred thousand pounds, remained due from the Defendant to the Plaintiff on account thereof, and that the Defendant refused to comply with the Plaintiff's application for an account thereof.

The bill charged that the instrument of the 6th of February and the 14th of March 1833, and the appointment of the Duke of Cambridge as guardian, and the pointment of the Defendant as guardian, were wholly invalid, according to the law, as well of Brunswick and of Hanover as of Great Britain, but that, under colour thereof, the Duke of Cambridge and the Defendant, respectively, took possession of the Plaintiff's property on his behalf, and not adversely; that by the law of England, the appointments of guardians and all the rights thereby purported to be given were valid, even if the same were valid by the law of Brunswick; and that if the same were valid at the time when the same were issued, having regard to the circumstances and situation of the Plaintiff at the time (which, however, the Plaintiff denied), there was nothing, in the circumstances or conduct or state of mind of the Plaintiff, to deprive him from the full right and power of enjoyment and disposition of his property.

The bill charged that the Defendant was liable to account to the Plaintiff for the receipts and payments, acts, neglects, and defaults of himself and his agents, under colour of his alleged appointment as such guardian as aforesaid.

[8] That the Duke of Cambridge, after becoming guardian, appointed three persons administrators or managers under him, who had been continued by the Defendant, and who made inventories of the Plaintiff's property, and from time to time accounted to the Defendant for their receipts and paid over the balances.

The bill specified certain property taken possession of by the Duke of Cambridge by the Defendant, and stated, that in 1833 and 1834 the Plaintiff was resident in France, and that the Duke of Cambridge, as guardian, attached his property there, and that the French Courts declared that the demand of the Duke of Cambridge was justifiable and without legal foundation, and they removed the attachments, and awarded to the Plaintiff damages, together with the costs of the proceedings, the amount of which the Plaintiff recovered from the Duke of Cambridge, by an action in Common Pleas here, to which he submitted. The bill also charged that the damages and costs, amounting to about £6000, had been paid out of the Plaintiff's personal estate.

The bill stated, that in November 1830, the Plaintiff made a peaceable attempt to take possession of his throne; that while at Osterode in Hanover, for that purpose, he was attacked by a party of armed men, but made his escape, leaving behind him property amounting to £4500, which was delivered to the Duke of Cambridge, and which had been paid over to the Defendant.

The bill charged that the accounts thereby prayed were intricate and complex, and could not properly be taken except in a Court of Equity.

The bill also contained the following charge, "That the Defendant is a peer of the realm, and that his title [9] as such is His Royal Highness Ernest Augustus Duke of Cumberland and Teviotdale in Great Britain, and Earl of Armagh in Ireland; and that since his arrival in this country, and during his late residence here, he has exercised, and now exercises, his rights and privileges as such peer as aforesaid."

The bill prayed a declaration that the instrument of February and March 1833,

and the appointment of the Duke of Cambridge as guardian of the Plaintiff's property, and the appointment of the Defendant were void; and that the Defendant might account to the Plaintiff for the property possessed by him, or by any person by his order, &c., since his appointment, including that which had been accounted for to the Defendant by the Duke of Cambridge; and that the Defendant might pay to the Plaintiff the balance found due from him on taking such account, the Plaintiff thereby offering, on taking such account, to make to the Defendant all just allowances.

The Defendant being resident in England, was served with a letter missive, whereupon an application was made, on his behalf, to the Lord Chancellor to discharge it, but which was unsuccessful. (1)

[10] The Defendant thereupon demurred to the bill, first for want of equity, and secondly on the ground that this Court "had no jurisdiction to grant relief or discovery, as to all or any of the matters or things in the said bill stated and alleged."

The demurrer now came on for argument.

Sir Charles Wetherell, Mr. Pemberton Leigh, and Mr. Elmsley, in support of the demurrer. The Defendant, who is a recognised independent sovereign, is not amenable to the jurisdiction of this Court. The law of nations, founded on principle of public policy, grants to an individual of this rank while in a foreign country immunity from process. Vattel, who treats of this subject says (Book 4, ch. 7, § 108), "We cannot introduce in any more proper place, an important question of the law of nations which is nearly allied to the right of embassies. It is asked, what are the rights of a sovereign who happens to be in a foreign country, and how the master of the country is to treat him? If that prince be come to negotiate or to treat about some public affair, he is doubtless entitled in a more eminent degree, to enjoy all the rights of ambassadors. If he be come as a traveller, his dignity alone, and the respect due to the nation which he represents and governs, shelters him from all insult, gives him a claim to respect and attention of every kind, and exempts him from all jurisdiction. On his making himself known, he cannot be treated as subject to the common laws, for it is not to be presumed that he has consented to such a subjection, and if prince will not suffer him in his dominions on that footing, he should give him notice of his [11] intentions. But if the foreign prince forms any plot against the safety and welfare of the State—in a word, if he acts as an enemy, he may very justly be treated as such. In every other case he is entitled to full security, since even a private individual of a foreign nation has a right to expect it."

"A ridiculous notion has possessed the minds even of persons who deem themselves of superior understanding to the common herd of mankind. They think that a sovereign who enters a foreign country without permission, may be arrested there; but on what reason can such an act of violence be grounded? The absurdity of the doctrine carries its own refutation on the face of it."

Though a foreign sovereign may sue as Plaintiff in the Courts of this country, the general proposition that he may be sued has never been laid down. The *dictum* in *Calvin's case* (7 Rep. 15 b.), the case in *Selden* (Table Talk, Law, 3), and the case *Hullett v. The King of Spain* (4 Russ. 225 and 560. 1 Dow & Cl. 169, and 2 R. (N. S.), 31. 1 R. & M. 9, n. 1 Cl. & Fin. 333, and 7 Bli. 359), which will be cited by the Plaintiff, do not warrant the proposition. In *Calvin's case*, it is said that a foreign king shall sue and be sued by the name of a king; but no instance is there cited of a sovereign being sued except that of Baliol King of Scotland, who was feudatory to the King of England, and as such was liable to the jurisdiction of his acknowledged

(1) The Lord Chancellor (on that occasion) said:—

This application is informal, the petition not being intitled in the cause, and on this ground alone I might dismiss the application. But upon the main point, namely, whether a letter missive ought to have been issued in this case, the Defendant is a peer of the realm, has taken the oath of allegiance to the sovereign, and his seat is in the House of Peers, and at present is resident here. I am of opinion, therefore, without reference to the more general question, that the letter missive was, in this case, properly issued. My attention was directed to the bill in this case, but I do not think I can look at the nature or subject of the suit, in deciding a question respecting the regularity of the process issued for the purpose of obtaining an appearance.

rior lord. Calvin's case shews that a king carries with him to a foreign country his privileges. It is said, "And hereof there is a notable precedent in Fleta, lib. cap. 3, sect. 9, where treating of the jurisdiction of the King's Court of Marshalsea, it is said, et hæc omnia ex officio suo licite facere poterit (ss. Seneschal' aul' hospitii) [12] non obstante alicujus libertate, etiam in alieno regno dum tamen reus in hospitio regis poterit inveniri secundum quod contingit Paris. anno 14 Ed. 1, de Helamo de Nogent capto in hospitio regis Angl' (ipso rege tunc apud Parisiam existente) cum discis argenti furatis recenter super facto, rege Franc' tunc presente, unde licet curia regis Franc' de præd' latrone per castellanum Paris. petita fuerit, ita hinc et inde tractatibus in consilio regis Franc' tandem consideratum fuit; sed Rex Angl' illa regia prerogativa, et hospitii sui privilegio uteretur, et gauderet, coram Roberto Fitz-John milite tunc hospitii regis Angl' Seneschallo de latrocinio victus, per considerationem, ejus cur, fuit (Moore, 798, 799), suspensus in patibulo ut Germani de pratis. Which proveth, that though the king be in a foreign kingdom, yet he is judged in law a king there."

The case in Selden is not an authority for this proceeding. It was referred to by Lord Thurlow in *The Nabob of the Carnatic v. The East India Company* (1 Ves. jun. 386), and appears by the note to that case, where it is stated, "The Lord Chancellor also observed, that the King of Spain had been once outlawed by Selden's advice to prevent him from taking advantage of his suit: that the outlawry was bad enough; but it was until reversed; therefore it was necessary for him to come in to reverse it, in order to take advantage of his suit. His Lordship said, he could not quote a better authority for this than Selden's Table Talk." The outlawry was therefore bad; besides which, it is clear from the circumstance that the Plaintiff had recovered costs, and the existence of other suits, that the King of Spain had submitted to the jurisdiction. [13] *Hullett v. The King of Spain* was the case of a cross-bill, (1) in which the King of Spain having, by his original bill, submitted to the jurisdiction, had rendered himself "subject to the control of the Court, and liable to the rules of practice" (1 & Fin. 354); and when the King of Spain "sues here as a Plaintiff, the Court has complete control over him, and may hold him to all proper terms." (1 Dow & Ry. 74.) The decision in *The Colombian Government v. Rothschild* (1 Sim 94) depended on the same principle.

The privilege of the foreign sovereign is, at least, equal to that of his ambassador, or his representative of the king? Now the Act of Ann (7 Ann, c. 12) is merely declaratory of the common law and of the law of nations. *Viveash v. Becker* (3 M. & Sel. 298); *Lockwood v. Coysgarne* (3 Bur. 1676). That statute, after reciting that the King had committed on the Russian Ambassador by publicly arresting him (see 1 Black. 255), "in contempt of the protection granted by Her Majesty, contrary to the law of nations, and in prejudice of the rights and privileges which Ambassadors and other public ministers, authorised and received as such, have, at all times, been thereby possessed of, and ought to be kept sacred and inviolable," it enacts that all writs "whereby the person of any ambassador, or other public minister of any foreign prince or State, authorised and received as such by Her Majesty, her heirs or successors, or the domestic or domestic servant of any such ambassador, or [14] other public minister, may be arrested or imprisoned or his goods or chattels may be distrained, seized, or attached, shall be deemed adjudged to be utterly null and void."

"by the common law and the law of nations," as declared by that statute, the privilege of the ambassador's retinue be privileged, how can it be maintained that the sovereign himself, whom the ambassador represents, is, by that law, entitled to the same respect?

Considerations of public policy must not be disregarded in this question; what would be the consequence of holding a contrary doctrine? If an independent sovereign be subject to the jurisdiction of this Court, he must be liable to

(1) A cross-bill is not liable "to pleas to the jurisdiction of the Court and pleas to the person of the Plaintiff, the sufficiency of which seem both affirmed by the original bill." Redesd. 291, Cooper Pldg. 304.

the consequences of a disobedience to its process, decrees, and orders; he must necessarily be liable to be attached and subject to personal restraint and incarceration. His imprisonment would cause the suspension of the functions of his Government, and such an act of outrage and aggression committed against a sovereign personally, and through him against his subjects, would inevitably be regarded by them as a *casus belli*.

The Defendant happens to be a peer of Parliament, and as such is privileged from arrest; but suppose the King of the Belgians or the King of Prussia came to the country on the invitation of the queen, on business of the utmost importance to the interests and peace of the two nations, or if the King of the French, with the reciprocity and courtesy so desirable and advantageous to both countries, were to return the sovereign's late visit, are they and all their retinue to be subject to be thrown in prison on bailable process, issuing out of the Queen's Courts, to answer a demand to which they [15] might not be liable in their own country, and which might ultimately turn out to be without foundation, would the French nation submit to such an insult? The friendly intercourse between sovereigns would be wholly prevented, if, by going to a foreign country, they are to render themselves liable to the most inferior Courts there; the consequences to this country by countenancing such suits might be most disastrous, and the public welfare requires that the consequences should be avoided.

The mere accident of a foreign sovereign being an English peer does not answer the question, his higher recognised dignity must prevail, the regal character cannot be annihilated so as to enable the Plaintiff to sue a party otherwise privileged. If it were necessary, the Court would make a distinction between the acts of a Defendant done as King of Hanover, and those done in his quality of an English peer. This was done in the case of *The Nabob of Arcot v. The East India Company*, where the Defendants filled the double character of sovereigns and a trading corporation. There the bill was dismissed, on the ground that the whole subject-matter of the suit was a political, and not a mercantile transaction. Here the whole transactions took place abroad, and are of such a nature that they ought to be imputed to the Defendant's regal character.

[16] Again, if the Defendant were liable to the jurisdiction, still he came to the country by the consent of the sovereign, and impliedly under her safe conduct, and he is entitled to the same protection as if the writ itself had been made out, in which case he would be protected from suit. (*Registrum Brevium*, 23, "*volumus et quod idem W. interim sit quietus de omnibus placitis et querelis*," &c.)

Secondly, the subject-matter of the suit is not one which is within the limits of forensic jurisdiction. It is one of an imperial and political nature, the guardian is a legitimate act of State emanating from the Germanic body, of which Brunswick is a component part. The Court is incompetent to deal with it.

By the civil law, curators were appointed over prodigals as well as over lunatics. *Furiosi quoque et prodigi, licet majores viginti quinque annis sint, tamen in curam adgnatorum ex lege duodecim tabularum.* (Justinian Inst. lib. 1, tit. 23.) Previous to the dissolution of the German Empire (1804), the powers of supreme guardianship over the princes of the empire belonged to the emperor. It afterwards devolved on the heads of sovereign states. The deed of curatorship was an act of State by the *de facto* Duke of Brunswick and the other Agnati, and followed out the decrees of the Germanic Diet and the deposition. What authority has the Rolls Court to deal with such a matter, or with the internal political arrangements of an independent State, or with the decrees of the Germanic Diet, or the imperial powers of the Agnati? How can this Court take on itself to determine these State questions?

(1) 4 B. C. C. 180, 198, and see *Moodalay v. Morton*, 1 B. C. C. 470, in which Lord Kenyon says, "I admit that no suit will lie in this Court against a sovereign power for anything done in that capacity; but I do not think the East India Company is within that rule. They have rights as a sovereign power, they have also duties as individuals; if they enter into bonds in India, the sums secured may be recovered here. So in this case, as a private company they have entered into a private contract, to which they must be liable."

it assumes jurisdiction, it will become the arbiter of any political transactions that may have taken place abroad, [17] although it is confessedly incompetent to adjudicate on such matters if they had taken place in this country, and although in the country in which the transactions happened the ordinary Courts have no jurisdiction.

The deed of curatorship is simply alleged to be void, but no ground is stated for that conclusion. The Court cannot take judicial cognizance of the law of a foreign country, the law itself must be stated as a fact. It is not alleged that the parties to the document were not the legitimate *Agnati*, or that they had not the powers which they assumed to exercise. In point of pleading the allegation is insufficient.

Thirdly. Independently of the privileged character of the Defendant, and the political nature of the subject, this Court has no jurisdiction in this case. Here is an act of a *forum competens* which cannot be questioned in this country; the whole matter has its locality in Brunswick, and there alone must the Plaintiff proceed. By the law of that country, the Plaintiff has been declared to be in such a state as to require a curator; until that decision has been reversed, he has no *locus standi* in this Court. A lunatic cannot file a bill against his committee for an account, nor can a bankrupt against his assignees; *Tarleton v. Hornby* (1 Y. & Coll. (Exch.) 172, 333); the proper proceeding is first to supersede the commission. If these transactions had taken place on British soil, the Plaintiff could not have maintained his bill until the deed of curatorship had been first set aside.

But supposing the deed, as is alleged, to be void, the Defendant is a mere wrong-doer. What right then has the Plaintiff to come into equity for an account, or to have a declaration that the deed is void? If void, it is [18] as void at law as in equity, and there is no prayer that it may be delivered up or be cancelled. This Court cannot declare the invalidity of the deed. It would first be necessary to enter into the legality of the deposition and the rights of the *Agnati*. As to the account, a party cannot treat an instrument as invalid, and yet seek an account under it, on the footing of its validity. If the deed be void, there exists no fiduciary relation to support such relief, and it would be perfectly impossible for the Master to take such an account, even if it were directed.

The bill too is multifarious, and seeks an account of the receipts of the Duke of Cambridge in his absence.

Mr. Kindersley, Mr. Turner, and Mr. Heathfield, *contra*, in support of the bill. There is no instance in Lord Redesdale's Treatise, or in any other work, in which a Defendant has claimed an immunity from suit by demurrer. If a Defendant pleads to the jurisdiction, he must shew what other Court has jurisdiction; *The Earl of Derby v. The Duke of Athol* (1 Ves. sen. 201).

Here the Defendant has submitted to the jurisdiction of the Court by appearing. If he wished to question the regularity of the process, he ought to have entered a conditional appearance with the registrar, and have sought to discharge it; *Davidson v. The Marchioness of Hastings* (2 Keen, 509). It is now too late, and the point has in fact been determined by the Lord Chancellor, who, after argument, and after the same points had been brought to his notice, determined that the letter missive had issued properly, and refused to recall it.

[19] It is not necessary to decide the general question, whether an independent foreign sovereign coming into this country is liable to the process of the Court, for here both parties, Plaintiff and Defendant, are British subjects; the Defendant by reason of the Act of Ann (4 Ann. c. 4), which enacts, "that the Princess Sophia, Electress and Duchess Dowager of Hanover, and the issue of her body, and all persons lineally descending from her born or thereafter to be born, be and should be, to all intents and purposes whatsoever, deemed, taken, and esteemed natural born subjects of this kingdom, as if the said princess and the issue of her body, and all persons lineally descending from her, born or thereafter to be born, had been born within this realm of England, any law, statute, matter, or thing whatsoever to the contrary notwithstanding." The Defendant, on the other hand, is a natural born subject; he is a peer of the realm, and since his accession to the Crown of Hanover, has exercised his rights as a peer. Having been born a British subject, he cannot put off his allegiance (1 Bl. Com. 369); but here he has since confirmed it, by taking the oath of

allegiance to Her present Majesty; he has voluntarily submitted to the Queen's jurisdiction, and is as liable to the Queen's writs as was Baliol King of Scotland to Edward the First, or Edward the First to Philip le Bel of France.

It is admitted that a foreign sovereign can sue in the Courts here; then, *a priori*, and independent of authority, one would say, that if he has a right to sue, he had a correlative liability to be sued.

There is, however, authority for saying that the [20] sovereign of a foreign country is liable to be sued. In *Calvin's case* (7 Rep. 15 b.) it is said: "But yet there is a diversity in our books worthy of observation; for the highest and lowest dignities are universal: for if a king of a foreign nation come into England, by the leave of the king of this realm (as it ought to be) in this case he shall sue and be sued by the name of a king; and herewith agreeth, 11 E. 3 tit. Br. (Moore, 803) 473, where the case was, that Alice, which was the wife of R. de O., brought a writ of dower against John Earl of Richmond, and the writ was *Præcip. Johann' Comiti Richmondia custodi terri & hæredis* of William the son of R. de O.: the tenant pleaded that he is Duke of Britain, not named duke, judgment of the writ? But it is ruled that the writ was good; for that the dukedom of Britain was not within the realm of England. But there it is said, that if a man bring a writ against Edward Baliol (*Ibid.*), and name him not King of Scotland, the writ shall abate for the cause aforesaid."

Selden, in his Table Talk, mentions an instance of the King of Spain being outlawed. (Selden's Works, vol. vi. 2041. See also the case of Ericus, King of Norway, before Edward the 1st., Ryley, Placita Parliamentaria, 143.) He says: "The King of Spain was outlawed in Westminster Hall, I being of council against him. A merchant had recovered costs against him in a suit, which because he could not get, we advised to have him outlawed for not appearing, and so he was. As soon as Gondimar heard that, he presently sent the money, by reason, if his master had been outlawed, he could not have the benefit of the law, which would have been very prejudicial, there being then many suits depending betwixt the King of Spain and the English merchants."

[21] Sir John Leach was of opinion, that a foreign sovereign could both sue and be sued. In Hovenden's Supplement to Vesey junior (vol. i. 149), it is stated, in a note to the case of *The Nabob of the Carnatic v. The East India Company*, "That a political treaty, between sovereigns, or parties exercising sovereign authority, cannot be the subject of municipal jurisdiction; but that its observance, or neglect, must depend on that respect which the parties bound thereby can be made to feel for the *jus gentium*, is established by the final result of this case. Lord Rosalyn even thought it doubtful, whether in any case, a foreign sovereign could sue or be sued, in a municipal Court of this country; *Barclay v. Russell* (3 Ves. 431, 433); but, in *De la Torre v. Bernales*, Sir John Leach, V.-C. (on the 22d April 1818) ordered the King of Spain to be named as a party to that suit, the object of which was to charge the Defendant, Bernales, in respect of acts done by him as agent of that king: and on a subsequent occasion (18th March 1819), when the same cause was under discussion, His Honor distinctly laid it down, that a foreign Government, or sovereign, could both sue and be sued in the Courts of this country. This determination is perfectly consistent with the principal case, understanding the Vice-Chancellor to allude, not to federal agreements bearing a political character, but only to personal demands of a private nature, and to cases where the fund, or the accountable parties, are within reach of the jurisdiction."

In the cases of *Hullett v. The King of Spain* (4 Russ. 225 and 560, 1 Dow & Cl. 168, 2 Bli. (N. S.), 31, 1 Russ. & My. 9, n., 1 Cl. & Fin. 333, and 7 Bli. 359), and *Glyn v. Soares* (1 Y. & Col. (Exch.) 644, and 7 Cl. & Fin. 466), a sovereign was made a Defendant. If this case depended on the Defendant's submitting to the jurisdiction, he has done so. He is, at the present moment, the Plaintiff in a suit in this Court; *The King of Hanover v. Wheatley* (4 Beavan, 78). The Queen herself, by a particular process, is liable to suit in this country: it would be absurd to place the Defendant in a better situation. It has been determined that a question concerning the right to the Isle of Man may be determined here; *The Earl of Derby v. The Duke of Athol* (1 Ves. sen. 201).

The instances of ambassadors do not apply: their immunity arises from the

necessity of their perfect freedom when negotiating between two countries. It is not suggested that the Defendant came here for any such a purpose, or otherwise than to exercise his rights of British subject as a peer of the realm. The Defendant claims an entire immunity, but ambassadors are not in all cases privileged, as if they are traders (1 Bl. Com. 260), or are subjects of the country to which they are accredited.

It is said that the consequences of the restraint to which sovereigns would be exposed on a disobedience to the process should prevent this Court interfering. The same reason would apply to cross-bills, in which cases it is admitted that a sovereign is liable to suit, but that reason does not prevail; the Court might modify its process of contempt, as in the case of peers, and might enforce obedience, and give relief by means of a sequestration against the goods of a Royal Defendant.

It is said to be matter of State. The decree of the [23] Germanic Diet, or the dethronement in consequence of it, might be so, but the deed of curatorship has no reference whatever to the former; it is quite independent. The Defendant and his agents have taken possession of the property of the Plaintiff, and is he not to be accountable for it? But matters of State are constantly inquired into, as in the cases of ship-money (3 State Trials, 826), general warrants, *Money v. Leach* (1 W. Blackstone, 555), and French compensation fund. (*Hill v. Beardon*, Jacob. 84.)

The argument as to safe conduct does not apply, that writ is only granted in times of war; in the present case no such writ is in existence.

Sir C. Wetherell, in reply.

The following authorities were also referred to in the course of the argument: *Novello v. Toogood* (1 Barn. & C. 554), *Melan v. The Duke of Fitzjames* (1 Bos. & P. 138), *De la Vigna v. Fianha* (1 B. & Ad. 284), Story's Conflict of Laws, 244, 322; *Don v. Leppmann* (5 Cl. & Fin. 1), *Allen v. Macpherson* (Phillips, 133, and 5 Beavan, 469), *Corporation of Carlisle v. Wilson* (13 Ves. 276), Grotius, b. 2, c. 14, and the proceedings on the case concerning the King's prerogative in respect to the education and marriage of the Royal family (1718). (15 State Trials, 1195.)

THE MASTER OF THE ROLLS. It is due to the great learning and ingenuity which have been brought to bear upon the important question raised in this case, and to the great extent and variety of the legal, historical, and political arguments used, that I should take time to consider of the judgment which I shall pronounce upon it.

[24] Jan. 13. THE MASTER OF THE ROLLS [Lord Langdale]. This case came on to be heard for argument, on a demurrer to the bill for want of jurisdiction and for want of parties.

The bill is filed by His Serene Highness Charles Frederick William Augustus Duke of Brunswick against His Majesty the King of Hanover, who is sued as His Royal Highness Ernest Augustus Duke of Cumberland and Teviotdale in Great Britain, and Earl of Armagh in Ireland.

The bill prays, that it may be declared that a certain instrument or writing, in the bill mentioned to be dated the 6th day of February and the 14th day of March 1833, and the appointment of His Royal Highness the Duke of Cambridge as guardian of the fortune and property of the Plaintiff, thereby purported to be made, and of the persons purported to be appointed administrators and managers under him, and the subsequent appointment of the Defendant as such guardian, are absolutely void and of no effect; and that it may be declared that the Defendant is liable and ought to account to the Plaintiff for the personal estate, property, and effects, and the rents, profits, and produce of the sale of the real estate of the Plaintiff possessed by the Defendant, or any person by his order or for his use, or any person having acted or purported to act under any appointment as administrator or manager under the Defendant, since his appointment as guardian by virtue of the instrument of the 6th of February and the 14th of March 1833, including therein the personal estate and effects, rents profits, and produce of the real estate paid or accounted for to the Defendant by the Duke of Cambridge; and that such accounts may be accordingly [25] taken—the Plaintiff offering, on the taking of such accounts, to make the Defendant all just allowances.

For this purpose, the bill states, that in the year 1830 the Plaintiff was the reigning duke of the Duchy of Brunswick, and was, in his private character or capacity, possessed of or entitled to real and personal property in Brunswick, and in England, Hanover, France, and elsewhere in Europe, to a very considerable value: that the

Duchy of Brunswick borders on the kingdom of Hanover: and that in the month of September 1830 His late Majesty King William the Fourth was King of Hanover, and His Royal Highness Adolphus Frederick Duke of Cambridge was Viceroy of Hanover, acting under the authority of His late Majesty King William the Fourth: that pending a revolutionary movement in Brunswick, a decree of the Germanic Diet of Confederation was made on the 2d of December 1830, whereby the Plaintiff's brother, William Duke of Brunswick, was invited to take on himself provisionally the government of the duchy; and the Diet left it to the legitimate dynasty of the Plaintiff to provide for the future government of the duchy; and that in February 1831 His late Majesty King William the Fourth, and William Duke of Brunswick, claiming to be the legitimate Agnati of the Plaintiff, caused to be published a declaration whereby they purported to dethrone the Plaintiff from the throne of the duchy, and declared that the throne had passed to Duke William; and that after this declaration was made, it was signed by their Royal Highnesses the Duke of Cumberland, (the present Defendant,) the Duke of Cambridge, and the Duke of Sussex; and that in pursuance of the declaration, William Duke of Brunswick took upon himself the government of the duchy, and he has ever since exercised the rights, powers, and authorities of Sovereign Duke of Brunswick.

[26] The bill then proceeded to state, that early in the year 1833 an instrument in writing, dated the 6th of February and the 14th of March in that year, signed by His late Majesty King William the Fourth, and by William Duke of Brunswick, was promulgated by them, and was to the effect following, viz. :—

"We, William the Fourth, by the grace of God, King of the United Kingdom of Great Britain and of Ireland and of Hanover, Duke of Brunswick and of Lunebourg, and we William, by the grace of God, Duke of Brunswick and of Lunebourg make known what follows :—Moved by the interests of our House, whose well-being is confided to us, and yielding to a painful but inevitable necessity have thought it necessary to consider what measures the interests (rightly understood) of His Highness Charles Duke of Brunswick, the preservation of the fortune now in his hands, the dangers and illegality of the enterprises pursued by the said duke, and, lastly, the honour and dignity of our House, may require; and after having heard the advice of a commission, charged by us with the examination into this affair, and after having weighed and exactly balanced all points of fact and law: and whereas after the dissolution of the German empire, the powers of supreme guardianship over the princes of the empire, which, up to that period, had appertained to the emperor, devolved on the heads of sovereign states, we, taking into consideration the laws and customs, and by virtue of the rights unto us belonging, in quality of heads of the two branches of our House, have decreed as follows :—

"Article 1st. Certain facts, either notorious or sufficiently proved, have caused us to arrive at the conviction that His Highness Duke Charles is at this time wasting the fortune which he possesses in enterprises [27] alike impossible and dangerous both to himself and other persons, and is seeking to damage the just claims which certain persons interested now or hereafter may legally have upon his property, we have consequently considered that the only method of preserving the fortune of His Highness Duke Charles from total ruin is to appoint a guardian over him.

"Article 2d. In consequence of this conviction, we decree that Charles Duke of Brunswick shall be deprived of the management and administration of his fortune, a guardian shall be appointed, whom we shall choose by mutual consent from amongst the very noble or noble male scions of our House, although the right of choice belongs to the legitimate sovereign of the Duchy of Brunswick, in virtue of his title alone.

"Article 3d. His Royal Highness the Duke of Cambridge, Viceroy of Hanover, having declared that he will willingly accept such guardianship, we confide the same to His Royal Highness by the present decree, which he will be pleased to consider as constituting his title to such guardianship.

"Article 4th. As His Royal Highness the Duke of Cambridge cannot, by reason of his position, by himself alone exercise the functions of guardian, he is authorized

limit himself to the functions of supreme guardian, and to substitute for the management and administration of the property one or more persons, who, under the authority of the King, will proceed in their own name, and on their own personal responsibility, to take an inventory of the same, and to take measures for the preservation and administration of the fortune placed under the guardianship of His Royal Highness, the Duke of Brunswick, who is to be at liberty to grant to them fees proportionate to their duties.

Article 5th. The administrators shall render an annual account of their management to His Royal Highness, the supreme guardian, who shall be asked to submit the same to us, that we may cause the same to be settled and approved. Confirmation shall be applied for in all cases wherein the laws require the consent of the supreme guardian.

Article 6th. The guardianship is to be considered as legally established in Brunswick, where it is to have its locality.

Article 7th. The present decree shall be published in the bulletin of the laws of the kingdom, in accordance with the usual forms; and all whom the same may concern are bound to render obedience thereto.

Given at our palace of St. James's, the 6th of February 1833, and at Brunswick the 14th of March 1833. We have signed with our proper hands and have placed our seals.

“WILLIAM (L.S.).

“WILLIAM, DUKE (L.S.).

The Baron Ompteda de Schleinitz.”

To this instrument was subjoined a note, which was signed by the Defendant, the Duke of Cumberland, and by the Dukes of Sussex and Cambridge, to the effect being:—“The undersigned have acknowledged with gratitude the foregoing management adopted by His Majesty, in accordance with His Highness the reigning Duke of Brunswick, in the interests well advised of His Highness the Duke Charles of Brunswick, for the [29] preservation of the fortune remaining in his hands, for the maintenance of the public peace in the Duchy of Brunswick and in the kingdom of Hanover, and for the honour and dignity of the great House of Brunswick and of the King of Hanover, another proof of the foresight of His Majesty and of His Highness for the well-being of that House: we solemnly attest this declaration by these presents, and with our hands, and to which we have placed our seals. London, 6th February 1833, ERNEST (L.S.). Kensington, 3d February 1833, AUGUSTUS FREDERICK (L.S.). Hanover, 13th February 1833, ADOLPHE (L.S.).”

The bill then states that the Plaintiff is advised, as the fact is, that the said instrument is absolutely void and of no effect; but that nevertheless the Duke of Cambridge accepted the appointment of supreme guardian of the Plaintiff's fortune and property, took possession of the real estates to which he was entitled in his capacity at Brunswick, and took possession of all such parts of the Plaintiff's property in Brunswick, and elsewhere, of a personal nature, as he could discover, to the amount of several hundred thousand pounds in the whole: that he sold and parted several parts thereof into money, and made certain payments on account of the Plaintiff and of his property; but that after allowing for such payments, there remained in his hands a very large surplus unaccounted for: that King William the 4th died on the 20th of June 1837, and thereupon the present Defendant became King of Hanover; and the Duke of Cambridge having resigned his appointment of guardian by some instrument in writing, to which the Defendant was a party, and which was signed by him and by William Duke of Brunswick, the Defendant was appointed guardian of the Plaintiff, and of his fortune and property, in the place of the Duke of Cambridge, under the instrument of the 6th of February and the 14th of March 1833, and with all the same powers and authorities as were thereby purported to be conferred on the Duke of Cambridge: that the Duke of Cambridge accounted for his receipts and payments to the Defendant, and paid him the balance; and that the Defendant took possession of the Plaintiff's property, and he received large sums of money on account thereof, and has thereout made some payments on account of the Plaintiff; but that a very large balance or

surplus, to the amount of several hundred thousand pounds, remains due from the Defendant to the Plaintiff on account thereof; and that the Defendant refuses to comply with the Plaintiff's application for an account thereof.

The bill charges, that the instrument of the 6th of February and the 14th of March 1833, and the appointment of the Duke of Cambridge as guardian, and the appointment of the Defendant as guardian, are wholly invalid, according to the law as well of Brunswick and of Hanover as of Great Britain; but that under colour thereof, the Duke of Cambridge and the Defendant respectively took possession of the Plaintiff's property, on his behalf, and not adversely: that by the law of England such appointments of guardians, and all the rights thereby purported to be given are void, even if the same were valid by the law of Brunswick; and that if the same were valid at the time when the same issued, having regard to the circumstances and situation of the Plaintiff at the time (which, however, the Plaintiff denies), there is now nothing in the circumstances, or conduct, or state of mind of the Plaintiff to debar him from the full right and power of enjoyment and disposition of his property.

[31] There is a charge, that the receipts and payments by the Duke of Cambridge and the Defendant respectively, on account of the Plaintiff and the management of his property, constitute a mutual account, containing many items as well on the debit as on the credit side thereof; that such account is still open and running, and is of an intricate and complex nature, and can only be taken in Court of Equity.

There are also charges relating to the administrators and managers who were appointed by the Duke of Cambridge, and are alleged to have accounted to the Defendant, and a very long statement of certain proceedings in France, in which it is alleged, that the Duke of Cambridge attached, but failed in an attempt to establish a claim to the Plaintiff's property in that country; a specification of certain property alleged to have been seized by the Duke of Cambridge and the Defendant respectively; and the statement of a transaction alleged to have taken place at Osterode in November or December 1830.

The Plaintiff having, in an earlier part of the bill, stated, that from a time previous to the Duke of Cambridge resigning the appointment of guardian, and within a few weeks past, the Defendant had been residing in Hanover out of the jurisdiction of this Court, and having charged that he the Plaintiff was resident and domiciled in England; and that the Plaintiff and Defendant were respectively subjects of the Crown of Great Britain and Ireland, concludes the charging part of his bill by charging, that the Defendant is a peer of this realm, and that his title as such is His Royal Highness Ernest Augustus Duke of Cumberland and Teviotdale in Great Britain, and Earl of Armagh in Ireland; and that since his arrival in this country, and during his [32] residence here, he had exercised, and thereby exercised his rights and privileges as such peer as aforesaid.

It has been stated to me as a fact on both sides, that the Plaintiff availed himself of a temporary residence of the Defendant in this country to serve him here with the process of this Court; and that the Defendant, before he appeared to the bill, and consequently before the demurrer was filed, applied to the Lord Chancellor to be relieved from the process; that the Lord Chancellor refused the application; and that thereupon the Defendant appeared to the bill in the usual manner: and upon this state of things the Plaintiff has founded an argument, which, if valid, would make it unnecessary for me to consider the principal question upon the demurrer. The Plaintiff has contended, first, that the appearance of the Defendant to the process ought to be deemed a waiver of any claim to personal exemption from liability to be sued; and, secondly, that the refusal of the Lord Chancellor to relieve the Defendant from the process ought to be considered by me as a decision of the Lord Chancellor that the Defendant is subject to the jurisdiction of this Court with reference to the subject-matter of this bill.

As to the first of these points, it would be singular if appearance, which is the first step towards making a defence, should be deemed an abandonment or waiver of any defence which the Defendant may have. An appearance may be a waiver of any mere irregularity in the service of process; but I am of opinion, that it is no waiver

such a defence as is now made; and which the Defendant has clearly a right to submit to the consideration of the Court. He claims to be exempt from liability to be sued; but he nevertheless appears, in order that he may, in a regular manner, form the [33] Court of the reasons upon which his claim is founded. As to the other point it appeared to me very improbable that the Lord Chancellor, in refusing to stay the process upon a bill, the contents of which were not regularly known to me, could have meant to decide that the Defendant was, with reference to the intents of the bill, liable to the jurisdiction of the Court. Upon this part of the case I have, however, thought it right to communicate with the Lord Chancellor, who has informed me, that in declining to interfere with the process, he did nothing which could in any way prevent the Defendant from making any defence which was open to him in the usual course of proceeding; and gave no opinion upon the question of jurisdiction in the particular case.

It is, therefore, incumbent upon me to consider the defence made to this bill by the present demurrer.

In support of the demurrer for want of jurisdiction, the following are amongst the principal propositions advanced on behalf of the Defendant:—

First, he is admitted by the bill to be King of Hanover, a sovereign prince, recognised as such by the Crown of England. As a sovereign prince, his person is inviolable, and he is not liable to be sued in any Court.

Second, the inviolability of a sovereign prince is not confined to his own dominions, but attends him everywhere. (*Jurisconsulti melioris notæ negant Principem extra ditionem esse mere privatum esse, &c.*, Zouch, 63.) Though a king be in a foreign kingdom, yet he is judged in law a king. (*Calvin's case*, 7 Coke, 15 b.)

[34] Third, his inviolability is not affected by his being temporarily resident in a foreign kingdom of which he is a subject. The Defendant is not the less a sovereign prince, and not the less exempt from being sued in any Court here, because he is a subject of the Queen and a peer of the realm.

Fourth, even if the Defendant should be held liable to be sued for some things in a foreign country, he ought not to be held liable to be sued in respect of the particular subject-matter of this suit, which is alleged to be matter of State, and not matter of common law jurisdiction.

Fifth and last, even if the Defendant should be held to be liable to be sued here, and if the subject-matter of the suit should be held to be matter of forensic jurisdiction, yet that it is not matter subject to the jurisdiction of this Court, but matter which must be deemed to be subject to the jurisdiction of some Court of special and peculiar jurisdiction, such as in this country are matters arising in bankruptcy, and various other matters, which, although proper subjects of common law jurisdiction, can only be adjudicated upon in Courts specially appointed for that purpose.

On the other hand, the following are amongst the principal propositions advanced in support of the bill on behalf of the Plaintiff:—

First, this ought to be considered as an ordinary suit between subject and subject. The Plaintiff and the Defendant are lineal descendants of the Princess Sophia, Electress and Duchess Dowager of Hanover, and as such (4 Ann. c. 4) are, to all intents and purposes, to be deemed [35] natural-born subjects of this realm. The Plaintiff is domiciled here. The Defendant was born here, is an English peer, and has taken the oath of allegiance. (1 G. 1, st. 2, c. 13.)

Second, no English subject can withdraw from his allegiance and subjection to the laws of the land. (Foster, Cr. L. 60, 184, 1 Bl. Com. 370, Moore, 798.) His becoming a sovereign prince of another country can make no difference in this respect: he remains an English subject, and is bound to obey the laws of England.

Third, the law of England affords no authority for the proposition, that sovereign princes resident here may not be sued in the Courts here; and there are *dicta* to the contrary; as in *Calvin's case* (7 Coke, 15) it is said, that "if a king of a foreign nation comes into England by the leave of the King of this realm, as it ought to be, in this case he shall sue and be sued in the name of king;" and it is reported, in the case of *la Torre v. Bernales* (1 Hov. Supp. 149), that Sir John Leach stated it to be his opinion that foreign sovereigns could both sue and be sued in this country. In

support of this proposition, reference was made to proceedings (1) in which John Balliol, King of Scotland, was summoned to answer charges made against him by the Court of Edward I., King of England; and to proceedings in which Edward I., King of England, was summoned to answer charges made against him in the Court of Philip Le Bel, King of France, at Paris. But these cases have nothing to do with the question: they were respectively adopted in virtue of, and for the purpose of enforcing the feudal superiority which Edward I. [36] claimed to have in the kingdom of Scotland, and the superiority which the King of France had over the province of Guienne.

Fourth, liability to suit does not necessarily involve liability to coercion. Defendant, as an English peer, is, by privilege, protected from personal coercion; even if a sovereign prince without such peculiar privilege were a Defendant here, the Court has power so to modify its process, as at the same time to do justice to the Plaintiff and have due regard to the person and dignity of the Defendant.

Fifth, the law of nations, the general law and the common interest of all mankind, is, that justice should be done all over the world. The right of a suitor here is not to be impeded by the assertion of an unrecognised privilege in any person against whom he has a legal demand.

Sixth, the Queen of England is liable to be sued in a proper form—a form applicable to a foreign sovereign; but if a foreign sovereign were not liable to be sued here, he would be placed in a better situation than our own sovereign, which, as I have said, would be absurd.

These propositions are all of them more or less important to be considered on the present occasion, and I have thought it convenient to enumerate them, although I do not have occasion to observe upon them all, in stating the grounds of the opinion which I have formed upon this demurrer.

The general proposition of the Defendant is, that by reason of his character as a sovereign prince, he is [37] exempt from the jurisdiction of any tribunal or Court in this country.

His limited or modified proposition, adapted to the specialties of the present case, is, that he is exempt from the jurisdiction of any tribunal in this country in respect of acts done in a foreign country, under foreign authority, and in no way connected with his own character of English peer and English subject.

It has been fully established (2) that a foreign sovereign may sue in this country both at law and in equity; and further, that if he sues in a Court of Equity, he submits himself to the jurisdiction of the Court. A cross-bill may be filed against him, and he must put in his answer thereto, not by any officer, agent, or substitute, but personally, upon his own oath. *The King of Spain v. Hullett* (1 Cl. & Fin. 359; 7 Bli. 359).

Lord Redesdale (2 Bli. N. S. 60) considered, that to refuse a foreign sovereign the right of suing in our Courts might be a just cause of war; and the liability of a foreign sovereign to be sued in a case where he himself was suing here, was considered as founded upon the principle that by suing here he had submitted himself to the jurisdiction of the Court in which he sued. The decision is in accordance with the principles of the civil law. The *Reconventio* is a species of defence, and *Qui non [38] cogitur aliquo loco judicium pati, si ipse ibi agat, cogitur excipere actiones et ad eundem judicem* (1 Digest, l. 22, Corpus Juris Civilis, 131.)

In the case of *Glyn v. Soares* (1 Y. & Col. (Exch.) 644), it was supposed that a person who was not a party to an action, but whose agent was, on his behalf the Plaintiff, might be made a Defendant to a bill in equity, for discovery in aid of defence to the action, and on that supposition it was held that the Queen of Por-

(1) Ryley, Pl. Parl. 154, *et seq.*, 3 Brady, 18, *et seq.*, 3 Tyrrell, 62, *et seq.*, 3 Rymer, 226, 231, 232, 1 Tytler, c. 2.

(2) *The King of Spain v. Machado*, 4 Russ. 560; *Hullett v. The King of Spain*, 1 N. S. 31; 1 Dow. & Cl. 169. And see *Roi d'Espagne v. Pountes*, Rolle's Ab. Court de Admiralty, E. 3; 1 Rolle's Rep. 133; Bulstrode, 322; Hobart, 78, Moore, 850; *Barclay v. Russell*, 3 Ves. 432, and *Dolder v. Lord Huntingfield*, 11 Ves.

was properly made a Defendant to the bill. Her demurrer, however, was allowed in the House of Lords (7 Cl. & Fin. 466), where it was held that such a bill of discovery could only be sustained against parties to the action. If she had been Plaintiff in the action, I presume that she would have been held to be a proper Defendant to the bill.

The case mentioned by Selden in his Table Talk (Law, 3), was probably of the same sort: there were many suits pending between the King of Spain and English merchants; a merchant had recovered costs against him in a suit, and could not get them, and process of outlawry was taken out against him for not appearing; but the circumstances are not stated with such particularity as to make it practicable to draw any conclusion from them.

The cases which we have upon this point go no further than this; that where a foreign sovereign files a bill, or prosecutes an action in this country, he may be made Defendant to a cross-bill or bill of discovery in the nature of a defence to the proceeding, which the foreign sovereign has himself adopted. There is no case to shew that, because he may be Plaintiff in the Courts of [39] this country for one matter, he may therefore be made a Defendant in the Courts of this country for another and quite distinct matter; and the question to be now determined is independent of the fact stated at the Bar, that the King of Hanover is or was himself Plaintiff in a suit for an entirely distinct matter in this Court.

There have been cases, in which this Court being called upon to distribute a fund in which some foreign sovereign or State may have had an interest, it has been thought expedient and proper, in order to a due distribution of the fund, to make such sovereign or State a party. The effect has been, to make the suit perfect as to parties, but as to the sovereign or State made a Defendant in cases of that kind, the fact has not been, to compel, or attempt to compel, such sovereign or State to come and submit to judgment in the ordinary course, but to give the sovereign an opportunity to come in to claim his right, or establish his interest in the subject-matter of the suit. Coming in to make his claim, he would, by doing so, submit himself to the jurisdiction of the Court in that matter; refusing to come in, he might perhaps be precluded from establishing any claim to the same interest in another form. Where a Defendant in this country is called upon to account for some matter in respect of which he has acted as agent for a foreign sovereign, the suit would not be perfect as to parties, unless the foreign sovereign were formally a Defendant, and by making him a party, an opportunity is afforded him of defending himself, instead of leaving the defence to his agent, and he may come in if he pleases; in such a case, if he refuses to come in, he may perhaps be held bound by the decision against his agent.

[40] There may be other cases in which sovereign princes, for the sake of having their claim or right determined, may have been afforded an opportunity of appearing, and they have voluntarily appeared as Defendants before the tribunals of this country, save in the case of a cross-bill or bill of discovery in aid of a defence, and in the case of a sovereign prince voluntarily coming in to make or resist a claim, it does not appear how he can be effectually cited, or what control the Court can have over him or his rights; and no case has been produced in which it has been determined that a foreign sovereign, not himself a Plaintiff or Claimant and insisting upon his alleged right to be exempt from the jurisdiction of the ordinary Courts, has been held bound to submit to it.

On the other hand, no case has been produced in which, upon the question properly raised, it has been held that a sovereign prince, resident within the dominions of another prince, is exempt from the jurisdiction of the country in which he is. In the case of *Glyn v. Soares* (1 Y. & Col. (Exch.), 698) the question was not argued at the Bar, but Lord Abinger took it into consideration, and distinctly expressed his opinion that, as a general proposition, a sovereign prince could not be made amenable to any Court of Judicature in this country; and upon this occasion, the Defendant insists upon it as a general rule, that in times of peace at least, a sovereign prince is, by the law of nations, inviolable: that obvious inconveniences and the greatest danger of war would arise, from any attempt to compel obedience to any process or order of any Court, by any proceeding against either the person or the

property of a sovereign prince; and indeed that any such attempt would be deemed a [41] hostile aggression, not only against the sovereign prince himself, but against the State and people of which he is the sovereign: that it is the policy of the law (to be everywhere taken notice of), that such risks ought to be avoided, and that this view of the subject ought of itself to induce the Court to allow demurrer.

If a foreign sovereign could be made personally amenable to the Courts of a country in which he happened to reside, he must be subject to the ordinary process of the Courts, and if not protected by any privilege legally established by the law of England, he would, in this country, be subject to the execution of writs of attachment and *ne exeat regno*, and other processes upon which he might be arrested, and in this the counsel of the Defendant cited the opinion of Vattel, who considered it to be a ridiculous notion, and an absurdity to think that a sovereign who enters a foreign country, even without permission, might be arrested there. (Vattel, iv. 7, s. 1, p. 486.)

It was attempted to meet the force of this argument, by alleging that this Court had authority to modify the means of executing its process, and compelling obedience to its orders, so as to suit the rank or dignity of particular Defendants; but this allegation was not supported by any authority, or by reference to any known practice of the Court. In the case of the King of Spain it was stated (7 Bli. 224) that his right, "in respect of privilege, was not greater than that of any of his subjects:" and the Lord Chancellor said, "The King of Spain sues here by his own right of sovereign, and so he must be sued, if at all; but beyond the mere name of sovereign it has no effect. He brings with him no privileges which exempt him from the common fare of other suitors." I am of opinion that the only exemptions from the ordinary effects of the process of this Court, are privileges which have a recognised legal origin, and that no others can be allowed.

To shew that a sovereign prince carries his prerogative with him into the dominions of other princes, reference was made to the case of Ingelram de Nesle, stated in Fleta. (Lib. 2, ch. 3, s. 9, p. 68, and cited in *Calvin's case*, 7 Coke, 15 b. and in Moore 798.) This man was an attendant upon Edward I., King of England, who, in France; he committed a theft there, and was apprehended for it by the French; but the King of England required to have him redelivered, being his subject, and he was sent to the King of England, to do his own justice upon him; whereupon he was tried before the king and marshal of the King of England's house, and executed in France. At a recent period, Monaldeschi, an attendant upon Christina, the abdicated Queen of Sweden, was, by her orders, put to death within her residence in France (see *Relation de la Mort du Marq. de Monaldeschi, &c.*, Arch. Cur. 2^e Serie, viii. 224). This fact in itself atrocious, but which was not seriously resented by France; and it is to have been afterwards defended by great authority. (Leibnitz.) Bynkershoek speaks of it thus:—"Quod factum Galli, quamvis indignabundi, impune transmissum est, ex impotentia muliebri, dicet alter, alter vero ex jure gentium, ut optimum est." (Bynkershoek, Op. ii. 151.)

But I own that with reference to the present case, I do not attach much importance to instances of this sort. [43] The doctrine or fiction which has been exposed by some writers on the Law of Nations, under the name of extra territoriality (Martens, 46, 1 Wheatley, 273), if it were carried out to its legitimate consequences, would, as it appears to me, render it highly dangerous for the sovereign of a country to admit within his dominions any foreign sovereign, or even any ambassador of a foreign sovereign. It is admitted, that the extent to which the doctrine should be carried out, must be subject to great modifications, and I do not think that it affords any assistance in the practical consideration of the question, as to the exemptions or privileges which ought, by the law of nations, to be allowed to a foreign sovereign temporarily resident within the dominions of another prince.

Another argument for the Defendant was, that a sovereign coming from his dominions into this country, attending the Court of the Queen, and sitting in Parliament, must be deemed to have come with the consent of the Queen, and to have

entitled to a safe conduct, (1) which would have contained a prohibition to sue him in Court (Reg. Brev. 26); that, therefore, the Defendant ought to be deemed to have resided here on the faith of such right, which he is not the less entitled to, since the letters of safe conduct were not actually applied for and issued. This argument assumes, that letters of safe conduct, such as might and lawfully ought to be issued at this time, and on the occasion of such a visit as that made to this country by the King of Hanover, would have contained a prohibition to prosecute a suit as this.

[44] But the argument for the Defendant, which appears to me to be the most important, was founded upon analogy to the immunities of ambassadors, recognised and declared to be in accordance with the law of England, by the statute 22. c. 12.

By that statute, it was declared, "that all writs and processes sued forth and executed, whereby the person of any ambassador of any foreign prince authorised and received as such by Her Majesty, may be arrested or imprisoned, or his goods seized, or attached, shall be deemed to be utterly null and void;" and a penal clause affecting any person who may sue out any such writ or process, is a proviso, that no merchant or trader within the description of the statute bankrupts, who puts himself into the service of any ambassador, shall have or enjoy any benefit by the Act.

It is argued, that the law of nations and the law of the land having granted such immunities to such ambassadors, the mere envoys and agents of sovereign princes, must have refused at least equal immunities to the sovereigns themselves, on whose behalf the immunities to ambassadors were given. If it be right, as it is universally admitted to be, that ambassadors should have such immunities, it must a fortiori be right that princes should have them; and thus it is argued, that because ambassadors are held to be inviolable in the countries where they reside, princes must also to be so.

But, on the part of the Plaintiff, this is denied, and it is said, that we must look to the reason of the law. An ambassador, who comes into a foreign State on the business of his sovereign, which cannot be transacted [45] without entire freedom and independence on his part, must be allowed privileges which are in no way required for the protection or accommodation of a prince who comes on a visit of pure or complimentary; and, moreover, that the immunity of an ambassador does not extend to every suit of every kind. There are exceptions depending on the peculiar liabilities or obligations of the person, or on the nature of the transaction; it cannot be inferred, that because an ambassador is in some or many cases exempt from suit, that therefore a sovereign prince is exempt from suit in all cases.

The question upon the demurrer is to be determined by that which may be taken to be the law of nations applicable to the case: there is no English law applicable to the present subject, unless it can be derived from the law of nations, and, when ascertained, is to be deemed part of the common law of England.

The law of nations includes all regulations which have been adopted by the common consent of nations, in cases where such common consent is evidenced by usage or custom.

In cases where no usage or custom can be found, we are compelled, amidst doubts and difficulties of every kind, to decide in particular cases, according to such light as may be afforded to us by natural reason, or the dictates of that which is thought to be the policy of the law.

"*Legis deficiente, recurritur ad consuetudinem, et deficiente consuetudine, recurritur ad rationem naturalem,*" and in the case now in question, it does not appear that there have been cases, or that events have occurred [46] from which any usage or custom of nations can be collected.

Synkershoeek, in his *Treatise de Foro Legatorum* (cap. 3 (Op. ii. 150)), discusses every question which is now under consideration. He supposes a sovereign prince

(1) As no king, &c., can come into this realm without a licence or safe conduct, so *pro Rege*, &c., which representeth a king's person, can do it. Co. Inst. 155.

to pass into the dominions of another prince, for any cause whatever of business or pleasure. It is not, he says, to be supposed, that the prince went there with the intent to put off his own sovereignty, and become the subject of another; yet, what is to be done, if he commits violence, or contracts debts in the country where he is; this, he says, will depend on the law of nations, adopted from reason and mutual consent, and established by usage. If we consult reason, much is to be said on either side. If a prince, in the dominions of another, becomes a robber, homicide, or conspirator, is he to escape with impunity? If he extorts money or becomes indebted, is he to be permitted to carry home his plunder? It is, he says, difficult to admit that; and yet, on the other hand, is that which reason and the consent of all nations has granted to ambassadors because they represent a prince and obey his orders, to be refused to the prince himself, perhaps transacting his own affairs? Is the sanction of the prince less than that of his ambassador? Shall we compel the prince himself to answer when his envoy is free? The learned writer, after in vain searching for precedents, proceeds thus:—"Nihil in hoc argumento proficies, rebus similiter gentibus judicatis, atque ita sola superest ratio quam consulamus. Et hac consulti ego non ausim plus juris tribuere in principem non subditum, quam in legatum et subditum. . . . Quare ut extremum est in legato, ut jubeatur imperio excedere, et in principe statuerem, si jus hospitii [47] violat. . . . In causâ aeris alieni id dixerim, nam arresto detinere principem ut æs alienum expungat, quamvis fuit stricti juris ratio permetteret, non permetteret tamen analogia ejus juris quod a legatis ubique gentium receptum est. Si neges, ubi de jure gentium agitur, analogiâ disputari posse, ego negaverim hanc questionem ex jure gentium expellere posse, cum exempla deficiant, quibus consensus gentium probetur, nec quicquam ad supersit quam ut ad legatorum exemplum ipsos reges et principes et quidem magis ab arresto dicamus immunes, et in eo a cæteris privatis differe."

In a case where there is no precedent—no positive law—no evidence of the common consent of nations—no usage which can be relied on—where reason, important and plausible are arrayed in opposition to each other—and where no clear and decided preponderance is to be found, it seems reasonable to endeavour to borrow for our guidance such light, however feeble and uncertain, as may be afforded by analogous cases, from whence have been derived rules adopted with great, though not perfect uniformity, by all nations.

It is true, that a decision derived from principles supported by analogous cases alone, cannot be entirely satisfactory; and yet it may be the best, the most satisfactory which the nature of the case admits of.

It will be more satisfactory in proportion to the clearness of the analogy between the cases under consideration.

It must be admitted, that all the reasons assigned for the immunity of ambassadors are not applicable to the case of sovereign princes; and it has been truly observed that an ambassador, if exempt from the coercive power [48] of the law in the country where he is, may, nevertheless, be compelled to submit to justice by the prince in his own country (II. Ward. 515, 596, 598); but that if you exonerate the prince himself, justice fails altogether: but in ultimate effect, the cases come very nearly to the same result. The prince, not being subject to a foreign power, may refuse to compel his ambassador to do justice, or may refuse to do the justice declared by a foreign tribunal, when requested by a foreign power: and the refusal, in either case, becomes a ground of imputation against the prince who refuses, and may give rise to those irritations which are so apt to prove incentives to war. Investigate the subject as we may, considerations of this sort press upon us. Whilst a prevailing respect for humanity and justice resides in the breasts of princes, and when there is consent as to the means of ascertaining and promoting the ends of justice in particular cases, it is well; but in the last result of any inquiry on the subject, we find, that in the absence of moral sanctions and of treaty, war and reprisal (i.e., war again in a particular form) are the sanctions of that which is called the law of nations.

If we hold sovereign princes to be amenable to the Courts of this country, the orders and decrees which may be made cannot be executed by the ordinary means. Where is the power which can enforce obedience? If accidental circumstances should give the power, and if, for the supposed purposes of justice, an attempt were made to

compel the obedience of a sovereign prince to any process, order, or judgment, he and the nation of which he is the head, and probably all other princes and the nations of which they are the heads, would see, in the attempt, nothing but hostile aggression upon the inviolability which all claim as the requisite of their [49] sovereign and national independence. On the other hand, if the jurisdiction of the Courts against sovereign princes be excluded, we are, on the institution of a claim, very nearly, though not quite, in the state to which we are brought by the process, order, or judgment on the former supposition. The State may have to seek redress for the injured subject, and justice is to be requested from a prince or chief against whom we have no ordinary means of enforcing it. It may be refused; acquiescence in the refusal is the abandonment of justice, and pressure after refusal implies an imputation, and gives rise to discussions and irritations which may again prove incentives to war. Justice can be peaceably and effectually administered there only where there is recognised authority and adequate power. What is to be done in cases where there is no power to enforce it?

It must be admitted, that the subject is replete with difficulties. These difficulties and the importance of maintaining the legal inviolability of sovereign princes, can scarcely be shewn more strongly, than by adverting to the opinions which have been expressed by eminent jurists, that offences committed by sovereign princes in foreign states ought rather to be treated as causes of war, than as violations of the law of the country where they are committed, and ought rather to be checked by vengeance, and making war on the offender, than by any attempt to obtain justice through lawful means.

Zouch (*Solutio questionis, &c.*, cap. iv. p. 66) says, "Ad id quod asseritur, malè principibus actum iri, si in eorum territoriis aliis principibus in eorum perniciem injurandi licentia sit permittenda, respondetur quod talis licentia neutiquam est permittenda. Sed eos bello *prosequi* juri gentium con-[50]-sentaneum est; et si cum in territorio principis in quem conjurarunt deprehensi sunt, *præsenti vindictâ* uti melius habebitur; juri gentium convenit disfidare et pro hostibus declarare unde non spectato judicio cuivis eos *interficere* impune liceat." And Bynkershoek (*Op. ii.* 151) says, "Quid si enim, more latronis, in vitam, in bona, in pudicitiam cujusque irruat, ne secus atque hostis, captâ grassetur in urbe. Poterit utique detineri forte et eludi quamvis *per turbam malim* quam constituto judicio."

When great and eminent lawyers, men of experience and reflection, so express themselves as to shew their opinion, that less mischief would ensue from the unrestrained and irregular vengeance of individuals and of the multitude, than from attempts to bring sovereign princes to judgment in the ordinary Courts of a foreign country where they have offended, however much we may lament that such should be the condition of the world, we may be sure of the sense which they entertained of the difficulty of making, and of the danger of attempting to make, sovereign princes amenable to the Courts of Justice of the country in which they happen to be.

After giving to the subject the best consideration in my power, it appearing to me that all the reasons upon which the immunities of ambassadors are founded do not apply to the case of sovereigns, but that there are reasons for the immunities of sovereign princes, at least as strong, if not much stronger, than any which have been advanced for the immunities of ambassadors; that suits against sovereign princes of foreign countries must, in all ordinary cases in which orders or declarations of right may be made, end in requests for justice, which [51] might be made without any suit at all; that even the failure of justice in some particular cases, would be less prejudicial than attempts to obtain it by violating immunities thought necessary to the independence of princes and nations, I think that, on the whole, it ought to be considered as a general rule, in accordance with the law of nations, that a sovereign prince, resident in the dominions of another, is exempt from the jurisdiction of the Courts there.

It is true, as was argued for the Plaintiff, that the common interest of mankind requires that justice should everywhere be done, and that, for the attainment of justice, all persons should be amenable to the Courts of Justice in the country where they are. Such is the general rule; but in cases where either party has no superior by whom

obedience can be compelled, where the execution of justice is not provided for by treaty, and cannot be enforced by the authority of the Judge; and where an attempt to enforce it by the authority of the State may probably become a cause of war; the same common interest, which is the foundation of the rule, requires that some exception should be made to it, and that exception is the general rule with respect to sovereign princes.

The question then arises, whether the exception in favour of sovereign princes and the exemption from suit thereby allowed, is to be entire and universal, or subject to any and what limitations.

The Act of Parliament relating to ambassadors professes to be, and has frequently been adjudged to be, declaratory (1 Barn. & C. 562), and in confirmation of the common law; [52] and, as Lord Tenterden said, "it must be construed according to the common law, of which the law of nations must be deemed a part."

The statute does not, in words, apply to the case in which the ambassador may be a subject of the Crown of England; but there is an exception to the exemption in the case of bankrupts in the service of ambassadors; and cases have frequently occurred in which an ambassador has himself been a subject of the sovereign, to whom he is accredited; and, notwithstanding some differences of opinion on the subject, it seems to be considered, that such an ambassador would not enjoy a perfect immunity from legal process, but would have an immunity extending only to such things as are connected with his office and ministry, and not to transactions and matters wholly distinct and independent of his office and its duties. Bynkershoek (Op. ii. 162) expresses his opinion:—"Legatum scilicet manere subditum, ubi ante legationem fuit, atque adeo si contraxit, aut deliquit subesse imperio cujus antea suberat. His autem consequens est nostros subditos quamvis alterius principis legationem accipere, subditos nostros esse non desinere, neque forum quo semper uti sunt jure subfugere." And Vattel (book 4, ch. 8, sec. 112) says, "It may happen that the minister of a foreign power is the subject of the State in which he is employed, and in this case he is unquestionably under the jurisdiction of the country in everything which does not directly relate to his ministry." And, after some discussion upon the question how we are to determine in what cases the two characters of subject and foreign minister are united in the same person, Vattel adds, "Whatever inconveniences attend the subjection of a minister to the sovereign with whom he [53] may reside, the foreign prince chooses to acquiesce in such a state of things, and is content to have a minister on that footing, it is his own concern."

And presuming from this view of what is considered to be the law of nations, with respect to the immunity of an ambassador who is a subject in the country of his residence, it must be distinguished what acts of his were connected with, or required for, the discharge of the duties of his ministry, and what were not; and that with regard to acts connected with his ministry, the Courts (considering his character as ambassador) would hold him to be exempt from suit; but that, with regard to acts not connected with his ministry, the Courts (considering his character of subject) would hold him liable to suit. The inquiry is whether, in like manner, a sovereign prince, resident in the dominions of another prince, whose subject he is, may justly and reasonably be held free from suit in all matters connected with his sovereignty, and his rights, duties, and acts as sovereign, and yet be held liable to suit in respect to all matters unconnected with his sovereignty, and arising wholly within the country to the sovereign of which he is a subject.

The first and most general rule is, that all persons should be amenable to the Courts of Justice, and should be liable to be sued. A consideration of the policy of the law creates an exception in the case of sovereign princes. May not a further consideration of the policy of the law create a modification or limitation of the exception in the case of sovereign princes who are subjects?

There are in Europe other sovereign princes who, if not now, have been subjects of the country of their origin or adoption. Upon such a question as this, [54] I do not disregard those cases, but they may have their specialties, of which I am not aware.

I cannot venture to say, that a subject acquiring the character of a sovereign prince in another country, and being recognised as a sovereign prince by the sovereign

[the country of his origin, may not, by the act of recognition, in ordinary circumstances and by the laws of some countries, be altogether released from the allegiance and legal subjection which he previously owed; but the case now before me must depend on its own circumstances; and I am of opinion, that it is not contrary to any principle and not unreasonable to consider, that in the contemplation of the Courts of this country, the inviolability which belongs to His Majesty the King of Hanover as a sovereign prince, ought to be, and is modified by his character and duties as a subject of the Queen of England.]

Previously to his becoming King of Hanover, he always lived in allegiance to the Crown of England, and in subjection to the laws of England. His accession to the throne was contemporaneous with the accession of the Queen to the throne of this kingdom; and since he became King of Hanover, he has been so far from renouncing or from shewing any desire to renounce, his allegiance to the Crown or his subjection to the laws of England—he has been so far from admitting it to be questionable, whether his sovereignty, and the recognition of it by the Queen, has absolved his allegiance or his subjection to the laws of England, that he has renewed his oath of allegiance, and taken his seat in the English Legislature, and has claimed and exercised the political rights of an English subject and an English peer.

[55] If he came here as King of Hanover only, the same inviolability and privileges which are deemed to belong to all sovereign princes would have been his, and, save in peculiar cases, such as I have before referred to, he would have been exempt from all suits and legal process. But coming here, not as King of Hanover only, but as a subject, as a peer of the realm, and as a member of Her Majesty's Privy Council, can it be reasonably said, that he is exempt from all jurisdiction, or, in other words, from all responsibility for his conduct in any of those characters?

The law of England admits the legal inviolability of the sovereign, requiring, at the same time, the legal responsibility of those who advise the sovereign. Can the law of England, in any individual case, admit the strange anomaly of an inviolable adviser of an inviolable sovereign, of a legal subjection without any legal superiority? Can any peer or Privy Councillor, whatever station he may occupy elsewhere, be permitted to give advice, for which any other peer, or any other member of the Privy Council, might be justly impeached, and yet hold himself exempt from the jurisdiction of the highest tribunal in the realm? May he enter into a contract which any other subject would be compelled to perform, and yet refuse to answer or claim whatever, either for specific performance or for damages?

Great inconveniences may arise from the exercise of any jurisdiction in such a case. They arise, perhaps inevitably, from the two characters which His Majesty as King of Hanover unites in his own person, and from the claim which he voluntarily makes to enjoy or exercise, concurrently, in this country, his rights as a sovereign prince, and also his rights as an English subject, peer, and Privy Councillor. He is a sovereign prince, [56] and, as such, inviolable in his own dominions, and, I presume, also in the dominions of every other prince to whom he is not a subject. Remaining in his own dominions, or in the dominions of any other prince to whom he is not a subject, he would, as I presume, be exempt from all forensic jurisdiction. But he comes to this country where he is a subject, and claims and exercises his rights as such. As a subject, he owes duties correlative to which, not individually, but the country at large may have legal rights, which are to be respected, and giving legal rights against a subject in respect of his acts and duties as a subject, it seems that they ought, if necessary and practicable, to be vindicated and enforced by the law. Those legal rights would be nugatory, if his inviolability as a sovereign prince would admit of no exception or modification. But any contradiction or inconsistency may be obviated by distinguishing, as in the analogous case of the ambassador, the acts which ought to be attributed to one character or the other; and, it appears to me, that, when necessary, it must be the office and duty of the Courts to make the distinction.

If the distinction can be justly made, why should it not, and why should not the jurisdiction be exercised, so far as the circumstances of the case will allow?

Admitting it to be the general rule, that sovereign princes are not liable to be sued, and that all sovereign princes may consider themselves interested to maintain

the inviolability which each one claims, and that any aggression upon it might, in ordinary circumstances, be a cause of war; yet, observing what is stated to be the law of nations in the case of ambassadors, conceiving that a rule applicable only to the case of sovereigns who are subjects, and think fit actively to exercise their rights as subjects, cannot have any extensive application, [57] and is not likely to excite any general interest, or any alarm, and having regard to that which is absolutely required to maintain the relation of sovereign and subject in any country, I am of opinion that no complaint can justly or will probably arise, from any legal proceeding, the object of which is to compel, as far as practically may be, a sovereign prince residing in the territory of another prince whose subject he is, to perform the duties of a subject, in relation to his own acts done in the character of subject only.

And admitting that, in ordinary cases, it may happen, that the execution of a decree cannot be enforced against a sovereign prince though a subject of this realm, I do not think that, for that reason, a Plaintiff should be deprived of all means of establishing his right in a due course of procedure; I do not think that I ought to presume that a sovereign prince, who deems it to be consistent with his dignity and interest to come here and practically exercise the rights of an English subject, will not also deem it consistent with his dignity and interest to yield willing obedience to the law of England when duly declared.

And for these reasons I am of opinion, that His Majesty the King of Hanover is and ought to be exempt from all liability of being sued in the Courts of this country for any acts done by him as King of Hanover, or in his character of sovereign prince; but that, being a subject of the Queen, he is and ought to be liable to be sued in the Courts of this country, in respect of any acts and transactions done by him, or in which he may have been engaged as such subject.

And in respect of any act done out of this realm, or any act as to which it may be doubtful, whether it ought to be attributed to the character of sovereign or to the character of subject, it appears to me, that it ought to be presumed to be attributable rather to the character of sovereign than to the character of subject.

And it further appears to me, that in a suit in this Court against a sovereign prince, who is also a subject, the bill ought, upon the face of it, to shew that the subject-matter of it constitutes a case in which a sovereign prince is liable to be sued as a subject.

I cannot, therefore, consider the present suit as an ordinary suit between subject and subject; it is a suit against a Defendant who is *prima facie* entitled to special immunities, and it ought to appear on the bill, that the case made by it is a case to which the special immunities ought not to be extended.

What is shewn is, that the Defendant is an English subject, and may therefore not be exempt from suit in some cases. Is it shewn that this is one of the cases in which the Defendant is liable to be sued?

The object of the suit is to obtain an account of property belonging to the Plaintiff, alleged to have been possessed by the Defendant, under colour of an instrument creating a species of guardianship unknown to the law of England. It is not pretended that any one act was done, or that any one receipt in respect of which the account is asked, was made in this country. Every act alleged as a ground of complaint was done abroad, in Brunswick, in Hanover, or elsewhere in foreign countries. No act alleged as a ground of complaint, was done by the Defendant before he became King of Hanover, and from the nature of the transaction, and the recitals in this instrument, there are strong grounds to presume, that it was only by reason of his being King [59] of Hanover, that the Defendant was appointed guardian of the Plaintiff's fortune and property. It is not pretended that the instrument has been impeached, or attempted to be impeached, in the country where alone it has its locality and operation, although it is alleged to be illegal there, and no reason is given why the Plaintiff has not availed himself of that illegality to obtain relief from it.

It is alleged to be null and void here; and upon this I may observe, that although, with regard to English instruments, intended to operate according to English law, the Court, knowing the nature of the instrument, the relation between the parties to it, and the law applicable to the case, may be able, even on demurrer in a simple case, to adjudicate thereon upon a mere allegation that the instrument is null and void,

yet that with regard to a foreign instrument, intending to operate according to a law not known in England, and which, as foreign law is to be proved as a fact in the cause, an allegation that the instrument is void is too vague. But passing that over, and considering the other matters which I have mentioned, and observing, notwithstanding the allegation at the Bar that the instrument complained of is wholly independent of any political or State transaction, it is in the bill stated as the sequel to a political revolution, which resulted in the deposition of a sovereign prince and the appointment of a successor, made under the authority of a decree of the Germanic Diet by the late King of Hanover and the reigning Duke of Brunswick; considering also that the instrument, stated as the sequel of these political proceedings (which I must consider to be either wholly immaterial, or as introduced into the bill for the purpose of shewing the character of the transaction in question), is stated to have been executed by the late [60] King of Hanover and the reigning Duke of Brunswick; and considering further, the objects for which the instrument is purported to have been executed, connecting those objects with the political transactions stated in the bill, and the transactions alleged to have taken place at Osterode in 1830, I should, if it were necessary for me to decide the question, be disposed to think that the instrument complained of is connected with political and State transactions, and is itself, what in common parlance is said to be a State document, and evidence of an act of State.

But, upon this occasion, it is not necessary for me to give any opinion upon the question whether the act complained of is or is not an act of State, or upon the question, which seems to have been raised in France, whether the Courts of a foreign country ought to take notice of such an instrument, for the purpose of enabling the guardian, under its authority, to possess the property and effects of the Plaintiff in such foreign country; it is not even necessary for me to decide the question whether, as against a subject only, this Court could have any jurisdiction to give relief in respect of acts done abroad, under such a foreign instrument as this.

The question which I have had to consider is, whether, under the circumstances of this case, and as against a sovereign prince who is a subject of the Queen, this Court has the jurisdiction which is attributed to it by this bill.

And I am of opinion, that the alleged acts and transactions of the Defendant, under colour or under the authority of the instrument in question, are not acts and transactions, in respect of which the Defendant is [61] liable to be sued in this Court, or in respect of which this Court has any jurisdiction over him.

Let this demurrer, therefore, be allowed.

[61] BRADSTOCK v. WHATLEY. July 7, 1843.

Notice of exceptions was not given until a day too late and was intitled wrongly. The Court relieved the party from the effects of the irregularity on payment of costs.

On the 7th of June the Plaintiff took exceptions to the Defendant's answer for insufficiency.

Notice of the exceptions was not served till the 8th of June, and such notice was intitled in a cause of *Smart v. Bradstock* instead of in *Bradstock v. Whatley*.

On the 17th of June an order was obtained referring the exceptions to the Master; and on the 20th the mistake in the title of the notice was discovered.

By the 24th Order of October 1842 (Ord. Can. 216) it is ordered, "That when any exceptions for scandal, impertinence, or insufficiency shall be taken, the solicitor of the party taking the same, or the party himself, if he acts in person, shall leave such exceptions at the Record and Writ Clerks' Office to be filed; and shall, on the same day, give notice of the filing thereof to the solicitor for the adverse party, or to the adverse party himself if he acts in person."

Mr. Pemberton Leigh, for the Plaintiff, now moved that the Plaintiff might be at liberty to give to the Defendant [62] a notice of having filed exceptions to his answer in this cause on the 7th day of June last, and if the Defendant should not, within

eight days after service of such notice, submit to answer such exceptions, then that the Plaintiff might be at liberty to obtain the usual order for a reference to the Master of this Court in rotation to look into the Plaintiff's bill, the answer of the said Defendant and the exceptions taken thereto, and see if the said answer be sufficient in the points excepted to or not.

Mr. G. Turner and Mr. Borrett, for the Defendant, contended that the Plaintiff was not entitled to be relieved from the effect of his non-compliance with the General Order, especially as the notice had been wrongly intituled. They cited *Pearse v. Ord* (4 Beavan, 127), *Salomon v. Stalman* (4 Beavan, 243).

THE MASTER OF THE ROLLS [Lord Langdale] said there appeared to have been a mere slip, from which he might relieve the Plaintiff on payment of costs, but that the difficulty was as to the form of the order to be made.

[63] HOBSON v. SHERWOOD. July 13, 1843.

The four-day order to enforce the production of documents in the Master's office is a party to the cause, does not require personal service.

The 11th Order of August 1841, as amended by the 6th Order of April 1842, does not apply to a case of default by a party in producing deeds in the Master's office pursuant to the decree, in which case the serjeant-at-arms goes upon a disobedience of the four-day order.

By the decree, as ultimately drawn up, the Defendants were ordered to produce before the Master all books, papers, and writings in their custody or power.

On the 31st of May 1842 the Master ordered the Defendants to produce deeds in their possession within fourteen days, and, default having been made, he, on the 21st of June, certified such default.

Upon this certificate, the Court, on the 21st of June 1842, made the four-day order, by which the Defendants were ordered to produce the deeds, within four days after personal notice on their clerk in Court, and, in default, it was ordered, that the serjeant-at-arms should bring them to the Bar of the Court to answer the contempt.

The Defendants, persisting in not producing the deeds, were afterwards arrested under this order, and brought to the Bar and turned over to the Queen's Prison.

Mr. Pemberton Leigh and Mr. Addis now moved that the Defendants might be discharged, on the ground of irregularity in the proceedings. They contended, first, that the four-day order, being the foundation for process of contempt, ought to have been personally served on the Defendants. *De Manneville v. De Manneville* (12 W. 203), *Rider* [64] v. *Kidder* (12 Ves. 202), in which it was said "The practice in this Court that, in order to fix a person with contempt, the service must be personal, is a strong analogy to the practice in Courts of Common Law upon attachment. That service must be personal, unless upon some very special application it is dispensed with; which may be under circumstances certainly. The reason of requiring personal service is, *non constat* that there is a contempt; that the party knows that he has neglected to do anything he was called upon to perform."

Secondly, that the mode of process ought to have been by attachment, in the first instance, and not by serjeant-at-arms; for, by the 11th Order of August 1841 (Ord. Can. 166, note (a.)), it was ordered, "That if any party who is by an order of the Court decreed to pay money or do any other act in a limited time, shall, after service of such order, refuse or neglect to obey the same, according to the exigency thereof, the party duly prosecuting such order shall, at the expiration of the time limited for the performance thereof, be entitled to an order for a serjeant-at-arms and such other process as he hath hitherto been entitled to upon a return *non est inventus*, by the Commissioners named in a commission of rebellion, issued for non-performance of a decree or order." On the 11th of April 1842 this order was amended (Ord. Can. 198), and an attachment was substituted for the serjeant-at-arms. That the 11th Amended Order was therefore applicable to this case where the four-day order issued in June 1842.

Thirdly, they contended, that the Defendants had repudiated the services of their solicitor, who had become [65] lunatic previous to the order in question being made, and that the Plaintiff had notice of it, and that therefore the Six Clerk employed by him had no authority to act afterwards for the Defendants.

Mr. Kindersley and Mr. Parker, *contra*, were not called on by

THE MASTER OF THE ROLLS [Lord Langdale] who said: The only question is whether there has been any irregularity in the proceedings; if there has, then notwithstanding the obstinate disobedience of the Defendants in complying with the order of the Court, they are entitled to their discharge.

The Court has ordered the production of these deeds, and the Master has certified to me that he has regularly summoned the Defendants to produce them, and that they have made default. It is said that the order was irregular, because personal service was not directed; but the order is perfectly consistent with the general practice of the Court. So far back as the year 1746 the terms of the order to compel the production of documents under a decree were (Seton's Decrees, 420) "that the Defendants shall produce before the Master all books of account, papers, and writings in their custody or power, in four days after notice thereof to their clerk in Court, in default thereof, that the serjeant-at-arms attending the Court should go against the Defendants, and bring them to the Bar of the Court to answer their contempt;" and I believe that these are precisely the terms of the order which has ever since been made.

The General Order of August 1841 does not apply to this case; it applies to cases where the order is made [66] by the Court, and not to proceedings in the Master's office by warrant and subsequent process, under a decree.

The last point is, that the person on whom the order was served is not to be considered the clerk in Court of these Defendants; there is, however, an ordinary proceeding for changing the clerk in Court by order; no such proceeding has been adopted in this instance, and therefore the clerk in Court has not been regularly charged.

It is then said that the Defendants had no knowledge of these proceedings; but in the affidavits it is perfectly clear that they had notice of the order made, and one of them has throughout expressed her determination not to produce these deeds. There does not appear to be any irregularity, and I must therefore refuse this application with costs.

[66] PERRY v. TRUEFITT. Dec. 8, 9, 1842.

The Leather Cloth Company v. The American Leather Cloth Company, 1865, 11 H. L. C. 523; 11 E. R. 1435 (with note); *Morgan v. M'Adam*, 1866, 36 L. J. Ch. 229; *Ford v. Foster*, 1872, L. R. 7 Ch. 625; *Singer Manufacturing Company v. Wilson*, 1876, 2 Ch. D. 461; *Johnston v. Orr-Ewing*, 1882, 7 App. Cas. 229; *Reddaway v. Banham* [1896], A. C. 209. As to *Gout v. Aleploglu*, 6 Beav. 69, n. See *In re Betherham's Trade Mark*, 1879-80, 11 Ch. D. 253; 14 Ch. D. 587.]

A ground on which the Court protects trade marks is, that it will not permit a party to sell his own goods as the goods of another; a party will not, therefore, be allowed to use names, marks, letters, or other *indicia* by which he may pass off his own goods to purchasers as the manufacture of another person.

A Plaintiff coming for an injunction in such a case appears to have been guilty of misrepresentations to the public the Court will not interfere in the first instance.

This was a motion for a special injunction to restrain the Defendant from selling a greasy composition for the hair, under the name of "Medicated Mexican Balm," under similar designations.

It appeared that, in 1836, a Mr. Leathart invented a grease or mixture for the hair, the secret and recipe for making which he sold to the Plaintiff, a hairdresser and barber residing in Burlington Arcade.

[67] The Plaintiff gave to the composition in question, the name of "Medicated

Mexican Balm," and sold it as "Perry's Medicated Mexican Balm." It having acquired an extensive sale and repute, the Defendant Truefitt (a rival hairdresser and perfumer living in the same place), had lately commenced selling a greasy composition, somewhat similar to that of the Plaintiff, in bottles, and with labels closely resembling those used by him. He designated and sold it as "Truefitt's Medicated Mexican Balm."

The Plaintiff thereupon filed this bill, alleging that the name or designation of Medicated Mexican Balm had become of great value to him as a trade mark: that its adoption by the Defendant was apt to deceive persons desirous of purchasing the Plaintiff's composition, and was very injurious to him. The bill prayed an account of the profits made by the Defendant, and for an injunction.

Though Mr. Leathart was the inventor, yet the Plaintiff, according to his own statement, used a printed shew card, in which he represented the article in question in the following terms:—"By special appointment—MEDICATED MEXICAN BALM, for restoring, nourishing, strengthening, and beautifying the hair, Perry, 12 and 13 Burlington Arcade, London. It is a highly concentrated extract from vegetable balsamic productions, of that interesting but little known country, Mexico, and possesses mild astringent properties, which give tone to weak and impoverished hair, and impart a glossy appearance to the naturally dull and harsh. Where there is a tendency to fall off, the Mexican Balm exerts its astringent qualities, and gradually but infallibly, braces the pores of the cuticle, and arrests the deterioration of the most beautiful ornament of the [68] human frame, a fine head of hair. *This admirable composition is made from an original recipe of the learned J. F. Von Blumenbach, and recently presented to the proprietor by a very near relation of that illustrious physiologist.*"

The application was supported and resisted by affidavits, in one of which, filed on the part of the Plaintiff, it was stated, that the Defendant's mixture being submitted to chemical analysis, was found to be "composed of lard and olive oil, perfumed with essential oils;" but that that of the Plaintiff "did not contain lard or any other animal fat."

It appeared also from an affidavit, that the Plaintiff had in many instances adopted the fanciful names invented for similar articles by the Defendant and other persons, he merely prefixing his own name thereto, as in the present case.

Mr. Pemberton and Mr. Trotter, in support of the motion. The Plaintiff had acquired the sole right of using the name invented by him, and of which he has had the uninterrupted enjoyment for six years. It has become a trade mark which the Defendant has no right to assume, and which this Court will protect. In *Milling v. Fox* (3 M. & Cr. 338), it was held that the Court "will grant a perpetual injunction against the use, by one tradesman, of the trade marks of another, although such marks have been so used in ignorance of their being any person's property, and under the belief that they were merely technical terms."

So in the "*Watch case*" (1 Chitty's General Prac. 721), "the Vice-Chancellor granted an injunction to restrain the Defendant from [69] sending to Constantinople certain watches with the word 'Pesendede,' in Turkish characters (meaning 'warranted'), in imitation of the watches of the Plaintiff, by which they had for very many years been distinguished, and by which he had obtained great credit in the Turkish trade." (1)

(1) *Gout v. Aleploglu*. V.-C. April 15, 1833.

Injunction to restrain a party from making and sending to Turkey watches having the Plaintiff's name or the word "warranted" engraved thereon in Turkish characters in imitation of the Plaintiff's watches.

This case seems to have been as follows:—The Plaintiff Gout had been accustomed to manufacture watches for the Turkish market, in which country they had acquired great repute, and were known by the marks engraved thereon, as after stated. The Plaintiff had been accustomed to engrave upon the inside of his watches, and in Turkish characters, his name, and the word "Pesendede," which signifies "warranted"

[70] We admit that when a party makes a new invention, and does not obtain the protection of a patent, any other person who can discover the process of the invention, may both make and sell the article; but what is complained of here is, that the Defendant not having discovered the ingredients of the Plaintiff's invention, sells a spurious article quite different from that manufactured by the Plaintiff under the name appropriated by the Plaintiff to his invention. He sells a composition of sand and olive oil, as the composition of the Plaintiff, which contains no animal fat. He sells an inferior article, and the trade and reputation of the Plaintiff is thereby injured. There is also evidence that the Defendant has represented the two articles as being the same, and that his own is the original. It could not be by accident that the Defendant adopted the peculiar name, his object could only have been to obtain himself the benefit of the character and celebrity of the article invented by the Plaintiff. The prefixing his own name does not remove the objection. The Defendant is committing a fraud on the Plaintiff, and an imposition on the public. This Court ought to restrain him from fraudulently using the words, adopted by the Plaintiff to distinguish his manufacture, for the purpose of attracting custom, which, but for such improper conduct on the part of the Defendant, would have gone to the Plaintiff; *see v. Morgan* (2 Keen, 213; and see *Day v. Benning*, 1 C. P. Cooper, 489).

[71] Mr. G. Turner and Mr. James Parker, *contra*. A party cannot acquire an exclusive property in a name; *Blanchard v. Hill* (2 Atk. 484), *Canham v. Jones* (2 Ves. 218); if there be any right, it is a legal right, which ought to be ascertained by proceedings at law, before this Court interferes by injunction. If the Plaintiff could establish such a right as that which he contends for, he would be in a better situation as a patentee after the expiration of his patent, who cannot prevent other persons from using themselves of his invention, or from selling the article by the same name. There appears also to be a usage amongst the trade to adopt any fanciful name invented by another party, if he merely prefixes his own name; and the Plaintiff, as appears from the affidavits, has adopted that practice in several instances, to the prejudice of the Defendant.

The Defendant has never pretended to sell his own manufacture as that of the Plaintiff, but a similar article merely; this he had a right to do. In every instance he carefully prefixed his own name to the article he sold, and sold it as "Truefitt's Medicated Mexican Balm," and not as "Perry's Medicated Mexican Balm." This is like the cases of *Sykes v. Sykes* (3 B. & Cr. 541), *Blofeld v. Payne* (4 Barn. & Ad. 1), where the Defendants had used the marks on the shot belts and the wrappers the bones in order to pass off their own manufacture as the Plaintiff's; so in *Kingdon v. Fox*, the mark used was the name of the Plaintiffs, and naturally designated them as the manufacturers of the steel made by the Defendant.

The false statements made by the Plaintiff to the public as to the invention, is approved." There was also R.G. and a crescent put in relief, and a sprig and acorn.

In 1831 the Defendant applied to the Plaintiff to undertake an order for the manufacture of watches to be consigned to Constantinople, but conceiving he might be his agent there, the Plaintiff refused to execute such order.

The Defendant afterwards got Messrs. Parkinson to manufacture watches for him, which there were engraved, in Turkish characters, the words "Ralph Gout" and "Pessendede" on the same part of the watch as those of the Plaintiff, and which the Defendant Aleploglu consigned to Constantinople, and sold there to the prejudice of the Plaintiff's trade.

Mr. Knight and Mr. Koe moved for an injunction.

Mr. Spence, *contra*.

The Vice-Chancellor granted an injunction in the terms of the notice of motion, restraining Aleploglu from sending or permitting to go to Constantinople and Turkey, or any other place, and from selling and disposing of any watches with the name of the Plaintiff thereon in Turkish characters, or the word "Pessendede" thereon in Turkish characters, or any watches in imitation of the Plaintiff's watches; and also restraining Aleploglu and Messrs. Parkinson from manufacturing or vending such watches. Reg. Lib. 1832, A. 1247.

fatal to his application for [72] an injunction. Though the invention is stated and proved to have been made by Leathart, the Plaintiff has represented to the public that "this admirable composition is made from an original recipe of the learned J. F. Von Blumenbach, and recently presented to the proprietor by a very near relation of that illustrious physiologist." It is also represented to be "a concentrated extract from vegetable balsamic productions of Mexico;" but that does not in any way appear to be the case. Now, in *Pidding v. How* (8 Sim. 477), the injunction was refused on the ground of the public misrepresentations of the Plaintiff as to the composition of a tea called "Howqua's Mixture." The Vice-Chancellor there says, "it is a clear rule laid down by Courts of Equity not to extend their protection to persons whose case is not founded in truth. And as the Plaintiff in this case has thought fit to mix up that which may be true with that which is false, in introducing the tea to the public, my opinion is, that unless he establish his title at law, the Court cannot interfere on his behalf."

Motley v. Downman (3 Myl. & Cr. 1. And see *Singleton v. Bolton*, 3 Doug. 239, and *Morison v. Salmon* (2 Man. & G. 385) were also cited.

Mr. Pemberton, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. The question in cases of this kind is, whether the Court should grant an injunction in the first instance, or should withhold its interference until the matter has been tried in a Court of law, to which jurisdiction the determination of the legal right properly belongs.

[73] I think that the principle on which both the Courts of law and of Equity proceed, in granting relief and protection in cases of this sort, is very well-understood. A man is not to sell his own goods under the pretence that they are the goods of another man; he cannot be permitted to practise such a deception, nor to use the means which contribute to that end. He cannot therefore be allowed to use names, marks, letters, or other *indicia*, by which he may induce purchasers to believe, that the goods which he is selling are the manufacture of another person. I own it does not seem to me that a man can acquire a property merely in a name or mark; but whether he has or not a property in the name or the mark, I have no doubt that another person has not a right to use that name or mark for the purposes of deception, and in order to attract to himself that course of trade, or that custom, which, without that improper act, would have flowed to the person who first used, or was alone in the habit of using the particular name or mark.

The case of *Millington v. Fox* (3 M. & Cr. 338) seems to have gone this length, that the deception need not be intentional, and that a man, though not intending any injury to another, shall not be allowed to adopt the marks by which the goods of another are designated, if the effect of adopting them would be to prejudice the trade of such other person. I am not aware that any previous case carried the principle to that extent.

In the present case the material facts do not appear to me to be in dispute. Some years ago the Plaintiff, Mr. Perry, became possessed of a recipe which he calls the secret for making a certain composition to encourage the growth of hair. To that composition he has given the name of "Perry's Medicated Mexican Balm." He says [74] that the term "Medicated Mexican Balm," to which he has prefixed his name, has acquired a character and reputation in commerce, by which his particular composition is distinguished, and that whenever the particular name of "Medicated Mexican Balm" has been used, it has been understood to mean the Medicated Mexican Balm of Mr. Perry, of which he has the sole secret. He says also, that nobody could well suppose there was any such composition other than that to which his name was attached. It is certainly is not very easy to see how that could be so, because all the words that are used in the phrase "Medicated Mexican Balm," are perfectly capable of being applied to a very different composition. It may be a *balm*, but not his balm; it may be *medicated*, but not medicated in his way; it may be *Mexican*, and yet not Mexican of the same sort or material as that which he uses. It is therefore difficult to suppose there could not be any other "Medicated Mexican Balm" than that to which the Plaintiff has given the name of "Perry's Medicated Mexican Balm." However, there is evidence, and evidence of considerable strength and importance to that effect, which is not denied.

The Plaintiff having sold this composition for several years, and derived considerable profit therefrom, the Defendant, Mr. Truefitt, a very few months ago, set up as manufacturer of "Medicated Mexican Balm." He is not, however, and does not pretend to be, the manufacturer or vendor of Perry's Medicated Mexican Balm, but the article which he makes and sells is by him designated as "Truefitt's Medicated Mexican Balm."

It is in no way denied that he has adopted the term "Medicated Mexican Balm" as the Plaintiff, or that he intended to derive some benefit from adopting the name, which, to the extent I have referred to, belonged [75] to the Plaintiff; but he says, he is, in the trade of perfumers to which he belongs, a general custom, that if any man invents a fanciful name for any article which he manufactures and sells for the trade, he never thinks, nor do the trade think that he has a property in that name, and that any other manufacturer has a right to adopt the same name, provided he only prefixes his own name to it as the manufacturer of the article so named. I should be very much surprised if it could be established that there was a custom of trade by which one man's property or rights could be transferred from him to another. In the case as this, if Mr. Perry alone had the peculiar right to this name, I should be surprised to find any custom of trade by which his right could be infringed upon: but however is the ground on which Mr. Truefitt says he acted; he says, "I have sold it in my own name."

There is, however, an imputation, that Mr. Truefitt sold his composition, alleging to be the manufacture of Mr. Perry. I believe, from the evidence, he intended seriously to guard against this: he seems to have thought that by prefixing the name of Truefitt to every article he sold, he prevented any imputation on him that he was selling Perry's article, and the care taken in that respect is remarkable. Even in the cases where the bottles of Perry were taken to be filled or *refilled*, as the cases state, Mr. Truefitt never allowed the bottles to go out of the shop with the name "Perry" on them, or otherwise than with his own name of "Truefitt" attached to them. The question is, whether in a case where there has not been, on the part of the Defendant, an intention to sell the article as the article manufactured by the Plaintiff, it is enough to induce the Court to grant the injunction? I think it is as the Plaintiff's [76] counsel stated, Truefitt is not accused of having sold the article as Perry manufactured, but of selling another article of a different kind, as and the article of Mr. Perry, distinguishing it by the name of "Truefitt's Medicated Mexican Balm," and without attaching the name of Perry to it, and that seems to be the point on which this case turns. Now it is a legal question to be determined at whether Mr. Truefitt had a right to do so or not; and I think, if the case rested on the merits alone, I should say that this motion ought to stand over, in order that the action might be brought to try the right; but when we see the representations made by Mr. Perry, I think they are conclusive against him on this application.

I entirely agree with the observation made by the Vice-Chancellor of England, in the case of *Pidding v. How* (8 Sim. 477) relative to Howqua's mixture of tea; I do think it is a favourable case for the interposition of this Court, to say the least when a party, having bought a secret invented by a Mr. Leathart, represents to customers and the world, that his "admirable composition is made from an exact recipe of the learned Von Blumenbach, and was recently presented to the Emperor by a very near relation of that illustrious physiologist."

The Plaintiff states also a circumstance, not in the least degree supported by evidence, that the composition is formed of vegetable balsamic production from Peru. There are other things, which I do not think it necessary to observe upon, but which make me think this is not a favourable case for a person to come in the first place and claim the assistance of a Court of Equity, in aid of a legal right, which I do not deny he may have.

[77] I think this case must stand over with liberty to Mr. Perry to bring an action, and either party must have liberty to apply.

NOTE.—The Plaintiff having taken no steps to try the action, the Defendant, on the 14th day of July 1843, applied for the costs of the motion, which were granted. The bill was then (with the consent of the Plaintiff) dismissed with costs.

[77] STRICKLAND v. STRICKLAND. *April 22, 23, 25, 27, 28, 29, August 4, 1842.*

[A note in the Addenda to 9 Beav. states that this case was affirmed by Lord Cottenham, January 27, 1848.]

In cases where there are outstanding terms, which may be set up in defence to the action, and prevent a trial of the real merits of the case, or where the facts are such, and of a nature so complicated that complete and effectual relief can only be given in equity, this Court will afford its assistance, and will, if the circumstances require it, first see that the legal requisites to the Plaintiff's title are established, and then give the necessary relief; but this must be upon a bill framed for the purpose, stating the difficulties, and praying the assistance of the Court to remove them. The cases of dower and partition are, however, exceptions to the rule.

Where a party sought in this Court to recover a real estate on the ground of his interest being equitable, but did not ask relief against any impediment to a trial at law, and it turned out at the hearing that his title was a legal title, the Court refused to retain the suit to enable the Plaintiff to establish his right at law by an action or issue, and dismissed the bill.

This case was argued by Mr. Pemberton, Mr. Bethell, and Mr. Heathfield, for the Plaintiff.

Mr. Kindersley and Mr. Shadwell, for the principal Defendant.

Mr. Turner and Mr. Koe, for other parties.

August 4. THE MASTER OF THE ROLLS [Lord Langdale]. This bill prays, that the will and codicil of Sir George Strickland, who died in 1808, may be established; and the trusts thereof carried into execution under the decree of this Court: and that it may be declared, that the Plaintiff, on the death of Walter Strickland, became [78] entitled, for his life, to all the estates (including the estates at Winteringham, East Haslerton, and Knapton), which are expressed by the will to be devised to George Strickland, Charles Strickland, and Walter Strickland respectively, but exclusively of the estates by the will devised to Charles Strickland, immediately or expectant on the death of Dame Elizabeth Letitia Strickland; and that the Defendant Sir George Strickland may be decreed to convey the same to the Plaintiff accordingly, and to account to the Plaintiff for the rents and profits thereof, received by him since the death of Walter Strickland, after deducting all payments made in respect of charges created by the will, and also to deliver to the Plaintiff the deeds and evidences of title of and relating to the same estates respectively; and that in the meantime, a receiver may be appointed of the same estates; and that it may be declared that the Plaintiff is entitled to cut down any timber, or to open and work any mines upon the estates to which he so became entitled for life; and that it may be declared that, under the circumstances in the bill mentioned, the Defendant Sir George Strickland is bound to settle and convey all the estates, lands, and hereditaments, in which the testator had any estate or interest (other than the estates which passed by his will), of or to which the Defendant Sir George Strickland became seized, or possessed, or entitled, under or by virtue of any will or settlement made previous to the date of the will of the testator Sir George Strickland, either directly or through Sir William Strickland, in such manner, that upon failure of issue male of Sir William, the same might remain to the other sons of the testator and their issue male (including the Plaintiff and his issue male) in succession, and on failure of such issue, in the same manner as the testator has, by his will, limited the rest of his estates in failure of issue male from him.

[79] Upon the hearing of this cause, it appeared to me that the title of the Plaintiff depended entirely upon the legal validity and effect of the will and codicil of the testator, and that he could not be entitled to any relief in this Court, until he had first established the validity of the devises by a proceeding at law.

It was then contended on the part of the Defendant Sir George Strickland, that the Plaintiff was not entitled to any relief whatever in this Court, and that, at all events, all proceedings in the cause should be suspended, till the Plaintiff had made out his title in an action; whilst, on the other hand, the Plaintiff contended, that his

title to the estates in question was an equitable title—that the circumstances of the case entitled him to relief here—and that, if it were necessary for him to establish the validity of the devise at law, it would be more convenient to do so on the trial of an issue, than on the trial of an action.

The question is, whether the bill is to be retained, and if so, whether it shall be retained for a year, with liberty for the Plaintiff to bring an action, or whether an order should be made for the trial of an issue.

Upon the facts which are in issue and proved in this case, I am of opinion, that the Plaintiff's title, such as it is, is a legal title, a title which may be made available at law in the ordinary course of legal proceeding, unless there be some obstacle, making it necessary and proper to ask for the assistance of this Court, and the bill be so framed as to entitle the Plaintiff to that assistance.

In cases where there are outstanding terms, which may be set up in defence to the action, and prevent a [80] trial of the real merits of the case, or where the facts are such, and of a nature so complicated, that complete and effectual relief can only be given here, this Court will afford its assistance, and will, if circumstances require, first see that the legal requisites to the Plaintiff's title are established, and then give the necessary relief; but this must be upon a bill framed for the purpose, stating the difficulties, and praying the assistance of the Court to remove them.

This is not the case in this suit. The bill states the Plaintiff's title, and that notwithstanding the devise under which he is entitled, the Defendant Sir George Strickland has taken, and holds possession of the estates in question, claims a right to receive the rents and apply them to his own use, and has possessed himself of the deeds. The bill does not allege, that the deeds are wanting to enable the Plaintiff to make out his title at law, or the seisin of the testator under whom he claims; but stating that the Defendant Sir George Strickland has refused to comply with the Plaintiff's request to give up possession of the estates and of the deeds, and to account for the rents, the bill proceeds to charge several circumstances, from which it is meant to be deduced, that the devise under which the Plaintiff claims, is to be deemed a valid devise; and, in effect, the Plaintiff seeks to recover possession of the estate, in this cause, by the strength of his own title here, not asking the assistance of this Court to relieve him from difficulties, which he may be unable to overcome at law without the aid of this Court.

It was argued, that if difficulties are shewn to exist, and if, from the nature of the case, it appears to be in the power of the Defendant to raise those difficulties, this Court will not only restrain the Defendant from [81] raising the difficulties, but will assume the whole jurisdiction over the case; and if this were so, the Plaintiff might be entitled to relief on this bill. But there is no such general rule; there are, indeed, some particular cases of legal right, such as dower and partition, in which the Court has assumed a general jurisdiction, probably in consequence of the difficulties which the Plaintiff would be subjected in seeking to obtain complete justice at law; but in other cases, the Plaintiff is to shew what the difficulties are, and how they impede him in a manner contrary to equity, and his bill ought to pray to be relieved from them.

In this case the bill does not contemplate any proceeding at law; it asks for no assistance in any trial, neither by the production of any deeds, nor by injunction from setting up outstanding terms, nor in any other way; and I am of opinion, that the Plaintiff has not shewn an equitable title—as it appears that the title by which he claims is a legal title—as he asks relief in this Court on the foundation of the equitable title which he alleges but has not shewn, and does not ask for the assistance of this Court in aid of any proceeding at law to recover upon a legal title, he is not, upon this bill, entitled to any relief here, and that therefore the bill must be dismissed.

Generally, in such a case the bill should be dismissed with costs; but having read the plea and the answer of Sir George Strickland to the original bill, and his plea and answer to the amended bill, and observing the mode in which his defence has been conducted in the pleadings and the allegations made in the answers, I think that, as against Sir George Strickland, the bill must be dismissed without costs. The other defendants are entitled to their costs.

[82] The cross-bill of Sir George Strickland must be dismissed without costs.

[82] BARKER v. COCKS. Feb. 23, 1843.

[See *Dean v. Handley*, 1865, 2 H. & M. 639.]

A testator gave a fund, subject to the life interest of his wife, to A., B., and C., equally to be divided between them, "but in case of the decease of C. without leaving lawful issue," he gave her one-third between A. and B. Held, that upon the decease of the wife, C., who was then living, became absolutely entitled to one-third of the fund.

Upon the marriage of James Nicoll Morris and Margaretta Sarah Cocks a settlement was made, whereby a sum of £17,000 3 per cent. Imperial annuities were settled on the husband for life, with remainder to the wife for life, with remainder to the issue, and, in default, as the husband should appoint.

There was no child of the marriage.

James Nicoll Morris, by his will dated in 1823, amongst other things, expressed himself as follows:—"And as to the sum of £17,000 3 per cent. Imperial annuities now subject to the trusts of my marriage settlement, and any monies which I may die possessed of in the Bank stock of this kingdom, I do hereby give and bequeath the same, from and after the decease of my said wife, unto my cousins John Bowden Morris and Margaret Penelope Morris and my sister-in-law Eliza Jane Cocks, equally to be divided between them, share and share alike; but in case of the decease of my said sister-in-law Eliza Jane Cocks, *without leaving lawful issue*, I do hereby give and bequeath her third part of the said stocks, funds, and securities equally between my said two cousins John Bowden Morris and Margaret Penelope Morris, and to their respective executors and administrators."

[83] The testator died in 1830. His widow, Margaretta Sarah Morris, died in February 1842.

By this bill, Eliza Jane Cocks (now Eliza Jane Barker) claimed to have one-third of the fund paid over to her.

Mr. Plunkett and Mr. Wickens, for the Plaintiffs, cited *Home v. Pillans* (2 Myl. & K. 15), *Galland v. Leonard* (1 Swan. 161), *Monteith v. Nicholson* (2 Keen, 719), *Griffith v. Smith* (1 Ves. jun. 97), *Bell v. Phyn* (7 Ves. 452), and see *Davenport v. Bishop* (2 Y. & Col. (C. C.), 463).

Mr. Glasse, for J. B. Morris and M. P. Morris; *Tilson v. Jones* (1 R. & M. 553); *Smart v. Clark* (3 Russ. 365).

Mr. Bates, for the trustee.

THE MASTER OF THE ROLLS [Lord Langdale]. I think that the Plaintiffs are entitled. The first object of the testator was that the three legatees should enjoy the property, share and share alike; each was to have an equal advantage with the others; but as to the one-third part of Eliza Jane Cocks, there is a gift over to the other two in case of her decease without leaving lawful issue. The question is, to what period of time does this event relate. If you make the dying without leaving lawful issue refer to the period anterior to the death of the tenant for life, you carry into effect the primary intention of the testator to divide the fund amongst the three, share and share alike.

[84] BONSER v. COX. August 1, 1842.

A creditor against two estates for the same debt, is entitled to receive dividends on the full amount from both estates, until he has been satisfied his debt.

THE MASTER OF THE ROLLS [Lord Langdale]. This suit was instituted for the administration of the estate of John Cox deceased, for the benefit of his creditors.

Sir Joseph Lock, who had been partner with Thomas Richard Walker, was a creditor of John Cox to the amount of £3200, for the payment of which he claimed a lien on a sum of £2982 stock, standing in the name of the Accountant-General of this Court, to the account of the testator's leasehold estate.

He had also a claim on a bill of exchange to which John Cox and others were parties.

And he had a collateral security from Ferdinando Cox and his wife, who transferred £30 long annuities into the names of Lock and Walker, as a guarantee for any which they might incur in and about the transactions with John Cox.

Sir Joseph Lock established his lien on the fund in this Court. The fund was ordered to be sold, and the money to be applied in reduction of the debt; and it was ordered, that Sir Joseph Lock should stand as a creditor on the general assets of John Cox for the balance and for his costs. The balance and costs having been ascertained, Sir Joseph Lock was, under the order, admitted a creditor for £50, 19s. 4d.

[35] Since his being admitted creditor for this sum, he has sold the long annuities assigned to him as a guarantee, and incurred some costs on account thereof; and he received, as a dividend on the estate of a bankrupt who was party to the bill of exchange on which John Cox was liable, the sum of £22, 12s.

This petition prays that the money received in respect of the long annuities may be applied in payment of any costs which Sir Joseph Lock may be entitled to be paid thereout; and that the residue thereof, together with the sum of £22, 12s., may be applied in satisfaction or reduction of the £459, 19s. 4d., for which he has admitted a creditor against the estate of John Cox.

I am of opinion that the Petitioner is not entitled to this relief. The £30 long annuities were a collateral security, and the produce is to be applied in payment of Sir Joseph Lock shall lose in respect of the transactions in question and certain. It is not to be applied in exoneration of the estate of John Cox. Whatever he received by Sir Joseph Lock, and applied otherwise than according to the order, he will be answerable for to Ferdinando Cox and wife, or those claiming for them.

And as to the £22, 12s., if it be obtained, as was stated at the Bar, from the estate of a person who was party to a bill of exchange to which John Cox was also a party, Sir Joseph Lock is entitled to payment of dividends out of both estates till his whole is satisfied; he is not to receive more than one satisfaction; but, until he is paid, he may stand as a creditor against the estate of John Cox, and also against the estate of Richard William Johnson, and receive dividends from both.

Dismiss the petition with costs. (See *Ex parte Wildman*, 1 Atk. 109, and *In re Bower*, 1 Phillips, 56.)

[36] CHOLMONDELEY v. LORD ASHBURTON. March 1, 2, 1843.

[S. C. 12 L. J. Ch. 337.]

Now, as such, cannot take under a limitation to the next of kin of her husband according to the Statute of Distributions.

On marriage settlement, the ultimate limitation of a fund was to such persons "as should, at the decease of the husband, be entitled to his personal estate, as his next of kin, according to the statute for the distribution of personal estate of persons dying intestate, if the husband had died intestate without having been married to his wife. The wife died, and the husband married again and died. Held, that the widow took nothing under this limitation.

On the marriage of George James Cholmondeley with Catherine Francis, his wife, a sum of £10,000 belonging to the former was settled upon the husband, and the children of the marriage; and in case of there being no children (which indeed) the fund was to be held on the trust following:—"In trust for such persons as would, at the decease of the said George James Cholmondeley, be entitled to his personal estate, as his next of kin according to the statutes for the distribution of personal estate of persons dying intestate, if the said George James Cholmondeley had died intestate without having been married to the said Catherine Francis."

There were no children of the marriage. George James Cholmondeley survived

Catherine his wife, and contracted a third marriage with the Defendant Mary Elizabeth Townsend (now Countess of Romney). He died in 1830, leaving two children as next of kin, viz, the Plaintiff, the only surviving issue of his first marriage, and the Defendant Frances Sophia Cholmondeley, the only issue of his third marriage.

The question in the cause was, whether, under the ultimate limitation, the widow of George James Cholmondeley was entitled to participate in the £10,000, or whether it belonged exclusively to his children, as his sole next of kin.

Mr. Pemberton and Mr. Tripp, for the Plaintiff; and

[87] Mr. Kindersley and Sir Walter Riddell, in the same interest, contended that the wife was not of the blood or kindred of her husband, and could not therefore take under a limitation to his next of kin.

They cited *Wilby v. Mangles* (4 Beavan, 358), *Watt v. Watt* (3 Ves. 244), *Gore v. Lord Camden* (14 Ves. 372), *Elmsley v. Young* (2 Myl. & Keen, 82, 780). 21 B. 8, c. 5, s. 3, and 22 & 23 Car. 2, c. 10.

Mr. Turner and Mr. Stinton, *contra*, argued that the widow of the third marriage was entitled to share in the fund. They cited *Hardwick v. Thurston* (4 Rum. 3) and *Bailey v. Wright* (18 Ves. 49).

Mr. Williams, for an executor.

THE MASTER OF THE ROLLS [Lord Langdale]. Cases of this kind are never satisfactory, in consequence of the popular meaning which in common parlance is attached to the words "next of kin according to the statute."

If the words "next of kin" had been omitted, I should have no doubt that the widow would be then entitled; but, having been inserted, I must give them full effect, and look for the persons whom the law designates by that expression. It is that the wife is not one of the next of kin. The whole is given amongst the next of kin, and the two children are therefore entitled if it be the fact that there were no children of the second marriage, and no appointment. Those facts must be ascertained.

[88] THE EARL OF LICHFIELD v. BOND. March 15, 16, 1843.

[S. C. 12 L. J. Ch. 329; 7 Jur. 209.]

Where a Plaintiff, by his bill, seeks a discovery of matters which might subject the Defendant to a criminal prosecution, and also seeks other legitimate discovery, it is his duty to separate the two; for if they be so mixed up or connected, that a discovery by inference or exclusion they may lead to a disclosure which might subject the Defendant to prosecution, he is not bound to answer any portion of it.

The bill in this cause prayed the delivery up of two bills of exchange, alleged to have been given for gambling, and for an injunction to restrain an action to be brought by the Defendant thereon.

The bill was filed in November 1842 and stated, "that the Defendant James Bond of No. 54 St. James Street, in the county of Middlesex, for some time previously to and on the 26th day of July 1841 kept a gambling-house for playing illegal games of chance and hazard at No. 54 St. James Street aforesaid."

That the Plaintiff lost £800 "at play and gambling in such illegal games of chance and hazard, at the said gambling-house;" that "in consideration of the money so lost, and of money alleged to have been lent to him for payment of such losses," the Plaintiff accepted and delivered to the Defendant the bills in question; and that the Defendant had commenced an action at law against the Plaintiff on such bills of exchange.

The bill further stated, that the Defendant pretended that the bills had been given for good and valuable consideration, whereas the Plaintiff charged the costs and it charged that the Defendant "ought, by his answer, to set forth in particular what consideration, and whether in money or money's worth, and if in money's worth, stating the dates, numbers, amounts, and particulars of all such bills, notes, or other orders or securities for money; and if in money's worth, stating in particular the pro-[89]-perty, articles, and things, with their respective descriptions, values, and amounts, and from whom obtained by him, and gave for the said bills respectively, and to whom, and on what day, and time of



lay, and in what places, and in whose house, and in whose presence respectively, stating the names, places of residence, and description of every person there present when he gave such consideration." It charged, that if the said Joseph Bond gave any consideration for the bills or either of them, it was but a nominal and inadequate consideration, and given colourably; and that if any considerable amount was paid, or the greater or some part thereof was paid back again, or in some manner returned, satisfied, accounted for, or secured, or an equivalent or nearly an equivalent hereof was returned to Joseph Bond, or some person or persons connected with him, or the same was lent for, and applied with the knowledge of Joseph Bond, in payment of losses by gambling, and for the purpose of unlawful gambling; and that a portion thereof was advanced, or in any manner applied for the lawful purposes of the Plaintiff.

That the Defendant was not in the habit of receiving bills of exchange in his trade, and that he ought to set forth what was and is the course and nature of his business and transactions, but that he was engaged in bill transactions for the accommodation of persons gambling and playing at games at hazard and chance, and in bills, notes, and securities for money lost and won at play, and for money lent or advanced for payment of money lost at play, and to be used for gambling, and other such purposes. The bill also charged, that the Defendant kept books in which were entries relating to the winnings and losses in his house.

[90] These and other similar statements and charges were interrogated in the usual manner, and the Defendant was required to answer them.

The Defendant, by his answer, merely stated that the Plaintiff had accepted the bills in question, and delivered them to the Defendant, who had commenced an action thereon; and with the exception of the bills and the proceedings in the action, he denied the possession of any documents "in the bill mentioned, and in his answer answered unto;" and "without admitting the truth of any of such matters, he declined to answer any of the other matters in the said bill mentioned, and inquired after and not thereinbefore answered unto, the Plaintiff, as the Defendant was advised and submitted and humbly insisted, not being entitled to any answer thereto from the Defendant."

The Defendant having wholly omitted to answer the other parts of the bill, the Plaintiff took twenty-two exceptions for insufficiency, which the Master however allowed; and the cause now came on upon exceptions taken by the Plaintiff to the Master's report.

Mr. Pemberton and Mr. Willcock, for the Plaintiff, in support of the exceptions, is clearly settled that this Court has jurisdiction to order securities given for money lost at play to be delivered up; *Rawden v. Shadwell* (Ambler, 269), *Wynne v. Alexander* (1 Russ. 293); and it has the power of compelling a discovery necessary for proving the Plaintiff's case; *Andrews v. Berry* (3 Anstruther, 634).

[91] The reason the Defendant objects to answer is, because he may be subject to penalties, but where the time limited for suing for the penalties has expired, a Defendant is bound to answer, and can no longer claim any protection; *Parkhurst v. Owen* (1 Mer. 400), *The Corporation of Trinity House v. Burge* (2 Sim. 411). In this case the time has expired, 31 Eliz. c. 5, s. 5.

The Statute of Ann (9 Ann. c. 14, s. 3) enacts, that persons liable to be sued shall be compellable to answer on oath, and this Act has been extended by the Act of George the Second (18 G. 2, c. 34), which enables a party to have relief as well as recovery in equity.

The statement of the Defendant's keeping a gaming-house is merely descriptive, and forms no part of the equity relied upon as the foundation for the relief claimed by the Plaintiff. The principal part of the matter which is unanswered has no relation whatever to that fact. The Defendant is bound to set forth the consideration given for the bills, &c.

Lastly, the objection to answer is not properly taken. The Defendant does not state that the discovery will render him liable to any penalty.

Mr. G. Turner and Mr. Toller, *contra*. The keeping of a gaming-house is an offence at common law, for which the Defendant might be indicted, *The King v. Rogier* (1 Bar. & C. 272). The answer of the Defendant to these interrogatories, would all

tend to lead a jury to the conclusion that the Defendant was guilty of that [92] offence. Where an answer would render, or tend to render a party liable upon a criminal matter, he is not bound to answer the facts, or any link in the chain of proof; *Padon v. Douglas* (16 Ves. 239, and 19 Ves. 225), *Maccallum v. Turton* (3 Y. & Jer. 183), *Southall v. —* (Younge, 308), *Glynn v. Houston* (1 Keen, 329), *The Earl of Suffolk v. Green* (1 Atk. 450).

This is not a proceeding under the Statute of Ann, brought within the three months, and that statute does not relieve the Defendant from the penalties attached to the common law offence for keeping a gaming-house.

If any of the interrogatories, taken alone, might be safely answered; yet in this case they are so connected with the imputed offence, that it would be impossible to answer them with safety. They exhaust all lawful consideration for the bill, and leave, by inference, that connected with the gaming-house. It was the duty of the Plaintiff so to have framed his pleadings as to keep the two separate.

Mr. Pemberton, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. Having regard to the particular relief sought, and disregarding some of the objectionable allegations contained in the bill, it appears to me that several of the questions comprised in the interrogating part are such as the Defendant might lawfully be required to answer, but that is not the question here. The question to be determined is, whether, upon this bill, framed as it is, [93] and containing the allegations which it does contain, the Defendant is bound to answer all or any of these questions.

I cannot conjecture what reason induced the Plaintiff to insert some of the allegations contained in this record. The fact that the Defendant kept a gambling-house at No. 54 St. James's Street, is certainly not the foundation for the relief prayed, yet the first thing positively stated in the bill is, that this Defendant for some time previously to, and on the 26th of July 1841, kept a gambling-house for playing at illegal games, at No. 54 St. James's Street. This is not a mere description of the Defendant's house, or of where he is to be found, but a distinct and positive allegation, that at the time stated the Defendant kept a gambling-house for playing at illegal games. This undoubtedly is an indictable offence, and is one most pernicious to society. There is scarcely any offence which leads to greater mischief, yet by this bill the Defendant is charged with having committed it. The next allegation in the bill is, that the Plaintiff lost £800 by playing and gambling at such illegal games at the said gambling-house, and these bills of exchange are then connected with the illegal transactions which took place at this house. The bill goes on to charge a great variety of circumstances relating to the bills, which are calculated to obtain from the Defendant the discovery, either that this was a gambling-house kept by the Defendant, or to exhaust all other means by which the Defendant might have obtained the bills, and all other valid considerations for them, and so leave the necessary inference (everything else being excluded), that this was a gambling transaction, and as the Plaintiff says, committed at this house.

[94] It is perfectly true, as has been argued that this, in reality, is not the foundation for the relief. It is impossible to conjecture why it was inserted; but there is the statement standing upon this record in connection with a great variety of others, and a discovery required of these matters which more or less directly tend to shew that this was a gambling transaction committed in this very gambling-house. Now I cannot help thinking, that in a case of this sort there may be just and legitimate grounds for seeking relief and discovery and yet there are circumstances in respect of which discovery ought not to be sought, and which the Defendant is not bound to give.

It is the duty of the Plaintiff in framing his record, and in asking for discovery, to separate the matters to which he is entitled to an answer, from those which he cannot legally call upon the Defendant to discover. My attention has not specifically been called to all the interrogatories, and pending an argument, it is impossible to read them through with that attention which a case of this kind requires; but my impression is, that the subjects in respect of which discovery might have been legitimately asked for, and which the Defendant was bound to give, are more or less mixed up with interrogatories and questions, which the Defendant is not bound to answer.

if answered, they might lead to discovery tending to subject him to prosecution or penalties. I think that this ought not to have been done. If upon looking at the interrogatories, and the statements on which they are founded, I find interrogatories quite distinct and independent from the criminal matter, it may be right to call upon the Defendant to answer them; but if they are not distinct and independent, which I think is the case with regard to those to which my attention has been particularly called, but are mixed up with other matters, or so connected with them, either by way of inference, or by way of exclusion, that they might lead to a disclosure of circumstances which would subject this Defendant to be prosecuted for the offence in which he is charged, then I think the doctrine of this Court would induce me to say that these exceptions to the Master's report must be overruled.

I will look over the bill. If I find any interrogatories distinct and unconnected with the criminal matter, I will mention it to-morrow; if not, the exceptions to the Master's report will be overruled.

March 16. THE MASTER OF THE ROLLS [Lord Langdale]. I have read over the bill in this case, and I find that the charge of the offence is more intimately connected with all the discovery sought, than I collected during the argument. The exceptions must therefore, be overruled. (See *Lee v. Read*, 5 Beavan, 381, and *The Attorney-General v. Lucas*, 2 Hare, 566.)

[96] COTTON v. COTTON. Dec. 22, 1842.

In the instance of the mortgagee of the reversion, the Court declined making a stop order on deeds brought into the Master's office under a decree.

This was a petition for the common stop order on funds in Court, and that the same might not be delivered out of the Master's office without notice to the petitioner.

Under a will, A. M. Cotton was entitled to the rents of a property *durante viduitate*, under the decree in this cause requiring the production of all deeds, &c., before the Master, the deeds in question had been produced under a warrant of the Master. The Petitioner was a mortgagee of the reversion of the fund and of the estate, the only question was, as to his right to a stop order on the deeds.

Mr. Stratton argued, that as the deeds had been brought into Court "for the settling of all perils, and the indifferent custody of them," *Dixies v. Hillary* (Cary, 26), the encumbrancer on the reversion was entitled to have them secured for his benefit, at least to an order that they should not be parted with without notice to him.

THE MASTER OF THE ROLLS [Lord Langdale] said, that the deeds had been brought into Court under the decree, and merely for the purposes of the suit. That would produce great complication to make such an order, and that as there seemed no authority for it, he must decline making one.

[97] CALVERT v. GODFREY. Dec. 23, 1842; Jan. 12, 13, 14, March 13, 1843.

C. 12 L. J. Ch. 305. See *Lachlan v. Reynolds*, 1853, Kay, 56; *In re Howarth*, 1873, L. R. 8 Ch. 417, n.; *In re De Teissier's Settled Estates* [1893], 1 Ch. 163.]

Court has no authority to sell the real estate of an infant, or to convert it, upon the notion that it would be beneficial.

When property is sold under a decree, and there is jurisdiction to sell, mere irregularities and errors in the proceedings will not invalidate the sale, or prevent a good title from being made under the decree.

A purchaser under a decree, to whom a good title could not be made, discharged from the purchase, with his costs, charges, and expences, including the costs of his petition to be discharged.

A person who had freehold, copyhold, and personal estate, died in September 1832, leaving an infant heir. His estate was insufficient to pay his debts and charges.

His partners, however, by deed, took upon themselves to pay all the debts, and secured the principal part of his property for his family. A suit was instituted for carrying the deed into execution, and the Master found that it would be for the benefit of the infant heir, that the real estate should be sold and applied in the manner mentioned in the deed. A decree was made for sale, and the infant was declared a trustee within the 1 W. 4, c. 60. Held, that a sale under the decree could not be enforced; that the Court had no jurisdiction to order the sale; that the infant was not a trustee within the Act; that the purchaser was not bound to wait till the error was corrected, and the Court therefore discharged him with his costs, charges, and expenses.

In this case, Miss Watson, the purchaser of a copyhold estate under the decree of the Court, by petition, prayed to be discharged from her purchase, on the ground that there was no jurisdiction to order the estate to be sold, and of certain alleged defects of title.

The estate belonged to Mr. Charles Calvert, who died intestate in the month of September 1832. At the time of his death, he was a trader subject to the bankruptcy laws, and was entitled to certain freehold and copyhold estates, and to a large personal estate.

He was also largely indebted, and was liable to the performance of covenants, the performance of which might, after his death, have been enforced as against his copyhold estates.

For the purpose of this application, and under the circumstances, the Court thought that it ought to assume that the intestate's freehold, copyhold, and personal estates were, in the aggregate, insufficient for the [98] payment of all his debts and liabilities, and consequently, that if the estate had been administered under the strict rules of law and equity, the whole would have been sold and disposed of, the debts and liabilities would have been but in part satisfied, and nothing would have been left for the intestate's heirs and next of kin, and that this would have been the result of a regular proceeding to sell and marshal the assets for payment as far as they would extend, of all the debts and liabilities.

In this state of things, and soon after the intestate's death his surviving partners proposed an arrangement for the full payment of all his debts, and for securing a provision for his family, and for the purpose of carrying this arrangement into effect a deed, dated the 15th day of May 1833, was executed.

By this deed, after reciting that the whole real and personal estate would fall very short of answering the debts and liabilities, it was further recited, that the surviving partners, out of regard to the memory of the intestate, and the interest of his family, proposed, that such measures should be taken, that the whole of the real and personal property (exclusive of his share in the partnership effects and property, and exclusive of a life-estate which belonged to his widow), should be secured and applied for the benefit of his family, and that the whole of his debts should be paid in full out of the capital and property of the partnership, or by the surviving partners; and after further reciting, that the freehold estates were liable to the payment of the simple contract, as well as the specialty debts, and that by marshalling the assets, the copyhold estates might be applied towards satisfaction of an annuity of £1700, which the intestate had covenanted to pay to his widow; and that such provision as therein mentioned was made for payment of all [99] the debts, it was agreed, that the freehold, copyhold, and personal estate of the intestate (with such exception as therein mentioned), so far as by law might be done, should be sold under the direction of a Court of Equity, and that the money to arise from the sale should be invested in the purchase of stock, and the dividends applied towards payment of the annuity, according to the intestate's covenant; and that after the widow's death, the capital should be divided equally among the children. The surviving partners were to apply the amount of the intestate's interest in the partnership assets, as far as it would extend, in satisfaction of all his debts, and they engaged, personally, to pay all the debts which could not be so satisfied; and they further engaged, personally, to satisfy so much of the widow's annuity as the other means contemplated by the deed were insufficient to pay, and that, whether the

states could be sold or not; and they also, by way of free gift, made a further revision of £12,000 for the children; and it was arranged, that a suit in equity should be instituted for the purpose of carrying the arrangement into effect.

A bill was accordingly filed, on the 7th of June 1833, by the widow and two of the children of the intestate, alleging that it would be beneficial to the children and all persons interested in the estate that the arrangement should be carried into effect. It was prayed, that an account might be taken of the intestate's personal estate: that a proper fund might be set apart to answer the annuity of £1700 due to the widow: that, if necessary, the real estate might be sold, for the purpose of raising such fund: that the debts of the intestate might be paid out of the personal estate, as far as was consistent with the deed of arrangement, in a due course of administration: that it might be ascertained, whether it was for the benefit of the children that the deed should [100] be carried into effect, and in that case, that the surviving partners of the intestate might be ordered specifically to perform the stipulations in the deed: that it might be declared, that the freehold and copyhold estates of the intestate were, under the settlement made on his marriage, charged with and subject to the payment of the annuity of £1700, thereby provided for his widow or her jointure: that it might be inquired of what freehold and copyhold estate the intestate died seised or entitled, and to which of his children the same had descended: that proper directions might be given for the sale of the freehold and copyhold estates of the intestate, or such part thereof as the Court should direct, and for the payment of his debts, and the marshalling and application of his assets and real and personal estates, for the benefit of his creditors and the other parties interested therein, and for other and consequential relief.

By the decree, dated the 24th of July 1833, it was ordered that an account should be taken of the intestate's personal estate, debts, and legacies; and that the Master should inquire, whether the surviving partners had paid any of the intestate's debts; and if they had, it was declared that they were entitled to stand in the place of the creditors whose debts they had paid, without prejudice to the deed of arrangement, and as to the partnership debts, not to a greater extent than the intestate's estate, as between them and the intestate, was liable. And the Master was to inquire of what freehold, copyhold, and leasehold estates the intestate was seised, possessed of, or entitled at the time of his death, and which were subject to any encumbrances, and who had received the rents. And it was declared, that the jointure or rent charge of £1700 to the widow, was a good charge on the freehold, copyhold, and per-[101]sonal estates of the intestate. The freehold estate was ordered to be sold, and the Master was to inquire, whether it would be for the benefit of the children, that the indenture of arrangement should be carried into effect, supposing the copyhold estate to be sold under the deed, or supposing that the same should not be so sold, whether it would be more for their benefit that the copyhold estate should or should not be sold, pursuant to that arrangement.

On the 20th of February 1839 the Master made his report upon the several matters referred to him; and, amongst other things, he stated his opinion to be, that it would be for the benefit of the children of the intestate that the deed of arrangement should be carried into effect, whether the copyhold estates should be sold under the arrangement or not, but that it would be more for their benefit, that the copyholds should be sold pursuant to the arrangement, than that the same should not be sold; and it appeared that no creditors remained unsatisfied, the debts having been paid by the widow or the surviving partners acting for her.

By the decree on further directions, dated the 28th of March 1839, it was declared, that it would be for the benefit of the infants that the deed of arrangement should be carried into effect; and after directing the freeholds to be sold pursuant to the former decree, it was declared, that it would be for the benefit of the infant that the copyholds should be sold, with the approbation of the Master, to the best purchaser, and that all proper parties should join in the sale, and that the money arising from the sale should be paid into the bank to the credit of the cause; and it was declared, that after the sale and payment of the purchase-money arising from the copyholds into Court, the infant De-[102]-fendant, Charles Calvert, as the

customary heir of the intestate's copyholds, held of the Manors of Isleworth Syon Isleworth Rectory and Twickenham, would be a trustee for the purchaser under the Act 1 W. 4, c. 60; and he was ordered to execute such surrender and assurance as should be proper and approved by the Master.

Under this order, and another order dated the 11th of June 1841, a manor house and lands at Whitton, being part of the intestate's estates, and partly freehold and partly copyhold of three several manors, was put up to sale, and was purchased by the Petitioner for £9450. She was let into possession, but being nevertheless allowed to object to the title, she stated several objections by her petition, and prayed to be discharged from the contract.

Mr. Kindersley and Mr. Selwyn, in support of the petition. Where a person purchases property under a decree of the Court, and it can be shewn that there is a material error in the decree, he will not be held to his purchase, but the Court will discharge him, *Lechmere v. Brasier* (2 Jac. & W. 287). The same authority shews that the purchaser is not bound to wait until the error has been corrected.

In the present case, the Court had no authority to sell the estate of the infant. The sale was not directed at the instance of the creditors, but for the purpose of carrying out an arrangement which it was conceived would be beneficial to the family. But an infant's inheritance is never bound by any discretionary act of the Court, *Taylor v. Philips* (2 Ves. sen, 23). In *Simson v. Jones* (2 Russ. & M. 3 [103]) it was held that the settlement by the Court, of an infant's leasehold was binding. Sir John Leach said, "This Court has no authority to give an infant a power of alienation even for her own benefit." (And see *Russel v. Russel*, 1 Molloy, 525.)

Though the intestate was a trader, still his copyhold estates were not renderable to his debts, either by the 47 G. 3, c. 74, or by the 1 W. 4, c. 47, which subjected to debts, the real estate of a trader, "which would be assets for the payment of his specialty debts," which copyholds were not. The Act of the 3 & 4 W. 4, c. 104, does not apply, as it passed subsequently, and the only way of reaching copyholds would be by marshalling the assets, as it appears that the annuity of the wife was a charge on the copyholds. The decree is erroneous in not declaring the intestate to be a trader within the Acts, in not directing the proper accounts, and in declaring the infant a trustee within the 1 W. 4, c. 60, which he evidently was not: besides this, the Court proceeded on the notion that the eldest son was the customary heir, whereas, as to some part of the property, the youngest filed his claim.

They also contended that the mode of taking the accounts before the Master appeared to be erroneous.

Mr. Pemberton and Mr. Sidebottom, *contra*. No fraud or collusion is suggested in this case; and, therefore, the very important question is, what are the rules of the Court in cases of purchases under its decrees, and how far has a purchaser the right to enter into the correctness of the proceedings, and object to the orders and decrees.

[104] The rule is this, that a purchaser is not bound by any irregularity in the proceedings, provided the proper parties are before the Court. All he has to do is that the decree is made in the presence of all proper parties, and then, whether they be infants or adults, they are all bound by the decree of the Court. *Lloyd v. Jones* (9 Ves. 37), *Curtis v. Price* (12 Ves. 89), and *Bennett v. Hamill* (2 Sch. & Lef. 100), in which Lord Redesdale says (page 576), "The principal question in this case is one of considerable importance, whether a sale, under a decree of a Court of Equity is to be impeached on the grounds on which this is sought to be impeached. Of all it is stated, that this is a case in which the heir of the debtor, as not being of age, ought to have had a day to shew cause against the decree, and for that reason, that the decree necessarily required his joining in the conveyance of the estate. I incline to think that that was so, that the decree in that respect was erroneous, and that there ought to have been a day to shew cause. And the objection is, that there was no sufficient account of the personal estate, and that the proceedings before the Master were a fraudulent contrivance between the Master and Johnson." Lord Redesdale, after saying that the latter was a trustee, which would require investigation, proceeded:—"But as to Hart's representation

and Hamill, the question is, whether they are persons who can be affected, supposing the circumstances to be clearly true as stated, namely, that there was error in the judgment of the Court in not giving a day to shew cause, and error also in directing sale under the circumstances. Now, on that subject I must confess, after considering this a good deal, I think it would be too much to say, that a [105] purchaser under a decree of that description can be bound to look into all these circumstances; if he is, he must go through all the proceedings from the beginning to the end, and save the opinion of the Court that the decree is right in all its parts, and that it would be impossible to alter it in any respect. The cases warrant no such opinion. On the contrary, as far as I can find, the general impression they give is, that a purchaser has a right to presume that the Court has taken the steps necessary to investigate the rights of the parties, and that it has, on that investigation, properly decreed a sale; then he is to see that this is a decree binding the parties claiming the estate, that is, to see that all proper parties to be bound are before the Court; and he has further to see, that taking the conveyance, he takes a title that cannot be impeached *aliunde*."

It would be absurd after the Court has pronounced its decision, to allow a mere purchaser to reargue the case by way of appeal.

In this case it is not necessary to decide on the abstract power of the Court over the real estates of infants, for if the rights of the parties had been worked out, the estate would have appeared insolvent, and a sale would be inevitable. The intestate covenanted to secure the £1700 a year out of his real and personal estate, the covenant constituted a lien on his copyholds, and the other creditors would have been entitled to have the assets marshalled.

The Court, in various instances, has bound the rights of infants in respect of their real estate. In *Wall v. Bushby* (1 Bro. C. C. 484) it was held, that an infant was bound by a [106] decree taken by consent, though there was no reference to the father; and in cases of election the Court will elect for an infant, and sell the real estate for that purpose.

If an error exists it can be removed within a reasonable time, and an opportunity ought to be given for that purpose.

They also cited *Lutwyche v. Winford* (2 Bro. C. C. 248), *Lightburne v. Swift* (2 Ball. & B. 207).

Mr. G. Turner and Mr. Willcock, in the same interest, cited *Mallack v. Galton* (3 P. Wms. 352).

Mr. Kindersley, in reply.

March 13. THE MASTER OF THE ROLLS [Lord Langdale]. There are three objections to the decree or order on further directions. First, that the sale of the copyholds is directed merely because it was deemed to be beneficial to the infant, and that the Court has no authority to do. Secondly, that this is a case not within the statute of 1 W. 4, c. 60, and, consequently, that the decree is erroneous in declaring the infant Charles Calvert to be a trustee within the true intent of that Act. Thirdly, that in fact Charles Calvert was not customary heir of so much of the land as was sold of the manor of Isleworth Rectory and Twickenham.

The first objection depends upon the jurisdiction of the Court. The Court may order real estates vested in [107] infants to be sold to satisfy the demands of creditors, or to give to *cestuis que trust* the benefit to which they are entitled, but it has no authority to convert the real estate of infants into personalty, or to sell the real estate vested in an infant upon the notion that the conversion or sale would be beneficial to the infant himself, or to himself and others.

In this case it appears to me, that creditors, unfettered by any contrary obligation of their own, might have been aided by the authority of this Court in the sale of this estate, and that in a proceeding adapted to the purpose, a good title might have been made under a decree.

But the widow and the surviving partners are the only persons having legal claims upon the estate, and they have entered into the deed of arrangement, according to the provisions of which, all the creditors were to be paid, and the annuity of the widow was to be fully satisfied, whether the copyholds were to be sold or not.

From the authorities which were referred to in the argument, it is apparent, that

if there be jurisdiction to sell, mere irregularities and errors in the proceedings will not invalidate the sale or prevent a good title from being made under the decree; and in this case I have not thought it necessary to consider several alleged errors in the mode of taking the accounts, and calculating the claims on the estate. Such errors, even if proved, would not have availed the Petitioner.

But if there was no person who had a right to call upon the Court to sell the estate for the satisfaction of a claim, then it is clear, that in substance as well as in words and form, the sale was ordered only on the ground [108] of its being beneficial to the infant to sell, and I think that this is not within the jurisdiction of the Court.

Now, by the deed of arrangement, the surviving partners were to apply the amount of the intestate's interest in the partnership assets, as far as it would extend, in satisfaction of all his debts, and they engaged, personally, to pay all the debts which could not be so satisfied, and they further engaged personally to satisfy as much of the widow's annuity as the other means contemplated by the deed was insufficient to pay, and in this manner, they provided that neither the creditors (by marshalling), nor the widow, under the covenant, should resort to the real estate intended to be saved for the children, and if this were all, there could be no question but that the sale was asked for and ordered only for the benefit of the children.

But then it was part of the argument, that in order to affect the copyhold premises, and to obtain a sale thereof, or the application in manner aforesaid of the rents, and for all the purposes consistent with the arrangement, and more especially as far as might be necessary to effectuate such arrangement, the debts which should be paid by the surviving partners were to be considered, not as discharged, but as kept on foot for their benefit subject to the arrangement, and that they should stand in the place of the creditors whose debts they had paid, or in place of the widow who, as administratrix, had paid the same, and also in the place of the widow in respect of monies paid to her on account of her annuity under her marriage settlement.

The object of this part of the agreement was not to enforce a legal or equitable right for the payment of the [109] debt, but, if practicable, to take advantage of the right (which without the agreement would have existed), merely for the purpose of effecting the arrangement, for the benefit of the children which the agreement was intended to secure to them, and even under this clause, the only foundation for an order to sell was, that the sale would be beneficial to the infant.

I do not think that this is a case of election, in which the Court having the duty of electing for the infant, can, as the result of the election, direct the real estate to be sold. It was I think justly argued, that if an infant entitled by descent to real estate could have a case of election raised by a proposal to do something for his benefit, no case could arise in which means might not be found to give the Court jurisdiction to sell the estate of an infant.

And on the whole, after a consideration of the deed of arrangement, of the facts and scope of the pleadings, of the decree and of the report, I think, that the order for the sale of the copyholds was founded solely upon the Master's finding, in conformity with the plain intention of the parties and the real facts of the case, that it would be beneficial to the children that the sale should be made; and looking at the whole arrangement, I think there can be no doubt that the sale would be beneficial to the customary heirs individually. But it appearing that the Court has not jurisdiction to sell the real estates of infants, on the ground that the sale is beneficial to them, I think that the order ought not to have been made, and that a sale under it cannot be enforced.

This being my opinion, it is the less material to consider the other objections, but I think I ought to state, that it does not appear to me that the case comes within [110] the provisions of the statute 1 W. 4, c. 60, and if it did, I think that the purchaser could not have been compelled to wait till an error so material as the declaration of a wrong person being trustee for the purchaser was corrected.

On the whole, therefore, and without entering into the particular objections as to the title, I think that the Petitioner is entitled to be discharged from her purchase, and to have the stock arising from the investment of the purchase-money paid into Court transferred to her.

And it must be referred to the Taxing Master to tax her costs, charges, and expenses incurred in respect of the purchase, including the costs of this petition, the money retained by the auctioneer must be repaid to her, and she must give up possession and account for any rent she has received.

[110] *BONSER v. COX. Dec. 9, 10, 12, 1842; March 13, 1843.*

[S. C. 4 Beav. 379; 49 E. R. 385; 10 L. J. Ch. 395; on appeal, 13 L. J. Ch. 260; 8 Jur. 387.]

... became surety for B. to C. for a sum "for value received by a draft at three months' date." C. (without the concurrence of A.), at once paid the amount to B., instead of giving the draft at three months. Held, that the agreement had been varied, and that the surety was therefore discharged.

This case is reported (4 Beavan, 379), and the Lord Chancellor having referred the matter back to the Master, it now came on upon exceptions to his second report.

Mr. Anderdon, for Messrs. Morrell.

Mr. Pemberton and Mr. Dixon, for the Plaintiff.

[111] Mr. Shebbeare, for the executors.

March 13. THE MASTER OF THE ROLLS [Lord Langdale]. Davies and Richard Cox were partners in the iron trade, Richard Cox and the Morrells were partners as bankers.

In October 1831 four bills of exchange for £500 each, drawn by Davies on Richard Cox, and accepted by him, payable in three months, were nearly due, and another bill of exchange for £750, on which Davies and Richard Cox were liable, was also nearly due.

John Cox, in order to enable Richard Cox to obtain from Cox and Morrells money herewith to meet two of the £500 bills, and to enable Davies and Richard Cox to provide for the £750 bill, joined Richard Cox in signing two promissory notes, one for £999 and the other for £750, to Cox and Morrells, and each of these notes was expressed to be given "for value received by a draft at three months' date."

When this case was first before me (4 Beavan, 379), it was admitted, First, that John Cox was a mere surety. Secondly, That the notes of John and Richard Cox were given for the purpose of enabling Richard Cox and Davies, respectively, to meet two of the £500 bills, and provide for the £750 bill. Thirdly, That the money was to be raised by discounting the drafts, which were intended to be the consideration of the promissory notes; and 4thly, That in point of fact the drafts were not given.

[112] Messrs. Morrell alleged, that although the drafts were not given, they advanced money to satisfy the bills which were outstanding against Davies and Richard Cox, and thus accomplished the purpose which was intended by the whole transaction, and gave to the principal debtor the benefit and accommodation which the surety intended to procure for him.

The executors of John Cox, on the other hand, insisted 1st, That it was not proved that Cox and Morrell had made any advance to pay the bills which were intended to be satisfied, and 2dly, That if it were proved that they had advanced money to pay those bills, the advance had not been made in such a way as to give to the principal creditor the three months' credit, which it appeared upon the face of the promissory note the surety had contracted for.

Messrs. Morrell did not contend that their alleged advance was made any other way than by direct payments on account of Davies and Richard Cox, to the full amount of both the sums for which John Cox had become surety. They said, that they had applied the money in paying the bills which John Cox intended to have satisfied. They did not allege that their payments were made subject to any deduction or discount, or were made on any special contract as to the repayment.

And on the other hand, the executors of John Cox did not allege that Messrs. Morrell had so paid the money as to get the bills which were intended to be satisfied into their own hands, with an immediate right of suing upon them.

In this state of circumstances, I overruled the exceptions, on the ground that the

advance if made by the [113] Messrs. Morrell, was not made in a manner to give the principal debtor any credit whatever. The outstanding bills which the surety intended to have paid, were in fact paid and satisfied, and as Messrs. Morrell alleged, were paid and satisfied by them; but the money wherewith such payment was made instead of being raised by the discount of a draft which had three months to run and in respect of which the principal debtor could not have been sued till the time had expired, was immediately advanced, by a direct payment, to the full amount of the account of Davies and Cox, in such a way as to give Cox and Morrell an immediate right to charge Davies and Cox in account with the full amount of the advance, and this being contrary to the apparent intention of the surety, he appeared to me to be released from his liability. The only question upon the facts stated by Messrs. Morrell was whether a surety, who makes himself liable for a loan to the principal debtor to be made in such a way as to secure to the principal debtor the months' credit, is to be held liable, when the loan is so made as not to give that credit.

The case went before the late Lord Chancellor, but unfortunately was so pressed upon him as not to obtain a decision upon that which was then the only question.

His Lordship was led to suppose, that it had been alleged here, that an equivalent for the drafts mentioned in the promissory notes had been given, by an advance deducting discount, that nothing had been omitted but the mere ceremony of giving the drafts and discounting them, Messrs. Morrell having in fact advanced the money less the discount, in such a way as to give to all parties the precise benefit for which they stipulated, and to preclude themselves from making any immediate [114] demand till the time of the intended credit had expired; and upon that supposition, His Lordship expressed his dissent to an opinion which he understood to have been stated here, though in fact no such opinion had been expressed, and though the facts upon which such opinion was supposed to have been formed, had never been stated or alleged.

On the other hand, his Lordship was led to suppose that it had been contended by the executors of John Cox, that the money advanced by Messrs. Morrell was advanced for the purpose of getting possession of the bills and obtaining an immediate right to sue upon them.

So that before his Lordship it appeared to be a question of fact; 1st, Whether Messrs. Morrell had advanced a sum of money deducting discount in such a way as to preclude themselves from the right of demanding or suing till the time of credit had expired; or, 2dly, Whether they had so advanced the money as thereby to obtain possession of the bills intended to be satisfied, with an immediate right to sue upon them.

I do not think it necessary to make any remark upon the singular notion that the money was anywhere considered to be immaterial what answers were given to these questions. With the impression made upon the mind of the Lord Chancellor, it was necessary to refer the exceptions back to the Master.

And at present, when the Master has made his further report and exceptions have again been taken, we are substantially in the same situation as before.

The executors of John Cox did not before, and do not now contend, that Messrs. Morrell so advanced the [115] money as to obtain an immediate right of suing upon the bills which were intended to be satisfied.

And Messrs. Morrell did not before, and do not now contend, that the money was advanced less the discount, or after deducting the discount, or on any special agreement or arrangement.

But they contend, as before, though on an altered state of facts, that they advanced the full money in satisfaction of the bills intended to be satisfied, and argue that in doing so, they did not release the surety.

And the executors of John Cox contend, as before, 1st, That there is no proof that the money was advanced in satisfaction of the bills; and, 2dly, That if the money was advanced in the manner alleged by Messrs. Morrell, it was not so advanced as to secure the principal debtor the credit which the surety intended for him, and that the surety is therefore released.

The Master has by his report, dated the 28th of June 1842, allowed the sum of £750 and interest as a debt due from the estate of John Cox to James and Edward Morrell, and has disallowed the claim of Messrs. Morrell to the sum of £999.

The Messrs. Morrell have taken exceptions to the Master's disallowance of their claim of £999, and the Plaintiffs have excepted to the Master's allowance of the debt of £750.

This case comes on upon exceptions to the Master's report. One exception taken by Messrs. Morrell on the ground that the Master has disallowed the claim made by them against the estate of John Cox deceased to the [116] amount of £999, and another exception taken by the Plaintiffs, on the ground that the Master has allowed claim made by Messrs. Morrell against the estate of John Cox to the amount of £750.

With respect to the exception of the Messrs. Morrell, it appears, that they agreed to advance the sum of £999 or £1000 on having a joint and several promissory note of John and Richard Cox deposited with them as a security, that in this transaction, John Cox was a mere surety for Richard Cox or for Davies and Cox, and that the advance was not to be made by a direct payment in money, but was to be obtained by the discount of a bill which had three months to run, and that this being the agreement upon which John Cox assumed his liability and became surety, the arrangement was varied without his authority, and the advance was made directly, and in such a way as to create no credit at all as between the bank and Davies and Cox. It was so made, as not to give to Richard Cox or to Davies and Cox any free and sure credit for any time whatever. Three months had been stipulated for, and the advance was so made as to create a debt of which payment might have been immediately demanded. This matter is stated in the affidavits of Mr. Robert Morrell, sworn on the 14th of November 1838, of James Robert Morrell, sworn on the 6th, and of Robert, sworn on the 8th of December 1841. It is not alleged that John Cox was a party to the arrangement said to be afterwards made; and I think that his position and his interest was or might be materially affected by it. A man may have reason to believe, that a person in pecuniary difficulty may effectually redeem his name if allowed time, and may be willing, on the assurance of the required time being allowed, to become surety for the payment of a particular debt at the end of that time, and yet would not become surety, unless such time were fully assured to the principal debtor. These are circumstances, which a person advancing money on the security and claiming the benefit of the suretyship does not appear to be to have any right to alter. It is not enough that he voluntarily forbears to demand payment during the time for which the surety had stipulated; the surety did not intend to rely on his forbearance, but rested on an agreement or condition that the principal debtor should have the time assured to him, and should thereby have assured and not a precarious freedom during that time. His conduct for his own protection might be materially affected by the difference, and if that stipulated time was not given, and no agreement of the surety to waive it is shewn, it appears to me that the situation of the surety is improperly altered and that he is released. *Bacon v. Chesney* (1 Stark. 192).

THE MASTER OF THE ROLLS next examined the evidence as to the £750, from which he concluded that John Cox was a surety for Richard Cox and proceeded:—It is clear that Richard Cox did not receive a draft at three months, which was intended for John Cox. The money was so taken, as, upon the acquiescence of the Messrs. Morrell, an immediate and direct advance of the whole sum, and therefore in this case, as well as in the case of the note for £999, I think that John Cox the surety was released.

The question is of considerable importance, and I think it very much to be regretted, that the parties did not avail themselves of the opportunity which they had, of obtaining the opinion of the late Lord Chancellor upon the subject. I should have been anxious to be guided by his judgment. They pursued a course, which has brought the subject back to me without that assist-[118]-ance, and seeing no sufficient reason to alter the opinion I before expressed, I must adhere to it.

The exception of Messrs. Morrell is overruled and the exception of the Plaintiffs is allowed.

NOTE.—The case afterwards came before the Lord Chancellor upon appeal, who affirmed the decision on the 9th of March 1844.

[118] EVANS v. WILLIAMS. May 2, June 7, 14, 1842.

The Plaintiff filed a traversing order. The Defendant afterwards made default in appearing at the hearing. Held, first, that the Plaintiff was not entitled to take as of course, such decree as he could abide by, but must go through his case and take such decree as to the Court might appear just; and secondly, that service of the traversing order must be proved by affidavit.

The Plaintiff obtained an order to file the traversing note (4 Beav. 485) under the 21st General Order of August 1841. (Ord. Can. 170.)

The cause came on for hearing, when the Defendant made default in appearing, and the Plaintiff, on the 2d of May, took such decree as he could abide by, which, under the 44th General Order of August 1841 (Ord. Can. 177), is absolute in the first instance.

Some doubt having, however, been raised as to the regularity of this decree, the cause was mentioned again on the 7th of June, when the first question was, whether it was necessary to prove the service of a copy of the traversing order, and, secondly, whether under the General Orders, the Plaintiff was entitled, upon the Defendant making default in appearing, to take such decree as he could abide by, or whether it was necessary [119] to go through the case, in order that the Court might make such order as might be just, as in the case of a bill taken *pro confesso*. (See *Gentry v. Sheridan*, 8 Ves. 191. *Molesworth v. Lord Verney*, 2 Dick. 667. *London v. Reed*, 1 Sim. & St. 44. *Collins v. Collyer*, 3 Beav. 600.)

Mr. W. M. James argued that it was not usual to produce an affidavit, at the hearing of a cause, as to any proceedings which had been taken therein. That the Court, where it was necessary, had always depended on the certificate of the St. Clerk that all the previous proceedings were regular; and, further, that the evidence alone taken in the cause and no affidavit, could properly be inserted in the decree.

He submitted, secondly, that as the traversing order had the same effect, "as if the Defendant had filed an answer traversing the whole of the bill, and the Plaintiff had filed a replication to such answer, and served a *subpoena* to rejoin," the Plaintiff was entitled, as in other cases, where the Defendant made default, to such decree as he could abide by.

THE MASTER OF THE ROLLS. This is quite a new proceeding, and the cause had therefore better be put in the paper on Tuesday next.

June 14. The cause was again mentioned, when

THE MASTER OF THE ROLLS [Lord Langdale] held, that it was necessary to prove by affidavit, the service of a copy of the traversing note, and that the Plaintiff was not entitled [120] to take such decree as he could abide by, but must open and prove his case.

Mr. W. M. James then went through the Plaintiff's case, and the Court made such decree as it thought just.

[120] JEWIN v. TAYLOR. July 7, 1842.

A bill containing offensive statements ordered, by consent, to be taken off the file.

Mr. Bacon moved to take a bill off the file with the consent of all parties. He stated that this was a family suit; that the bill contained offensive statements and allegations; and that the parties having compromised were all desirous that the bill should be removed from the records of the Court. He cited *Tremaine v. Tremaine* (1 Vern. 189), in which "the cause was between father and son, and there having been great heat and indecent reflections on both sides in bill and answer, and the matter being ended by compromise, upon motion made in Court by Mr. Porter, the bill and answer were taken off the file, by consent."

THE MASTER OF THE ROLLS [Lord Langdale] made the order.

[121] CARTWRIGHT v. SMITH. Jan. 11, 1843.

The Plaintiff submitted to a demurrer by omitting to set it down within twelve days, and the V.C. ordered him to pay the costs of suit. The Plaintiff afterwards obtained at the Rolls an order of course to amend, suppressing in his petition the order of the Vice-Chancellor. It was discharged for irregularity on the ground of the suppression.

On the 6th of August 1842 one of the Defendants, Smith, filed a demurrer to the bill.

The Plaintiff did not set it down for argument within twelve days, in consequence of which, under the 34th Order of August 1841 (Ord. Can. 174), it was "held to be silent, and the Plaintiff was held to have submitted thereto."

On the 15th of November the Vice-Chancellor, to whose Court the suit was removed, made the usual order for the taxation of Smith's costs of the suit, and for payment thereof by the Plaintiff.

On the 25th of November the Plaintiff obtained, upon petition at the Rolls, an order of course to amend the bill as against all the Defendants.

This order was obtained on the simple allegation, as to the Defendant Smith, that he had appeared and filed a demurrer on the 6th of August. The petition wholly omitted any mention of the order of the Vice-Chancellor.

Mr. Pemberton and Mr. Piggott, for the Plaintiff, moved to discharge the order to amend. They cited *Mackenzie v. Claridge* (see 6 Beav. 123).

Mr. Torriano, *contrâ*. There is a distinction between a demurrer being *allowed*, and a demurrer being *submitted* to. Where a demurrer is submitted to, the Plaintiff is at liberty to amend his bill on payment of [122] costs.⁽¹⁾ The order of the Vice-Chancellor is erroneous, as it is only upon the "*allowance* of a demurrer," that the Plaintiff is entitled to his full costs under the 31st Order of April 1828. (Ord. 17.)

If the Plaintiff has acted wrong, it has been in consequence of a slip of the solicitor, and is not considered that the Long Vacation was not to be reckoned.

THE MASTER OF THE ROLLS [Lord Langdale]. I think that this order is irregular, as it was obtained, as of course, on an imperfect statement of facts, suppressing which was most material, viz., the order of the Vice-Chancellor.

The order was made here on the suggestion, that a demurrer had been filed, and not been set down, there being at the time an order of the Vice-Chancellor, which exists, directing the costs of the demurrer and suit to be paid by the Plaintiff. The fact was wholly suppressed.

I cannot say that the order of the Vice-Chancellor was irregular, I am bound to treat it as a valid order until it has been discharged.

As to the right of a Plaintiff to amend his bill and prosecute his suit against a Defendant, where it has been terminated by a slip in not setting down the demurrer, and by no means prepared to say that he may not be allowed to do so, upon setting opposite party right as to costs; but the real facts and circumstances of the [123] must be brought forward and stated to the Court, in order that it may be enabled to exercise its judgment on them.

This motion must be granted.

NOTE.—The rule is different in the case of a plea. If the plea be allowed or submitted to, the parties may nevertheless go into evidence to prove and disprove facts relied on by the plea. See *Robert v. Jones*, *post*, M.R. 21st December 1843. (May. 57, 266.)

(1) See *Warburton v. The London and Blackwall Railway Company*, 2 Beav. 253.

[123] MACKENZIE v. CLARIDGE. July 7, 1842.

Where a Plaintiff neglects to set down a demurrer within the twelve days, the Defendant is entitled to his costs of suit and demurrer, and an order for them will be made *ex parte*.

In this case the Defendant filed a demurrer. The Plaintiff neglected to set it down within twelve days, and, therefore, under the 34th Order of August 1841 (Ord. Can. 174), it was deemed to have been submitted to.

Mr. Bacon moved, *ex parte*, that the Plaintiff should pay to the Defendant his costs of the demurrer, and also his further costs of this suit.

THE MASTER OF THE ROLLS [Lord Langdale] made the order. (Reg. Lib. 1841, B. 1400.)

[124] KING v. WILSON. Feb. 20, 1843.

[See *Manson v. Thacker*, 1878, 7 Ch. D. 624; *Green v. Sevin*, 1879, 13 Ch. D. 599.]

A tenant in possession purchased the property, which was represented to be forty-six feet in depth; it turned out to be thirty-three only. Held, that he was entitled to an abatement.

Though time be not of the essence of a contract, it may be made so by notice, when there has been great and improper delay on one side in completing. It may however be waived by proceeding in the purchase after the expiration of the time fixed by the notice.

On the 20th of July 1841 the Defendant, who was the tenant and occupier of a certain freehold house and premises at Islington, agreed to purchase the same from the Plaintiff, and by the terms of the contract, the purchase was to be completed on the 23d of August 1841.

The particulars stated the property to be *forty-six feet* in depth, when, in fact, the depth was only *thirty-three feet*.

The abstract was delivered on the 31st of July, and was returned with requisitions and objections on the 10th of August. One of these required proof of the vendor's descent. To meet this, the certificate of the marriage of the vendor's parents was furnished, which shewed that they were married on the 21st of March 1794, and this was accompanied by the certificate of the vendor's baptism on the 1st of June 1794, but which stated that he was born on the 17th of April 1794. The draft of a solemn declaration under the Act (5 & 6 W. 4, c. 62), as to this matter, was also sent. The evidence was not satisfactory to the purchaser, who required either the next brother of the vendor to join in the conveyance, or the bond of indemnity of some responsible person.

On the 1st of September the vendor stated that he had no better evidence to offer, nor any corroborative proof, for both the medical man and nurse were dead. He declined the proposal of the purchaser and threatened to file a bill.

[125] Some further correspondence, which is not material, took place between the parties, and ultimately, on the 18th of September, the purchaser wrote to say, that if the objection as to the insufficiency of the proof of the descent was not removed within a week, he should consider himself no longer bound, and of this he thereby gave formal notice.

The vendor afterwards offered to give an indemnity, which proposal the purchaser entertained, but, on the 28th of September, objected to the person proposed, and insisted that he was no longer bound by the contract. On the 15th of November the vendor furnished the solemn declaration of a party present at the marriage, but the purchaser refused to renew the subject, and this bill for the specific performance was in consequence filed on the 27th of November 1841.

The cause now came on for hearing. The Plaintiff entered into no evidence in

the cause as to his descent, and the Defendant insisted that the contract had been put an end to, and also that the abstract furnished did not go back far enough.

Mr. Pemberton and Mr. S. P. White, for the Plaintiff, asked for a reference to the Master as to the title, and as the Defendant had raised an untenable defence that the contract had been rescinded, they argued that the Defendant should, at once, be ordered to pay the costs up to the hearing.

Mr. Kindersley and Mr. Dunn, *contra*, contended that as the Plaintiff had failed to comply with the reasonable requisition of the purchaser, within the time limited by the contract and by the notice, the contract had been put an end to.

[126] Secondly, that the conduct, default, and *laches* of the Plaintiff had been such as to disentitle him to any relief in this Court.

Thirdly, that if the purchase was to proceed, then, that there having been a great representation as to the quantity of the land sold, the purchaser was entitled to compensation for the deficiency in quantity.

Fourthly, that no special order ought to be made as to the costs up to the hearing, especially as the suit had originated from the default of the Plaintiff in furnishing satisfactory evidence as to his descent.

Mr. S. P. White, in reply. The Defendant is not entitled to any compensation for the erroneous description. He was tenant and in possession of the premises, and he knew what the property was which it was the intention of the Plaintiff to sell, which he intended to purchase.

Taylor v. Brown (2 Beav. 180), and *Hyde v. Dallaway* (4 Beav. 606), were cited.

THE MASTER OF THE ROLLS [Lord Langdale]. The first question in this case is, whether the contract has been put an end to. Now, I am clearly of opinion that much time may not be of the essence of a contract, yet where there is great and proper delay on one side, the other party has a right to fix a reasonable time in which the contract is to be completed; that time will then be considered by the Court as having become of the essence of the contract; and in case the party in default in doing what is right and [127] proper on his part, within the time fixed, it will be a reason why this Court will not afterwards interfere in his favour to compel the execution of the contract.

The question is whether those circumstances occur in the present case. I cannot think that the conduct of the vendor in this case was not satisfactory with respect to the proof required of his legitimacy. The first certificate stated the date to have taken place in March, and the certificate of the baptism (which is evidence whatever of the birth), shews the baptism to have taken place in April following. It therefore seems to have been necessary to inquire very minutely into the circumstances, and when the birth really took place. The correspondence is not material, until we come to the 1st of September 1841. There was then a real objection, and the only mode proposed for removing it, was by tendering the declaration of the mother. I do not think it material that the declaration was sent without signature, and without having gone through the usual formalities, though it is a very good reason for returning it in order that it might be perfected. The parties did not agree upon the mode of removing the objection; the purchaser's agent on the 18th of September says, "If this objection is not removed within a week, I shall consider my client no longer bound, and of this I beg to give you notice." Now I must say, that under the circumstances, this was rather too strict a time, it was not reasonable to require everything to be done within a week. However that might be, I think that under the circumstances of this case, the contract was not put an end to; for we find these gentlemen (meaning, I daresay, the parties to the correspondence should be continued without any prejudice) afterwards proceeding in the matter, and considering whether a satisfactory indemnity could not be given; in which [128] event, it is not disputed, the contract might be completed with regard to the letter fixing the time within which it was to be done; so that there was something which might have been done, after the expiration of the time fixed, by means of which the contract would have been completed. It appears to me that under the circumstances that the contract is not put an end to.

The next consideration here is, whether the conduct of the Plaintiff has been such, that the Court in its discretion will refuse to grant a specific performance. Now

really the whole question under discussion between the parties, and in issue in the cause, or nearly so (for although other objections have been spoken of, yet they have not been stated in a way to make me attach any weight to them), was as to the legitimacy of the Plaintiff. When the Plaintiff was called upon to prove it, I think it would have been better to have procured the necessary proof at once, but I do not think that the circumstance of not having done so is a reason why this bill should be dismissed, especially when the Defendant, by his answer, insists that the contract was put an end to, and not on the default in procuring the requisite evidence. Seeing that there is an existing contract, I think there is no reason why it should not be specifically performed.

The next question is as to the compensation, and I am of opinion that compensation ought to be given. The depth sold is forty-six feet, whereas the vendor had only thirty-three. It is said that no deception could have been practised, because the Defendant was in possession of the premises, and, being in possession, he must have known that it was a mistake, and that there were only thirty-three feet. Now I don't know that [129] persons in the occupation of premises are in the habit of measuring them; I think you would find very few persons who know the exact depth and frontage of their premises. The purchaser had it stated to him that the property was forty-six feet in depth, and it is a remarkable circumstance, that the particular having stated forty-six feet in depth, the abstract of title describes the premises as thirty-three feet. That was objected to immediately. It is said you have described it as forty-six feet when in point of fact there are only thirty-three. What was the answer made by the solicitor of the vendor? In substance it is this, recently there has been an admeasurement and by the admeasurement it appears that there are forty-six feet. Was the Defendant then to blame in not going to ascertain and measure it? I cannot say he was. The representation was in perfect conformity with the particulars, and I see no reason at all why he was to test the reiterated representation by an actual admeasurement. Further, I see no reason for thinking that the purchaser might not have formed his plans as to the property, with reference to the notion that there were forty-six feet in depth.

It has been urged, with great ingenuity, that the excess of representation being very great (thirteen out of forty-six), ought to have attracted the attention of the purchaser, but why did not the vendor, who ought to have known something about the matter, and who had caused a recent admeasurement to be made, communicate to the other side that it had been ascertained to be thirty-three, and not forty-six feet? I think on the whole that there is a right to compensation.

The other question is with respect to the costs of the cause up to the hearing; some things have occurred in [130] this case, from which I think that the Plaintiff is not entitled to those costs. There must be a reference to the Master as to the title, and to ascertain the amount of compensation, and the costs must be reserved.

[130] NEEDHAM v. SMITH. Dec. 22, 1842; Jan. 19, 20, 1843.

Where a guardian *ad litem* of a person of unsound mind, though not so found by inquisition dies, a special application is necessary to obtain the appointment of a new guardian, and an appointment by an order of course is irregular.

In 1839 the Defendant, John Needham, was of unsound mind, though he had not been found lunatic by inquisition, and the Court in that year appointed Mr. Hunt to be his guardian, to defend the suit. (1)

In August 1842, Hunt having died, an order was obtained, as of course, whereby, on the humble petition of John Needham, a person of unsound mind, Thomas

(1) See Redesdale (4th ed.) 103, 104; *Howlett v. Wilbraham*, 5 Mad. 423; *Lee v. Ryder*, 6 Mad. 294; *Brooks v. Jobling*, 2 Hare, 155; Ord. Can. 217; 1 Dan. Pr. 320, 248; *Easterby v. Henwick*, Reg. Lib. A. 1835, fol. 5; *Smith v. Annesley*, Reg. Lib. B. 1833, fol. 398; *Mayo v. Wright*, Reg. Lib. B. 1836, fol. 86; *Miller v. Smales*, Reg. Lib. B. 1828, fol. 1759.

Fainwright was assigned guardian of the Petitioner in the room of Hunt, deceased. His order was obtained, as of course, and without any evidence as to the present capacity of John Needham.

A motion was made to discharge the order, on the ground of the irregularity. Affidavits were filed as to the present mental competency of the Defendant.

Mr. Turner, in support of the motion.

[131] Mr. Koe and Mr. Terrell, *contra*.

Mr. Pemberton, for the Plaintiff.

THE MASTER OF THE ROLLS [Lord Langdale] was of opinion that it was regular to obtain the order as of course. He said, that where a party was found insane by inquisition, he was presumed to remain so during the existence of the commission; but where the lunacy had not been so found, and the Court took on itself to appoint a guardian *ad litem*, then the Court presumed that the same state of mind continued so long as the guardian retained the authority committed to him; then, however, that authority ceased, even by the death of the guardian, the resumption in favour of sanity revived. That as the present order ought not to have been obtained except upon a special application, it ought therefore to be discharged.

His Lordship also adverted to the evidence of present sanity, and said, that if it had been brought to the notice of the Court, the order complained of would not have been made.

[131] BASSFORD V. BLAKESLEY. Jan. 27, 1842.

[See *Republic of Costa Rica v. Erlanger*, 1874, L. R. 19 Eq. 45.]

Where deeds are impeached for fraud, the mere allegation of fraud by the bill will not entitle the Plaintiff to an order for their production; on the other hand, in order to obtain a production, it is not necessary that the fraud should be admitted by the answer, the Court must look at the circumstances of each case. An order made for the production of a deed impeached for fraud, though the fraud was denied by the answer, the case on the whole being such as to render an inspection proper.

This suit was instituted for the purpose of setting aside a series of conveyances early voluntary obtained by a nephew from his aged uncle.

[132] In 1837 the Plaintiff lost his only daughter, in consequence of which (as was alleged), he became overwhelmed with grief. The Plaintiff at this time was nearly seventy years of age, and possessed estates of considerable value; and, in April 1838, he conveyed one of those estates to the Defendant, his nephew, reserving thereout a life-estate only, and an annuity of £100 a year for any wife he might marry.

In June 1838 the Plaintiff conveyed a second estate to the Defendant, reserving thereout a life interest; and in June 1839 he granted to the Defendant a lease of the property during the Plaintiff's life at an inadequate rent.

In August 1840 the Plaintiff being on the point of marrying again, released to the Defendant the annuity of £100 a year; and, in December following, he also conveyed to the Defendant his life-estate. In these different transactions a small and mere colourable consideration was purported to be given; but, in the result, the Plaintiff completely denuded himself of the whole of his property, worth more than £14,000 in favour of the Defendant.

The Plaintiff alleged that these deeds had been obtained by fraud, deception, and undue influence, and that the Defendant had procured them by practising on the fears and weakness of the Plaintiff.

The Defendant by his answer, which was of considerable length, though he denied these allegations, stated that the Plaintiff had long entertained a great regard for the Defendant, who was his heir apparent, and had long determined to provide for him; but the conveyances had been made by his uncle of his own free will out of regard to the Defendant, and for some other [133] consideration, with the assistance of a

separate solicitor on each several occasion. The case, however, made by the Defendant himself was one of great suspicion. The answer set out the conveyances at some length, and admitted them and the title-deeds to be in the Defendant's possession.

Mr. Moore, in support of the motion.

Mr. G. Turner, *contrà*, resisted the production of the conveyances, which were the Defendant's title-deeds. He argued that the mere allegation of fraud was not sufficient to entitle the Plaintiff to the production; that as the fraud had been denied by the answer, and as the deeds in question would not prove the Plaintiff's case, he was not entitled to see them. He cited *Tyler v. Drayton* (2 Sim. & St. 309), *Kennedy v. Green* (5 Sim. 6. And see *Balch v. Symes*, Turn. & Russ. 87. *Neale v. Latimer*, 2 You. & C. (Exch.) 257; 11 Bli. 112, and 4 Cl. & Fin. 570).

THE MASTER OF THE ROLLS [Lord Langdale]. I perfectly agree, that where a Plaintiff alleges that deeds have been obtained by fraud, and the answer entirely denies the fraud and states the deeds, the Plaintiff is not, in that situation of things, entitled to an order for their production.

On the other hand, it is not necessary, in order to entitle the Plaintiff to the production of the deeds, that the Defendant should admit that there has been fraud.

The Court must look to the circumstances of each case, and looking to the circumstances under which these deeds have been obtained, I think it is quite reasonable that the deeds should be produced. Here [134] are conveyances from an old man under very extraordinary circumstances and almost without consideration. It is said these are the Defendant's title-deeds, but, according to his own statement, he has no title except what he derived by gift from the Plaintiff. I think that the Plaintiff should be at liberty to see what he has done, and that the Defendant should produce these deeds.

I agree with the rule stated by the Defendant's counsel, that a Plaintiff is not, upon a mere allegation of fraud, entitled to the production of deeds which have been impeached; but here is not only the allegation of fraud, but circumstances which shew me that the Plaintiff is fairly entitled to have the matter inquired into.

NOTE.—The cause afterwards came on for hearing on the 30th of April 1842, when upon concessions being offered by the Defendant, the case was compromised.

[134] TARBUCK v. TARBUCK. Dec. 16, 22, 1842.

A petition was presented in the names of A. and B., but without the authority of C. Held, that having regard to the rights of the Respondents, the petition could not be ordered to be taken off the file on the application of A.

Mr. Ward, a solicitor, presented a petition in the names of Hannah Tarbuck and Francis Tarbuck.

A motion was made on behalf of Hannah Tarbuck, that the petition might be taken off the file, or that her name might be struck out, and that all proceedings might be stayed. The ground upon which the application was made, was, that Mr. Ward had no authority to act for Hannah Tarbuck.

Mr. Rolt, in support of the motion.

[135] Mr. Pemberton and Mr. Rogers, *contrà*.

Wiggins v. Peppin (2 Beav. 403), *Lord v. Kellett* (2 Myl. & K. 1), were cited.

A similar motion was made on behalf of Francis Tarbuck.

THE MASTER OF THE ROLLS [Lord Langdale]. I am of opinion upon the affidavits that Francis Tarbuck never withdrew his authority to Mr. Ward until after the petition was in the paper, but I think that Hannah Tarbuck had withdrawn her authority. Hannah Tarbuck asks that the petition may be taken off the file, having regard to the interest of the Respondents who are entitled to have some order made on it, I think that this cannot be done, and that the only order that I can make is, that Hannah Tarbuck's name ought not to be used.

[135] LORD MOSTYN v. SPENCER. Jan. 26, Feb. 22, 1843.

[S. C. affirmed on appeal, 14 L. J. Ch. 1; 9 Jur. 97.]

depositions suppressed after publication, on the ground that one of the Commissioners was the nephew and agent of the Plaintiff.

The fact of publication having passed, or the death of the witness, will not prevent the suppression of the depositions, when the Commissioner is disqualified by interest, provided the application be made within a reasonable time after the discovery of the objection.

This was a motion on behalf of the Defendant, that the depositions of a witness examined under a commission on behalf of the Plaintiff, might be suppressed for irregularity.

By the decree made in the cause, certain inquiries were directed, and a commission being become necessary to examine witnesses on behalf of the Plaintiff, an order for such commission was made in January 1841, but the Defendant did not join therein.

One of the Commissioners named by the Plaintiff was Cymric Lloyd, who was the nephew and agent of the Plaintiff. The nature of his agency did not appear on these proceedings, and the relationship between the Plaintiff and Lloyd was not known to the Defendant till some time after.

On the 5th of March 1841 the commission was executed by Lloyd and another Commissioner at Caen, and Pugh was examined thereunder. Publication having been made, the depositions were delivered out in December 1841. In January 1842 the Defendant objected to the evidence of Pugh, on account of his interest. The case proceeded in the Master's office, and on the 15th of December 1842, upon the return of the Master's warrant to settle his report, the name of Cymric Lloyd being observed by the Defendant's solicitor, an inquiry was made, when it appeared that Cymric Lloyd was the nephew and agent of Lord Mostyn. Notice of this motion was then given.

The witness Pugh had since died.

Mr. Kindersley and Mr. Teed, in support of the motion.

"No person can take part in the execution of a commission who is not wholly indifferent." *Cooke v. Wilson* (4 Mad. 380), and where depositions are taken by Commissioners who are disqualified by their connection with the parties to the cause, the Court, even after publication, will suppress them.

[137] It is stated in the Practical Register (page 121), that "the common exceptions to Commissioners are these: that he is of kindred, allied to the party for whom he is named," &c., "or any other apparent cause of partiality, or siding with either party."

So in *Hinde* (page 304), it is said, "Commissioners ought to be indifferent persons; and after Commissioners are struck, if it be discovered that one or more of the Commissioners is or are nearly allied, of counsel, solicitor, master, or partner with the Plaintiff or Defendant, or any apparent cause of partiality, or siding with either party, it may be shewn, the Court, upon motion, or the Master of the Rolls upon petition, will set aside the depositions, and name Commissioners *de novo*."

Here, the Commissioners stood in the relation both of nephew and agent to the Plaintiff. The depositions have been irregularly taken, and the Defendant having made his objection immediately upon the discovery of it, they ought now to be suppressed.

Mr. Turner and Mr. Craig, *contra*, contended, that the objection was made too late; that the Commissioners having been named in January 1841, the Defendant and his agents then knew of the appointment of Cymric Lloyd as a Commissioner, and that from the facts proved, he must have known of his relationship to the Plaintiff; that he had proceeded on the evidence, and had waived the objection, and as the Court had a discretion, it ought not to exercise it, so as to prejudice the Plaintiff, now that he was deprived, by the death of the witness, of the opportunity

of re-examining him ; the more especially as there was no suggestion of any un-^[138] fairness having been practised, and as the Master had prepared his report founded on this very evidence. *Gordon v. Gordon* (1 Swans. 166, and 1 Wils. C. C. 155), was cited.

THE MASTER OF THE ROLLS [Lord Langdale]. This motion is of so much importance, both as regards the practice of the Court, and the interest of the parties, that I shall not dispose of it without further consideration. The only question seems to be whether the party making this application is precluded, by the length of time or from the circumstances of the case, from making this application. A question has, to my great surprise, been raised, whether depositions can be suppressed, on the ground of a Commissioner being a person engaged in the interest of one of the parties to the cause. There is nothing more clear, and if it had now to be decided for the first time I should not have the least hesitation in so deciding. Persons appointed by the Court to take depositions must be impartial, and if they are appointed in such a way as to secure that important object, it is the duty of the Court to suppress the deposition of this, I conceive, there cannot be a doubt.

But if a party is cunning enough to get a person interested appointed Commissioner, and the objection is not observed, is the Court to receive evidence tainted by partiality? The doctrine is too important to be passed over without observation. Commissioners are the officers of the Court, though they are nominated and proposed to the Court by the parties ; the Court entrusts the parties with their nomination, subject to their being struck off by the opposite party, and to this ^[139] sanction that if it turns out that the persons are improper, the evidence shall not be available.

The argument used at the Bar with reference to what ought to be done by the Court in such a case, is most important. Suppose that a person is appointed a Commissioner whom the Court would not knowingly have appointed, he not being likely to deal impartially between the parties. If the objection be known to the opposite party, and with such knowledge he permits the proceeding to go on, running the chance of having the evidence in his favour, but resolved to take advantage of the point of form, if the evidence should turn out to be against him, can the party so in such a manner be allowed, after publication, to come to this Court for the suppression of the depositions? This argument is most material, and I must carefully examine these affidavits with this view. It is the duty of a person desirous of obtaining the regularity of proceedings, to make the objection as early as possible. The point is this, was the Defendant aware of this objection, or were the circumstances such that he ought to have known it? He cannot avail himself of any irregularity there has been negligence on his own part ; but if he really did not know of the objection, and came forward at the earliest period he could, is it now too late? I said that he ought to have applied to the Court before the depositions had been taken in the Master's office, and that it is now too late to bring forward the objection. I find it difficult to believe that Lord Eldon expressed any such opinion in *Gordon v. Gordon* : his observation applied to the case before him : he never intended to say that if one party concealed the objection, and the other brought it forward at the earliest moment after he discovered it, he cannot avail himself of it, after the deposition has been once read.

[140] Feb. 22. THE MASTER OF THE ROLLS [Lord Langdale]. This motion made by the Defendant for an order to suppress the depositions of William Pugh as being irregularly taken.

The depositions were taken on behalf of the Plaintiff, under a commission in which the Defendant did not join ; and the Plaintiff having named his own Commissioner the objection is, that one of the Commissioners, whom he named and who acted in the execution of the commission, was his nephew and agent.

I am of opinion that it was clearly wrong to insert the name of the Plaintiff's nephew and agent as a Commissioner. The Court would not, knowingly, have appointed as its minister for the execution of a commission to examine witnesses a person whose connection and employment rendered him so liable to be biassed. The nomination of Commissioners is intrusted to the parties, subject to all the consequences of improper nomination, and it would lead to the most dangerous consequences if parties were allowed to avail themselves of the evidence taken under commission.

pon which they had placed their own agents; and accordingly, the Court has suppressed the depositions, when taken under a commission, in which a solicitor (1) in the cause, or the clerk of a solicitor (2) in the cause has been named as a Commissioner. conceive that a person who is acting for the party as his agent, though he may not be his solicitor, is not less objectionable than if he were so; not being a solicitor, he may perhaps [141] be considered as less likely to be aware of the duty of being strictly impartial on such an occasion. It is not a valid objection to an application of this sort, that publication, has passed, if the party complaining comes within a reasonable time after he has discovered the objection; and the real question upon this motion is, whether the Defendant has come in a reasonable time.

It appears that Mr. Burdekin, who was then a Defendant to the cause, was introduced to Mr. Cymric Lloyd on the 9th December 1839, and was then informed that Mr. Cymric Lloyd was a relation of the Plaintiff. This was after the decree was made, but a full year before the time when the Plaintiff obtained the order to examine witnesses; and I am of opinion, that the knowledge then imparted to Burdekin that the Plaintiff had a relation called Cymric Lloyd, does not justify the supposition, that Burdekin must have known that Mr. Cymric Lloyd named in the commission which issued more than a year afterwards, was the same Mr. Cymric Lloyd, a relation of the Plaintiff, and also his agent.

In February 1841 it was first known that Cymric Lloyd was named as a Commissioner; there was not, at that time, any knowledge that he was the Plaintiff's agent, and does not appear that the Defendant then knew that he was the Plaintiff's relation; the cause and the execution of the commission proceeded, on the supposition that the Commissioners had been duly nominated. After publication, an objection was taken to the evidence of William Pugh who had been examined under the commission, on entirely different grounds, and it failed. The taking of and relying on this objection long, appears to me to be wholly inconsistent with the notion that the Defendant knew the objection now made.

[142] It was not till October 1842 that the Defendant's agent knew that a Mr. Cymric Lloyd was the agent of the Plaintiff, and not till December 1842 that the Plaintiff's agent, was known to be the Plaintiff's near relation and a Commissioner who acted in the execution of the commission.

The nature of the agency has not been explained; no evidence on the subject has been given on the part of the Plaintiff, and I have therefore no reason for inferring, that the agency was not of a nature to give the bias which it is so necessary to avoid. It is not without reluctance that I make the order. The witness is dead, there was a charge of partiality of conduct, and the Plaintiff may be deprived of evidence very important to his case. But it cannot be permitted to parties to name their own agents and relations to be Commissioners for the examination of witnesses, and if there be no fraud, neglect, or default on the part of those who complain, it does not appear to me that the Court would be justified in refusing the ordinary remedy, on the ground that the wrong had been long unknown, or because the party committing the wrong had been successful in concealing his malpractice for a long time. I must therefore order the depositions to be suppressed.

NOTE.—The Plaintiff appealed to the Lord Chancellor.

[143] *STARTEN v. BARTHOLOMEW.* Jan. 16, 1843.

[S. C. 12 L. J. Ch. 179.]

Two suits were instituted on behalf of infants, but it was found that it was most for their benefit to prosecute the second. The first suit was properly instituted; but there being some impropriety of conduct on the part of the solicitor, who instituted

(1) *Fortescue v. Coake*, Godb. 193; *Fricker v. Moore*, Bunb. 289, and *Schwyn's case*, 1 Dick. 563.

(2) *Newton v. Foot*, 2 Rep. in Ch. 393, and 2 Dick. 793; *Cooke v. Wilson*, 4 Mad. 20; *Chamseau v. Riley*, Rolls, 9th Dec. 1840.

it on his own authority, and nominated his brother as next friend, the first bill was, upon an interlocutory application, dismissed without costs.

Two suits were instituted on behalf of infants. The Court having referred it to the Master to ascertain which of the two suits was most for the benefit of the infants (5 Beav. 372), the Master reported in favour of the second.

A petition was now presented to confirm the Master's report, and to dismiss the first suit with costs to be paid by the next friend or his solicitor.

The first suit was instituted by Mr. R., a solicitor, without any authority whatever. He nominated his brother as next friend. Mr. R. was intimate with the father of the infants, and had been concerned for their deceased mother, but his brother was a stranger to the family.

It is not necessary to go into the details of the circumstances of the case, further than to state, that the Court, upon this application, was of opinion, that under the circumstances of the case, and having regard to the adverse claims of the father as insolvent debtor, it was proper to have instituted a suit on behalf of the infants. Mr. R., the solicitor, had stated his intention, by means of the suit, to procure payment of a sum which he claimed to be due from the mother of the infants. It also appeared, that the next friend was a mere nominee of the solicitor, and the bill being filed on the 18th of July 1842, the *subpoenas* were not served, and no notice given to the Defendants. The second [144] suit was instituted on the 28th of July, without notice of the existence of the first suit, and no intimation of the existence of the first suit was given till after the filing of the second bill.

Mr. Parsons, in support of the application.

Mr. Bayley, for the trustees.

Mr. Wood, *contra*.

Mr. Parsons, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. In cases of this kind, the Court exercises a very careful discretion, on the one hand, in order to facilitate the proper exercise of the right which is given to all persons to file a bill on behalf of infants, and on the other to prevent any abuse of that right, and any wanton expense to the prejudice of the infants.

There are great complaints in this suit of the bill being filed by a stranger. I must, however, say, that if it is proper for the protection of the infants to institute a suit, such suit is not, on that ground alone, to be found fault with, nor is a party on that account to be charged with the costs, if it should turn out, upon inquiry, that the suit is for the benefit of the infants. On the other hand, if a bill be filed by the nearest relative of an infant, and it turns out that it was filed not for their benefit, but for the private interest or purposes of the next friend, such a party would be charged with the costs of the suit.

The question is, not whether there was authority from the father of the infant to file this bill, but whether a mere stranger has filed this bill, without regard to the interests of the infants, and for his own purposes.

[145] I have had several of these cases before me, in which I have had to determine whether the bill was filed improperly, and to make orders adapted to the circumstances of each particular case; it has been my duty not to discourage the filing of proper bills on behalf of infants for the protection of their estates, but at the same time to prevent improper bills being filed on their behalf.

This is a case in which *ex concessis* it was clearly proper to file a bill; the interest of the infants in this case being such that it was impossible for the trustees to act without the direction of the Court.

On the reference, the Master has found that the second suit is the most proper to be prosecuted. The consequence is, that there is one bill filed which will be beneficial to the infants to prosecute, and a subsequent bill filed, which will be more beneficial to be prosecuted. What, according to the ordinary practice of the Court, is next to be done? If no fault is to be found with the first suit, the ordinary course is to stop it, and to give costs to the next friend, although the first suit may not be as beneficial to the infants as the second.

It is said such an order will not meet the justice of the case, because the bill was

improperly filed. I think that Mr. R. was wrong in two or three things. He was wrong in saying he would use the suit as the means for obtaining payment of his debt. Again, he ought not to have nominated a next friend of his own authority; I certainly do not think it right for a solicitor who may consider it right to institute a suit for infants, nominally to put forward the name of another person, but in reality to prosecute it himself.

[146] In the third place, I think that after filing the bill, he ought, without delay, to have served the *subpoena*, and have given notice to the trustees who were to answer. He did not do that for ten days, and in the meantime another bill was filed, and this created a very useless expense.

Under all these circumstances, I think I must dismiss the first bill without costs, and the costs of all other persons must be costs in the second suit.

NOTE.—See *Sale v. Sale*, 1 Beav. 586; *Fox v. Suverkrop*, *Ibid.* 583; *Guy v. Guy*, Beav. 460; *Mortimer v. West*, 1 Wil. C. C. 159.

[146] DRYDEN v. FOSTER. DANSON v. FOSTER. Jan. 19, 1843.

A creditor's bill was filed, which also prayed other relief. Soon after a purely creditor's suit was instituted by another party, and a decree obtained therein within seven days. The Court stayed the first suit so far only as it prayed an administration of the assets.

The first of these suits was instituted on the 2d of November 1842, on behalf of creditors of the intestate, and prayed for the administration of the estate, and that certain partnership accounts should be taken. No answer had been put in.

The second was a simple creditor's suit, instituted on the 6th of December 1842, seven days afterwards, and on the 13th of December, a decree was obtained.

Mr. Pemberton and Mr. Bayley moved, in the second suit, to stay the proceedings in the first.

Mr. Renshaw, *contra*, objected that the two suits were not precisely for the same act; that the first suit asked that certain accounts might be taken with respect to a partnership business, and also for an injunction and receiver, and an action might arise in which it might be proper to grant them. He urged also, that a second decree had been obtained by collusion.

THE MASTER OF THE ROLLS [Lord Langdale] ordered, that all further proceedings in the first suit, so far as administration of the assets of the intestate was thereby sought, should be stayed; and he gave to the Plaintiff in the first suit liberty to go on in the second, and prove for what he might eventually establish in the first cause. (Reg. Lib. A. 1842, fo. 497.)

[147] ROBINSON v. BRUTTON. Feb. 11, March 20, 1843.

Surety given to sue on a bond given to the late Six Clerks, as a security for costs, upon a proper indemnity.

On the 22d of May 1841 the next friend of the Plaintiff was ordered to give surety for costs, and he accordingly executed the usual bond to the Six Clerks, May and Allen.

On the 22d of November 1842 the bill was dismissed with costs; and the next day being abroad, "the Defendant applied to the officer who had the custody of the bond to deliver it over to him, in order to proceed against the surety, on his giving an indemnity for the costs of any proceedings which might have to be taken in the name of the Six Clerks, but it was refused, on the ground that there were no more Six Clerks in existence (5 & 6 Vict. c. 103), and, consequently, they could not consent to [148] the use of their names, nor could they authorise the handing of the bond to the Defendant's solicitor.

Mr. Simpson moved that the Defendant might be at liberty to put the bond in suit, and use the names of the obligees.

THE MASTER OF THE ROLLS said he would make inquiry before he made an order.

March 20. THE MASTER OF THE ROLLS [Lord Langdale] now ordered, that the Defendant should be at liberty to put the bond in suit, and for that purpose ordered the bond to be delivered by the proper officer to the Defendant; and further ordered that the Defendant should be at liberty to make use of the names Vesey and Allen, and should first give proper indemnity, to be settled by the Master in case the parties differed. (Reg. Lib. 1842, B. 562.)

[148] ALLAN v. HOULDEN. Jan. 18, 1843.

[S. C. 12 L. J. Ch. 181.]

One of two sureties who had joined the principal debtor in a bond, filed a bill to set aside the transaction on the ground of fraud, and prayed an account of the payments of the bond. Held, that the principal debtor and the co-surety were necessary parties, notwithstanding the 32d Order of August 1841.

A demurrer for want of equity and want of parties, succeeded only on the last ground. No costs were given.

This case came on upon general demurrer, and the general outline of the case was as follows.

In 1838 the Defendant Houlden agreed to sell to Sherman his business as upholsterer and stock to the [149] value of £2000, the valuation to be made by indifferent persons.

The Plaintiff William Allan together with George Allan agreed to become sureties and they joined Sherman in a bond to Houlden for securing the £2000.

The bill alleged various frauds on the part of Houlden in this transaction; that Houlden had greatly misrepresented the amount of the profits of his business which was the inducement to purchase the stock. That the valuation of the stock had been improperly and fraudulently made by a friend of Houlden alone, and that Houlden had not performed the stipulations on his part. The bill stated, that payments had been made in discharge of the bond exceeding the value of the stock; that an action had been commenced thereon against the Plaintiff, and it prayed that an account might be taken of the sums paid on account of the bond, and that the bond might be delivered up to be cancelled, and for an injunction.

Neither George Allan the co-surety nor Sherman were made parties to this bill. The Defendant filed a demurrer for want of equity, and for want of parties.

Mr. Turner and Mr. Heathfield, in support of the demurrer, proceeded first to argue the demurrer for want of equity; but the Master of the Rolls, without hearing the other side, intimated his clear opinion, that it could not be sustained.

They then argued that the suit was defective for want of parties. That the transaction could not be partially [150] set aside; *Myddleton v. Lord Kenyon* (2 V. & J. 391); and if it was to be totally set aside, then Sherman, the principal, and George Allan the co-surety ought to be before the Court. That the bill also prayed an account, which could only be effectually taken in the presence of all parties interested, otherwise a succession of bills might be filed for the same object, and accounts be repeatedly taken; besides this, Sherman had possession of the goods which, upon setting aside the whole transaction, ought to be restored.

Mr. Pemberton and Mr. S. Miller, *contra*, on the point of parties, argued, that the Plaintiff was relieved by the Thirty-second General Order of August 1841 (Ord. C. 174), from making the co-obligors parties to the suit. The account prayed is merely ancillary to the principal relief.

THE MASTER OF THE ROLLS [Lord Langdale] held that the bill was defective for want of the parties pointed out, and he allowed the demurrer on that ground alone; but as the principal objection had failed, he gave no costs of the demurrer. (*Benson v. Hadfield*, 5 Beav. 546.)

[150] THE ATTORNEY-GENERAL v. PARGETER. Jan. 23, 24, Feb. 1, 1843.

[S. C. 13 L. J. Ch. 81.]

A husbandry lease of charity lands for 200 years at a fixed rent, cannot, unless there be some special reason, be supported in equity. Such a lease of charity lands cannot be supported upon any custom of the country in which the lands are situate. The purchaser of a charity lease takes with notice of the facts appearing thereon shewing its equitable invalidity.

This was an information filed for the purpose of setting aside a lease of charity lands, which had been granted by the trustees for a term of 200 years at a fixed rent of £14, 3s.

[151] It appeared that Thomas Foley had in his lifetime built a school for sixty boys. By his will, he devised the house and various real estates in fee to the persons named in his will, and gave to the same persons a sum of money to be expended in the purchase of other real estates, to be conveyed to them; and he directed the lands to be employed for the purposes of the charity. He afterwards in his will, speaking of his devisees, termed them "Feoffees."

The testator died in 1677, and new trustees were afterwards appointed. On the 28th of September 1695 the trustees demised part of the charity lands to William Parker for 200 years, at a rent of £14, 3s. The lease contained an exception of the mines and quarries, coal, ironstone mines and minerals, with liberty to search for and get the same, and also an exception of the hares and other game, with liberty for three of the trustees, &c., to sport, to hawk upon the premises, and a covenant by the lessee to preserve the game. The lessee did not subject himself to any obligation to build or to expend any money, but he covenanted to pay the reserved rent, to keep the buildings and fences belonging to the premises in good and tenantable repair, to use upon the premises the hay, straw, and fodder, and the dung, soil, and compost arising thereon, and to manure the premises in a good and husbandly manner.

The Defendant stood in the situation of a purchaser of this lease.

Mr. Kindersley and Mr. Spurrier, in support of the information. This is a purely husbandry lease for 200 years, at a small, inadequate and fixed rent; practically this is an alienation of the charity property, and according to the authorities this is a breach of trust, and the lease is in equity void.

The lease on the face of it shews that it was a demise of charity lands for too long a period, at a fixed rent, and it carries, on the face of it, notice of the breach of trust; the Defendant, therefore, cannot say that he is a purchaser for valuable consideration without notice.

Mr. Pemberton, Mr. Turner, and Mr. Harwood, *contrà*, contended first, that this was not a husbandry lease, and that the reasoning did not apply; secondly, that the will was not the original instrument of the foundation of the charity, and if that instrument were produced by the trustees, it might shew that there was a power of granting such a lease. The will shewed that the school had been completed in 1670, and both the will and the inscription on the picture of the testator (which was produced in evidence), shewed that the trustees were "feoffees," and therefore implied that the property had been conveyed to them by some instrument other than the will. Thirdly, that the evidence shewed that the custom of the country warranted such a lease, and there were instances in which the testator himself had granted such leases, and lastly that when, at a great distance of time, the Attorney-General sought to set aside a lease as against a purchaser, he must shew inadequacy of consideration at the time it was granted, and notice in the purchaser. That here the Defendant was purchaser for valuable consideration and without notice. In *Attorney-General v. Backhouse* (17 Ves. 283, 293), such a lease was supported in favour of a purchaser, and Lord Eldon observed, "These parties must be understood at least to have notice that the lessors were trustees for a charity: but I [153] cannot go the length that the

purchasers had notice that this was a bad lease; that depending upon a number of circumstances *dehors* the lease."

Mr. Kindersley, in reply.

The following cases were cited, *Attorney-General v. Green* (6 Ves. 452), *Attorney-General v. Owen* (10 Ves. 555), *Attorney-General v. Griffith* (13 Ves. 565), *Attorney-General v. Kerr* (2 Beav. 420), *In re The Berkhamstead Free School* (2 Ves. & B. 13), *Attorney-General v. Hungerford* (2 Cl. & Fin. 357; 8 Bl. 437), *Attorney-General v. C.* (3 Mer. 524), *Attorney-General v. Warren* (2 Swan. 291; and see *Attorney-General v. Brettingham*, 3 Beav. 91, and *Attorney-General v. The South Sea Company*, 4 Beav. 45), *Attorney-General v. Backhouse* (17 Ves. p. 293).

Feb. 1. THE MASTER OF THE ROLLS [Lord Langdale]. This is an information a bill filed to set aside a lease dated the 28th of September 1695, whereby certain charity lands were demised to William Parker for 200 years, at the stationary rent of £14, 3s.

It does not appear that any consideration, other than the rent, was paid or agreed to be paid for the lease. There was no surrender of any former lease; the lessee did not subject himself to any obligation to build or to expend any money, but covenanted to pay the reserved rent, to keep the buildings and fences belonging to the premises in good and tenantable repair, to use upon the premises the hay, straw and fodder, and the dung, soil, and compost arising thereon, and to manure the premises in a good and husbandly manner.

[154] I think that this is a husbandry lease, and not the less so, because there is an exception in the grant, of the mines and quarries, coal, ironstone, mines and minerals, with liberty to search for and get the same; and also an exception of hares, partridges, pheasants, and other beasts and birds of warren, with liberty to three of the trustees, their servants and followers, to hawk and hunt upon the premises, at their wills and pleasures, and a covenant by the lessee to preserve game for the same persons.

This being a husbandry lease of charity lands granted for 200 years at a fixed rent, it cannot stand, unless there be some special reason to support it.

I am of opinion, that the length of the term is not justified or excused by the reservation of the mines, and the right to get coal and minerals.

It is argued, that there are in this case circumstances, to shew that the foundation of the charity is not forthcoming—that there must have been some deed of covenant—and that if such deed of settlement were produced, it would or it might be thereby shewn, that there was authority to grant this long lease.

It does not appear to me that the facts of the case afford any foundation for the argument, that there was any deed or instrument other than the will, whereby the estate was vested in the trustees.

The testator, having built a schoolhouse in which sixty boys were placed, devised the house and various real estates to the persons named in his will in fee, and gave to the same persons a sum of money to be expended in the purchase of other real estates, to be conveyed to them in fee: he directed the lands to be employed for the purposes of the charity, and in afterwards speaking of the persons to whom he had made the devise, he calls them "feoffees," instead of "devisees" or "trustees," and from this it is argued, that it should be inferred that there must have been some feoffment besides the devise; but I own that it appears to me, from the context of the will, that in using the word "feoffees," the testator means only to designate, in other words, the several persons to whom he had devised the estate in fee. I cannot suppose that he made a devise of the lands to the same uses, to persons to whom he had previously conveyed the same lands by feoffment; and I do not think that the inscription on the picture adds any probability to the argument. It does not appear what was the date of the inscription, and I think that by "feoffees," was meant the persons, who, as trustees, were possessed of the fee or inheritance of the estate, and that the will of the founder was the instrument by which the estate was settled.

In the lease in question, the devisees are described as trustees or feoffees; the description perhaps intended to reconcile their real character as trustees with the slightly erroneous description of them in the will, and on the testator's picture, if such inscription was existing at the date of the lease, which does not appear.

It is next argued, that this lease was granted according to the custom of the country, and according to the usual mode of letting, adopted and acted upon by the trustees themselves. It appears, indeed, that the trustees had granted some other leases of the same kind, and an attempt was made to prove the alleged custom of the country. I think that the attempt was unnecessary, for if any number of such leases had been proved, they [156] could not have established a custom which would have justified trustees in alienating the charity lands in this way, but the proof failed, and some leases for twenty-one years were produced.

It is lastly argued, that the Defendant's father was a purchaser of the estate for a valuable consideration, and that he was not bound by an equity to set aside the lease founded on extrinsic circumstances, but the purchaser must be held to have had notice of the lease which he purchased.(1) The equity of this case is not founded on extrinsic circumstances, but on the facts appearing on the lease itself, shewing it to be such, that if due consideration had been given to the subject, neither lessors nor lessees could have thought the lease beneficial to the charity, or anything less than a breach of trust.

[157] *GURDEN v. BADCOCK.* Nov. 5, 6, 16, 1841; Dec. 6, 7, 1842.

[S. C. 12 L. J. Ch. 62.]

In 1812 the executors of a receiver applied to pass his accounts and pay in the balance, this was ordered, but payment was not made. In 1841 they were ordered to pay in the balance without interest, and it was held that they could not object the want of assets.

A was appointed receiver, but the solicitor in the cause alone acted and paid over the rents to the tenant for life. An incumbrancer compelled the receiver to pay the same amount into Court, and after payment of his claim, there remained a surplus, which was paid to the tenant for life. Held, that A. could not, on petition, obtain repayment by the tenant for life or out of the estates.

Under the will of the testator, Mr. Price was tenant for life of an estate, subject to certain incumbrances thereon, and to an annuity of £100 a year payable thereout to Mary Sanders.

In 1805 a bill was instituted by Price and another for the purpose of paying the charges and carrying the trusts of the will into execution.

In 1806 Mr. Drayson was appointed receiver of the estates, in the usual manner. The receiver was continued by the decree made in 1808, and he was ordered to keep down the incumbrances.

Mr. Drayson, the receiver, did not, however, in fact, act, but a Mr. Kirby who as trustee was a Defendant in the cause, and was also the solicitor of the Plaintiff and Defendants, received the rents, and took upon himself the management of the matters. Mr. Drayson died in 1809, and in 1812 his executors, by the direction and suggestion of Kirby, applied for and obtained leave to pass the receiver's accounts and to pay the balance into Court. The Master found a sum of £992 to be due from the receiver; this sum however was, in fact, in the hands of Kirby, and was never paid into Court. The tenant for life was let into possession in 1809, and was directed to keep down the annuity and incumbrances.

The cause was heard on further directions in 1814 when certain declarations were made.

[158] The suit remained in a state of inactivity for some years, but in 1830 the conduct of the cause was taken from the Plaintiffs and given to the representatives of Mrs. Sanders the annuitant, to whom an arrear of annuity was due. They some years after, discovering that the receiver's balance had not been paid into Court, presented a petition, praying that his surviving executor might pay into Court the sum

(1) See *Walter v. Maunde*, 1 Jac. & W. 181; *Cosser v. Collinge*, 3 Myl. & K. 283; *Pope v. Garland*, 4 Y. & Col. (Exc.) 394, and *Paterson v. Long*, 6 Beav. 590.

of £992 and interest. The incumbrancers having priority over the life-estate had not been paid off.

It was alleged that Mr. Kirby in his lifetime, had paid over a portion of the £300 to Mr. Price, the tenant for life, and that after his decease his executor had, in 1828, paid over £437, 19s., the balance, to Mr. Lovell, Mr. Price's solicitor in the cause, who gave the following receipt for the same:—

“In Chancery.

“July 26, 1836.—*Gurden v. Badcock and Others*.—Received of Mr. Henry Ellison surviving executor of the will of the late J. M. Kirby, Esq., the sum of £437, 19s., money retained by him out of the rents resulting from the Westbury and Mixtun estates, towards the costs of his bill which have been otherwise discharged.

“For Mr. B. Price,

“JOHN LOVELL.

Mr. Pemberton and Mr. Lloyd, in support of the petition, asked, that the executor of the receiver might be ordered to pay the fund into Court with 5 per cent. interest.

Mr. Kindersley and Mr. Dixon, for Mr. Price, the tenant for life.

[159] Mr. Russell and Mr. Romilly, for Mr. Deacon, the executor of the receiver, contended that there was no case for charging the executor personally; and that he had no assets in hand to discharge the claim. That the *laches* of the parties had been such, as to disentitle them to the assistance of the Court. That the balance, never, in fact, came to the hands of the receiver, and by arrangement between the parties it had been paid by Kirby to the tenant for life. That the relief now asked could not be granted on petition.

Mr. Ellison and Mr. Smythe, for other parties.

Mr. Pemberton, in reply.

THE MASTER OF THE ROLLS said that the executors, having three years after the testator's death, and with perfect knowledge of the state of his assets and the circumstances of the case, presented their petition for passing the accounts and payment of the balance, could not now be heard to say that they had no assets.

That as to the delay, the parties had existing duties to perform, and had had the matter brought to their attention both in 1828, and again in 1836, when they entered into arrangements not with the parties having the first charges, but with the tenant for life. That as there were existing claims, prior to the estate of the tenant for life, towards the liquidation of which this fund was liable, his impression was that the money must be paid into Court, but whether or not with interest required consideration. His Lordship said he would read the documents before deciding.

[160] Nov. 16. THE MASTER OF THE ROLLS [Lord Langdale] said, that the Respondent must pay into Court the amount of principal money, and the costs of application; but considering the length of time which had elapsed, and the *laches* of the parties, he ought not to direct the payment of interest: that the case was an unfortunate one, the parties having implicitly relied on the solicitor, but everything tended to shew the responsibility of the representative of the receiver.

On the 16th of December 1841 the executor of the receiver paid into Court the amount as directed, and which sum, together with another sum in Court, was in 1842 applied in payment of the incumbrances and costs, and the residue of the fund after such payment, was directed to be paid to Pugh, the assignee of Price, the tenant for life. The claims of the parties having preference to the tenant for life, became satisfied, and they gave up possession of the estates.

The executor of the receiver having first learned of this order in July 1842 presented a petition praying that an account might be taken of the monies paid by Kirby, the agent of the receiver, and by the executors of the receiver to the tenant for life; and that the tenant for life might repay the amount to the Petitioner, and that it might be declared that in default the rents of the estate might be applied to the discharge thereof.

The affidavit of Price stated, that he had never received any accounts from Kirby. That in 1836 when negotiations were pending as to the payment of the balance



the executor of Kirby to him, Price, he had insisted on the representatives of Kirby paying interest on the balance. That Lovell, in 1837, rendered him [161] an account, in which he was credited with the £437, 19s. received from the executor of Kirby, and which was the first time he was acquainted with the arrangement made. That no account had ever been received by him, Price, and that the £437, 19s. had been applied in liquidating the balance of Lovell's account against Price.

Mr. Pemberton and Mr. Romilly, in support of the petition. The ground on which the £992 was ordered to be paid into Court, on the former occasion, was, that it was wanted for the incumbrancers. It has turned out that it was not required for that purpose. If the Court had been aware of the state of the funds, no order would have been made for payment by the executor of the receiver. The surplus of the fund paid in, after paying the incumbrancers, belonged, in equity, to the representatives of the receiver, and if the fund had remained in Court, it would, on application, have been repaid to the executor of the receiver. Price and his incumbrancer have obtained it out of Court, behind the back of the parties interested, so that Price has, in effect, twice received payment of the same sum from the receiver. The jurisdiction of the Court cannot be destroyed by the irregular payment out of Court, besides which the nature of the suit is such, that the Court has still jurisdiction and control over the rents of the property, and, by their proper application, the Petitioner may be indemnified.

Mr. Kindersley and Mr. Lloyd, for Price. The Court has no jurisdiction, upon petition, to fix a lien on the real estate of the tenant for life, at the instance of a stranger to the cause.

Before the Petitioner can have the relief he asks, the accounts must be taken as between Price and the [162] estate of Kirby, and all the equities between them determined.

Both the receiver and Kirby who represents him, ought also to be charged with interest on their balances, and the poundage ought to be disallowed. All this involves a series of proceedings which cannot be taken on petition.

If the Petitioner had wished to establish any equity on the fund, he should have obtained a stop order.

THE MASTER OF THE ROLLS [Lord Langdale]. If this were the simple case supposed, there would be no great difficulty in dealing with it. If the receiver had paid to the tenant for life, money which he ought to have paid into Court for the benefit of a creditor, and at a subsequent period had been compelled by the creditor to pay the same amount into Court, and if, after full payment to the creditor, a surplus remained in Court which the tenant for life applied to have paid to him, the Court would have no difficulty in stopping payment, until the claim of the receiver had been investigated; and no difficulty in exercising its jurisdiction in ordering the remaining fund in Court to be paid back to the receiver.

That is not this case. Here there has been an irregularity from the beginning. In July 1806 the receiver was appointed: it seems he never acted as such, except for the purpose of rendering the accounts under the dictation of Mr. Kirby, who received the rents of the estate. He, it seems, was solicitor for the next friend of the infant Plaintiff, and was executor and trustee of the will under which the estate was to be administered, [163] and in that character was a party to the cause. In 1807 an account was rendered down to Michaelmas. In 1809, at Michaelmas, two years' further accounts were to be rendered, and shortly after that time the receiver died.

In 1812 the executors of the receiver, again at the dictation or suggestion of Kirby, applied for leave to pass the account, and the accounts were passed on the 6th and 7th of November 1812, and £992 was found due on this account. This amount, though appearing due from the receiver, was, in fact, in the hands of Kirby, and continued in his hands for very many years. In 1836 an account seems to have been settled; it appears, though the evidence is not very distinct, that there had been several previous payments to Price, the tenant for life, and in July 1836, upon the settlement of the account, the balance was paid by the representative of Kirby to Lovell, the solicitor of Price.

Supposing no account to have been settled, what would be the right of the receiver who has been thus called on to pay the money into Court? He claims the

benefit of the payments made to Price by Kirby. Can he have them without subjecting himself to all the liabilities of Kirby to Price? It appears to me that he cannot. The receiver who appointed Kirby to act as his agent, claims the benefit of the payments made by Kirby to Price. In order to have the benefit, he must place himself in the situation of Kirby, and if Kirby was liable to Price, I apprehend, that subject to those liabilities only, can the receiver work out his claim. If no account was settled, what was the relation between Kirby and Price? Drayson was appointed receiver, but Kirby assumed to act as such; and I am inclined to think [164] that as between Price and Kirby, Kirby was subject to all the liability to which the receiver was subject. If there was no account settled, no settlement between the parties, what were the liabilities of Kirby or his estate? In 1836 was he not liable to pay interest for all that time, and liable to be deprived of his poundage?

On the other hand, suppose the account was settled as between Kirby and Price, can the present Petitioner, the receiver, claim the benefit of the payments made by Kirby to Price, without opening the account; and can a right to open the account be established in any such proceeding as this? It is possible that the account may be opened, but I cannot, on a petition of this description, consider it to be opened.

This case comes on upon petition, after an order for the distribution of the funds in Court, not asking that an anticipated payment to the tenant for life may be stayed, or that the sum improperly paid may be brought back; but it asks a general account of what was paid, and seeks the benefit of a lien on the estate, for what shall appear due on the account. I do not think that the relief can be granted on petition in a case like this. There are many cases where liberty is given to apply, in which an application may be made by persons not parties to the record, but they are persons having a direct interest in the execution of the decree. There is nothing in this decree that gives an interest to the Petitioner, and what is asked is not the result of any decree or direction in the cause, but is founded on something not appearing at all in the record. If I considered it a case in which money had been got out of Court by fraud or improper concealment, it would be subject to other considerations.

[165] It appears that the accounts between Kirby and Price have been such, that you must overturn what has taken place between them before you can get at the account. Under these circumstances, I cannot grant the relief which is sought. There is a grievous hardship if what is alleged is true, that Price had some of the money in his hands, which the receiver was ordered to pay into Court.

I do not determine that the Petitioner has not the right he claims; all I can say is, that he has not such a right as he can make available upon petition.

The petition must be dismissed without costs, and without prejudice to any further proceedings.

[165] DARTHEZ v. CLEMENS. Dec. 22, 1842.

Where a bill for an account which relies on certain items as the ground for transferring the matter from the jurisdiction of a Court of law to that of equity, also contains a general vague charge of there being voluminous and intricate accounts between the parties; then, if the Plaintiff fails in supporting his equity upon the particular items, he cannot maintain the bill against a demurrer upon the latter vague charge. Upon a bill for a general account between A. and B., a question arose as to these items, whether they ought to be charged against A. or against C., with whom A. and B. had had some mutual dealings. Held, that C. was not a necessary party to the suit.

The Plaintiffs Messrs. Darthez & Co. were merchants residing in London, and the Defendant Clemens was a merchant at Malaga. The Defendant and one Ritchie of New York, were the Plaintiffs' correspondents in trade, and had made consignments of goods and merchandise to them, and the Plaintiffs, from time to time, advanced money on the credit of the consignments. The Defendant having commenced an action at law against the Plaintiffs for the recovery of [166] £1705, the alleged amount of the balance due from the Plaintiffs to the Defendant, the Plaintiffs filed

his bill, to have between them the accounts taken, and to restrain the proceedings at law.

The greatest portion of the allegations of the bill related to three particular sums of £1000, £1000, and £700, which the bill insisted ought to be brought into the account between the Plaintiffs and the Defendant, and for which it alleged credit ought to be given by the Defendant, by means of which the balance would be turned in favour of the Plaintiffs. It stated, as the foundation for this, certain transactions between the three parties, in the course of which these three sums had become due; and it appeared in dispute between the Plaintiffs and the Defendant, whether from the nature of the dealings and the effect of the correspondence between the three parties, these sums ought to be charged in account against the Defendant, or against Ritchie alone, who was alleged to be insolvent.

After stating these matters, the bill, as the foundation for a general account, stated as follows: "That various other dealings and transactions were, from time to time made, and did take place by and between the Plaintiffs and the said Defendant hereto, in the way of their respective trades or businesses as merchants, and divers remittances and consignments of monies, bills of exchange, goods, and merchandise were, from time to time, made, by and from the said Defendant to the Plaintiffs; and divers sums of money were, from time to time, paid by the Plaintiffs by the direction, and to and for the use and on account, of the said Defendant hereto, exclusive of the particular sums hereinbefore in that behalf mentioned, and divers goods and merchandise were, from time to time, shipped and sent by [167] the Plaintiffs by the direction and to and for the use of the said Defendant hereto; and the monies and goods so remitted and paid, on each side, by and between the Plaintiffs and the said Defendant hereto, amount to a very large and considerable sum in the whole; and a considerable balance of sum of money hath become and is now justly due and owing from the said Defendant hereto to the Plaintiffs on the foot of the said account; and by the means aforesaid, an account hath arisen, and is still open, subsisting and unsettled between the said Defendant and the Plaintiffs, in respect of the matters aforesaid.

"That the said accounts between the Plaintiffs and the said Defendant, and more especially having regard to the transactions between the said Defendant hereto, and the said John Ritchie herein appearing, are of a very voluminous nature, and consist of several hundreds of items on both sides of the account, including a daily interest account; and such account between the Plaintiffs and the said Defendant could not, without manifest inconvenience and injustice to the Plaintiffs, be taken in a Court of Common Law, and such account cannot, in fact, be justly or properly taken except in a Court of Equity, where such matters are properly cognizable and relievable."

The bill charged that a balance was due to the Plaintiffs; it required the Defendant to set forth all the dealings and transactions, and prayed a general account of all the dealings and transactions between the Plaintiffs and the Defendant.

To this bill Clemens alone was made a Defendant, and he demurred to this bill, first, for want of equity, and, secondly, for want of parties.

[168] Mr. Kindersley and Mr. Colvile, in support of the demurrer, contended that it appeared from the statement in the bill (which they commented on) that the Plaintiffs were not entitled to set off the three sums in question, which alone formed the subject of dispute between the parties; and that a Court of law was perfectly competent to decide such a question. [Mr. Pemberton. We do not rely on these three items, but insist on the Plaintiffs' right to the general account.] The Plaintiffs then must shew, on the face of their bill, that the account between them and the Defendant can only be taken in this Court, otherwise they will not be allowed to withdraw the case from the Court of law which already has jurisdiction. Mere general allegations of the intricacy of the accounts are insufficient for the purpose: they will be disregarded by this Court, and will be considered as struck out. *Davidson v. Bailey* (6 Ves. 136), *Frietas v. Dos Santos* (1 You. & Jer. 574), *King v. Rossett* (2 You. & Jer. 33), *Bowles v. Orr* (1 You. & Col. 464).

Secondly, Ritchie is a necessary party to this suit, for if these three items are to be brought into the account between the Plaintiffs and Defendant, the balance between Ritchie and the Defendant will be altered. Ritchie has an interest in the matters; the Plaintiffs, asking to have the benefit of the set-off as against the

Defendant, have improperly omitted making Ritchie, the person principally interested, a party to the suit.

Mr. Pemberton and Mr. Rogers were not heard by

THE MASTER OF THE ROLLS [Lord Langdale], who said—I do not think that this demurrer can be sustained. The Plaintiffs say they are entitled to a general account, [169] and to have credit for the three particular sums; but they concede, for the purpose of this demurrer, that they are not entitled to relief in respect of the three sums, and rest on their right to the general account.

The Defendant states, what I believe is perfectly true in point of law, that if there be a bill for an account in respect of particular items, or any number of particular items, and the Plaintiff fails in sustaining the demand upon those particular items, and the bill happens to contain a general vague charge that there are voluminous and intricate accounts between the parties, and which charge is inserted merely as a pretext for the purpose of bringing the case within the jurisdiction of a Court of Equity, the Court, in so vague and uncertain a case, will disregard that general allegation, will consider it as struck out of the bill, and not allow it to protect the bill against a demurrer for want of equity. That is the utmost extent to which the cases have gone.

It therefore comes to this, does this bill contain such vague and general statements, statements put in merely as a pretext for transferring the jurisdiction from the Court of law to this Court? If the account can be fairly taken in a Court of Common Law, this Court will not interfere, even in the case of merchants' accounts consisting of mutual dealings; but in this case I am persuaded not only that the accounts between these parties could not be advantageously taken in a Court of law, but that they could not be taken at all there. Everybody knows how an action upon such an account would necessarily end; it would end in the account being taken in this Court, or by a reference.

It is said that the bill is defective for want of parties. If the three items should ever come into question, the [170] Plaintiffs must make out their case by proof; but it does not follow that Ritchie is a necessary party to the taking of the accounts between the Plaintiffs and the Defendant. I think also that the demurrer cannot be sustained on this ground.

Demurrer overruled.

[170] GARDNER v. JAMES. Jan. 24, 27, 1843.

Bequest of residue, in trust, after payment of an annuity of £50 to A. for life, to apply the residue of the interest towards the maintenance of the children of B. until twenty-one, and in case of the death of A. during their minority, to apply the whole or so much as was necessary in the same way, and after the death of A., when such children attained twenty-one, to transfer the principal to them. There was a gift over in case there should be no children of B. living at the death of A. The fund was more than sufficient to provide for the annuity. Held, that the gift to the children was not confined to those living at the death of the testatrix.

The testator, by his will, bequeathed his residuary personal estate to his executor, upon trust to "invest the whole residue thereof at interest, and pay £50 per annum, part of such interest, unto Susannah Brunton, and her assigns for life; and after payment of the said sum of £50 *per annum*, upon trust, to apply the residue of the interest of the said trust money, for and towards the maintenance, education, and support of any child or children of Henry Holland Gardner lawfully begotten, until he, she, or they should, respectively, attain his, her, or their age or ages of twenty-one years; and also, in case of the death of the said Susannah Brunton during the minority of such child or children of Henry Holland Gardner, then, in trust to apply the whole of the interest of such trust money, or so much thereof as in the discretion of his said trustee should be considered necessary for that purpose, for the maintenance, education, and support of such child or children; and after the death of the said Susannah Brunton, and when such child or children of Henry Holland Gardner

[71] should have attained such age or respective ages of twenty-one years as aforesaid, then, upon trust, to transfer such trust money to such child, if there should be only one, or if there should be more than one, to all such children, share and share alike; but if there should be no such child of Henry Holland Gardner living at the death of the said Susannah Brunton, or in case of the death of such child or children before they should attain the said age of twenty-one years as aforesaid, then, after the death of Susannah Brunton, the testator gave and bequeathed the whole of the said trust money, and all accumulations thereof, to John James, his executors, administrators, and assigns absolutely."

A bill was, in 1828, filed by the children then *in esse* of Henry Holland Gardner, in which the accounts were taken, and the residue was found to consist of £2700 per cent.; of this sum £1677, 13s. 4d. was set apart to answer the annuity of £50, and the dividends on the remainder were ordered to be applied towards the maintenance of the Plaintiffs in the suit, who were infants.

Henry Holland Gardner had afterwards four children born, who claimed to be interested in the residue. The Plaintiffs in the first suit then instituted the present suit, praying a declaration that the children living at the death of the testator were one entitled under the will.

Mr. Hallett, for the Plaintiffs.

Mr. Blower, *contra*.

Mr. Hallett, in reply.

[172] The following authorities were referred to:—*Sprackling v. Ranier* (1 Dick. 14), *Ringrose v. Bramham* (2 Cox, 384), *Hill v. Chapman* (1 Ves. jun. 405), *Davidson Dallas* (14 Ves. 576), *Butler v. Lowe* (10 Sim. 317), *Defflis v. Goldschmidt* (1 Mer. 17), *Balm v. Balm* (3 Sim. 492), *Scott v. The Earl of Scarborough* (1 Beav. 154), *Crone Odell* (1 Ball. & B. 449), *Whitbread v. Lord St. John* (10 Ves. 152), *Andrews v. Worthington* (3 Bro. C. C. 402).

Jan. 27. THE MASTER OF THE ROLLS [Lord Langdale] said, he was of opinion that the gift to the children was not confined to those living at the death of the testator, that after-born children were let in, but he could make no further declaration at the present time.

[173] HOOPER v. PAVER. Feb. 11, 1843.

In the Vice-Chancellor's cause, the Plaintiffs described themselves as resident abroad. The Defendants obtained *ex parte* at the Rolls, an order for security for costs. An application to the Master of the Rolls to discharge it, on the ground that the Defendants had in their hands funds belonging to the Plaintiffs sufficient to indemnify them, was refused, because there was no irregularity in the order, and the cause being attached to the Vice-Chancellor's Court, the Master of the Rolls could not enter into the merits.

The Plaintiffs in this cause having described themselves as resident abroad, the Defendants obtained, as of course, at the Rolls, an order that the Plaintiff should give security for costs.

The cause was attached to the Vice-Chancellor's Court.

A motion was now made to discharge the order for irregularity.

Mr. Smyth, in support of the motion. The bill in this case is filed by the children, and the administration of a fund to which they are entitled under the settlement of their parents; and it appears that the Defendants have a fund of £6000 in hand which belongs to the Plaintiffs. If Defendants have in their hands a fund belonging to the Plaintiff, sufficient to indemnify them against the costs of the suit, they have a right to demand a further security for those costs.

The order having been made here, the application for its discharge must necessarily be made to the Master of the Rolls, as the Vice-Chancellor has no jurisdiction to alter or discharge the orders of the Master of the Rolls. *Whitehouse v. Hickman* (1 S. & L. 104), *Earl of Glengall v. Bland* (1 Hare, 624).

Mr. Pemberton and Mr. Rolt were not called on by

[174] THE MASTER OF THE ROLLS [Lord Langdale] who said, that the Plaintiffs

having described themselves as resident abroad, it was quite of course to obtain an order for security for costs. The order complained of was therefore perfectly regular, and if the Plaintiffs sought to discharge it on other grounds they must apply to another jurisdiction.

The motion must be refused with costs.

NOTE.—See 9th Order of May 1837, Ord. Can. 114; 6th Order of May 1839, Ord. Can. 137; *Robinson v. Milner*, 5 Beav. 49, and *St. Victor v. Devereux*, *post*.

[174] PINNER v. KNIGHTS. Feb. 11, 1843.

A bill being filed without the written authority of one of several Co-plaintiffs, and the evidence being unsatisfactory as to the retainer, his name was struck out as Co-plaintiff with costs to be paid by the solicitor.

Where a solicitor files a bill without a written authority, the *onus* of proof is cast on him. If there be any doubt on the matter, the Court will hold him liable.

Mr. G., a solicitor, had filed this bill in the name of Mr. Thomas Knights and others. It appeared, however, that he had had no communication with Thomas Knights, and had received no authority from him personally to institute the suit, but had acted by the directions of Mr. Knights' brothers, who said that they had communicated with him, and that he had authorized the step.

It was now moved, that Mr. Knights' name might be struck out as Co-plaintiff with costs to be paid by Mr. G. the solicitor.

Affidavits were filed in support and in opposition to the motion by Mr. T. Knights and by his brothers, but [175] which it is not necessary to state further than that they appeared to the Court to leave the fact of the Plaintiff's authority to his brothers, in considerable doubt.

Mr. George Turner, in support of the motion, asked for a similar order to that made in the cause of *Hood v. Phillips*. (See next case.)

Mr. Pemberton and Mr. Dixon, *contra*.

THE MASTER OF THE ROLLS [Lord Langdale]. I have of late had several of these cases before me (*Tabbemor v. Tabbemor*, 2 Keen, 679; *Wiggins v. Peppin*, 2 Beav. 403; *Allen v. Bone*, 4 Beav. 493), which I exceedingly regret.

Nothing surprises me more than that solicitors should so frequently take upon themselves to file bills in the names of persons who have not given them authority in writing. The general rule of the Court is, that a solicitor should obtain a written authority from his client; I have often had occasion to observe, that the interest of the client does, very often, induce a solicitor to file a bill before he has had an opportunity of obtaining an authority in writing; I cannot consider a solicitor is to be blamed in cases of that kind, but, as I have said before, he acts most imprudently if he does not take the very first opportunity to obtain the sanction of the client for what he has done. The law of the Court is perfectly clear, that if the authority afterwards comes into question, ay or no, whether there is an authority from the client or not, and there is no writing, it will go against the solicitor unless he can prove distinct authority or implied authority by acquiescence or some other means.

[176] Now, in this case, there does not appear to have been any personal communication between Mr. G. and Mr. Thomas Knights; Mr. G. trusted to the representations of the brothers, who said they had communicated with Mr. Thomas Knights, and that he had authorized them to instruct him. The consequence is, that Mr. G. must prove satisfactorily, that the brothers were empowered to authorize him. When we come to examine the evidence, it is impossible for the Court to make up its mind on which side the truth lies, and upon that ground, and upon that ground alone, I am under the necessity of saying that the solicitor, on whom the burthen of proof is cast, has not, in the midst of this conflicting and contradictory evidence, made out his case.

The authority not having been proved, this motion must be granted.

[176] HOOD v. PHILLIPS. July 21, 22, 1842.

[See *Nurse v. Durnford*, 1879, 13 Ch. D. 767.]

bill filed without the authority of the Plaintiff, was dismissed with costs, and the Plaintiff was taken under an attachment for non-payment of costs. The Court, on motion, ordered the solicitor to indemnify A., but refused to release A. as against the claim of the Defendants. Held, also, that A. was not, on such an application, to be deprived of his right against the solicitor to damages for his imprisonment.

In this case, a suit had been instituted in the names of Hood and of Sanders and the cause coming on for hearing, it was dismissed with costs.

In this proceeding Mr. Phillips, who acted as solicitor for the Plaintiffs, took his actions entirely from Hood, and, as it appeared, never communicated with Sanders, or obtained from him any authority for instituting or prosecuting the suit.

[177] Upon the dismissal of the bill, a *subpoena* for costs issued; the Plaintiff was taken under an attachment for their non-payment, and was lodged in gaol.

Mr. G. Turner now moved that the name of Sanders and Mary his wife might be struck out of the record of the Plaintiff's bill in this cause:—that the Plaintiff might be discharged out of custody as to his contempt for not paying £63, 4s. costs to the Defendants, and that Phillips might be ordered to pay the costs of this application, together with the costs which Sanders had become liable to pay, by reason of his having been made a party to this suit.

Mr. Pemberton and Mr. Freeling, for the Defendants.

Mr. Kindersley and Mr. Lewis, for Phillips.

Wilson v. Wilson (1 Jac. & W. 457), *Wade v. Stanley* (*Ibid.* 674), *Tabernor v. Prior* (2 Keen, 679), were cited. (And see *Wiggins v. Peppin*, 2 Beav. 403; *Allen v. Allen*, 4 Beav. 493; *Hall v. Bennett*, 2 Sim. & St. 78.)

THE MASTER OF THE ROLLS [Lord Langdale]. Before filing a bill, it is the duty of the solicitor to obtain distinct authority; the general rule is that he ought to have it in writing, but though this is the proper course, still it is not necessary, if it be proved that the Plaintiff has afterwards acquiesced in the proceedings, and that the circumstances are such that the Court can infer an authority. Whenever the question is, whether the [178] authority has been given or not, and it becomes the subject of doubt and argument, the *onus* of proving it lies on the solicitor. In this case there is the least circumstance from which I can infer that any authority was given by Sanders: no express authority is proved; no communication with him, and no circumstance from which my mind can be led to the conclusion that any authority was at all given. Then it is said that the subject of this suit was one proper for the jurisdiction of a Court of Equity; I am informed, that such was the opinion of a man of the Bar, and that, in consequence of that opinion, this suit was instituted. Authority seems to have been given by one of the Plaintiffs, and, without doubt, the solicitor thought that the best mode of conducting the suit was to make all these parties Co-plaintiffs. It was very unfortunate that he did not recollect that with the authority of one he could not proceed in the name of both. In consequence of his having proceeded without that authority, he has become subject to consequences which follow on this present motion.

It is said, that not only did Sanders not authorise the suit, but that he expressly dissented from it, not indeed to Phillips, but to the Co-plaintiff. Having dissented, knowing nothing of the matter, he was not further informed of it till the bill was filed with costs; then he was told that he had not only lost the £500 for which he had sued, but also the costs incurred in consequence of the suit. I should have been glad to have heard that the solicitor had made some communication to Sanders, saying, "I have made a mistake and will protect you." Instead of that, it does not appear that he took any step whatever. The consequence, as might have been expected, was, that a *subpoena* for costs followed, and shortly after an attachment was issued, under [179] which Sanders was lodged in gaol, where he now remains, for

non-payment of the costs to which he was subjected by Phillips, who thinks proper to contend that he is not bound to indemnify him at all. It is clear, however, that he has a right to be relieved from these costs at the expense of Phillips.

I am afraid that the forms and rules of this Court do not enable me to exonerate him from the claims of the Defendants. It seems to have been considered necessary that the declared rights of parties in a cause should be preserved, the similar claims of a party to the cause has, upon different occasions, been made effectual; and, notwithstanding this unfortunate person has been brought into the present situation without any authority given by himself, I fear I cannot relieve him from the demands of the Defendant, except by arrangement.

I have no doubt whatever, that he ought to be exonerated by Phillips from the demand, and the order to be made ought to be like that in *Wade v. Stanley* (1 L. W. 674). I cannot but hope that he will immediately take proceedings not only to release the Plaintiff from his present situation, but also from the further imprisonment which is impending over him, if the costs due from him to other parties are not paid.

It is asked, that I should make it a condition for giving relief, that the Plaintiff should be precluded from demanding any damages. I think that no authority can be produced to this effect. If there were, I would follow it; if not, I am disposed to make a precedent. The only thing that can be done on the present application is, to exonerate the unfortunate man [180] at the expense of Phillips, by these means to exempt him from future imprisonment.

I cannot give him compensation for having been taken away from work and kept in prison, the effect of which may be his entire ruin. Such a state of things as here brought about cannot be contemplated without the greatest regret.

The delay is not such as to deprive him of any right whatever.

NOTE.—By consent of the Defendants, the Plaintiff was discharged out of custody. Reg. Lib. 1840, A. fol. 1055.

[180] PRICE v. LOCKLEY. Feb. 17, 1843.

[S. C. 7 Jur. 143. See *In re Coley* [1901], 1 Ch. 43.]

Bequest to A. for life, and after her decease to the testator's "four children, survivor or survivors of them equally, or to their heirs lawfully begotten." Of the four children died in the life of A. Held, that his children took one-third by way of substitution.

The testator, by his will dated in 1805, after giving certain legacies, proceeds as follows:—"All the residue and remainder of my money, and book debts, after payment of my just debts and funeral expenses, I will and order that the same shall be collected and placed in the public funds, for the use and behoof of my said wife and two said children Eliza and Joseph, during the term of my said wife's natural life so long as she shall remain my widow; and at the decease of my said wife, I will and bequeath the same to my said four children, the survivor or survivors of them, or to their heirs lawfully begotten. All the rest of my personal estate and effects of what nature or kind soever, I likewise give and bequeath to my said [181] wife during the term of her natural life, or so long as she shall remain my widow; and after her decease or second marriage, in either case, I will and order that the same shall be disposed of by sale, and money equally divided among my said four children or the survivor of them or their heirs as aforesaid. I likewise order that the sum of £30 hereinbefore mentioned for placing my son Joseph in apprenticeship shall be deducted from his share at the decease of my said wife."

The testator died in 1805.

The testator's son Joseph, afterwards assigned his share to Oliver James, and died in 1837, leaving five children. The testator's widow afterwards died in 1843.

The contest in this suit was whether Oliver James, or the five children of Joseph, were entitled to the one-fourth.

Mr. Rogers, for the Plaintiff.

Mr. Koe, for Oliver James, contended that Joseph Price, upon surviving the testator, took a vested interest in one-fourth of the residue, and that it had passed by his assignment.

Mr. T. Parker, for the children of Joseph, contended that the true construction of the will was this: that, if the testator's four children survived the tenant for life, they would have taken absolutely between them, and that, on the death of any of the four children in the lifetime of the widow without children, the survivors would have taken, but if they left children, such children would take the share of their parent by substitution. That Joseph, therefore, had no interest which he could pass over to Oliver James.

[182] Mr. Parker, junior, for the administratrix of Joseph Price.

Mr. Stinton, for other parties.

Mr. Koe, in reply.

The following cases were cited; *Gittings v. M'Dermott* (2 Myl. & K. 69), *Walker v. Miles* (1 Jac. & W. 1), *Cripps v. Wolcott* (4 Mad. 11), *Hervey v. M'Laughlin* (1 Price, 100), *Pope v. Whitcombe* (3 Russ. 124).

THE MASTER OF THE ROLLS [Lord Langdale] was of opinion that, in the event which had happened, the children of Joseph took one-fourth by way of substitution.

NOTE.—See *Pearson v. Stephen*, 5 Bli. 203, and 2 Dow & C. 328.

[183] BEARE v. PRIOR. (*Ex relatione.*) March 9, 1843.

[S. C. 12 L. J. Ch. 262.]

Estate was conveyed by A. to B., upon trust, for ten years, to apply the rents in payment to B. of the interest and capital of £1000 lent by B. to A., and then to B. to pay off the residue of the £1000, and hold the remainder in trust for the life and children of A. The rents exceeded the interest. B. permitted A. to retain possession, and the interest was not applied as directed. Upon a bill by B. against A. and his wife and children for a sale: Held, that B. could not, until he took possession, be made liable for what, without his wilful default, he might have received, except upon a cross-bill raising that question.

On the marriage of the Defendant Henry Prior in 1819, an indenture was made, whereby, after reciting the intended marriage, and that Prater had agreed to lend Prior a sum of £1000, Prior covenanted to surrender certain copyholds to Prater, upon trust to apply the rents in payment, in the first instance, of the interest on the sum of £1000 and then to apply the surplus of the rents in reduction of the principal sum of £1000 till February 1829; and then, upon trust to sell and pay off the residue (if any) of the debt due on the mortgage, and invest the remainder of the proceeds in trust for the wife for life for her separate use, with remainder for the issue of the issue of the marriage.

The rents were more than sufficient to pay the interest. Prater was, in 1819, entitled to the copyholds.

On the 27th of February 1829 a memorandum was indorsed on the indenture of and signed by Henry Prior, stating that it was agreed that the sum of £1000 should continue upon mortgage for ten years longer.

Prater died, and, in 1840, his representatives filed this bill against Mr. and Mrs. Prior and their children, alleging that the whole sum of £1000 was still due with an interest, and praying for an account and for a sale of the mortgaged copyholds, and that the surplus might be invested upon the trusts of the indenture of February 1819.

[184] The Defendant Prior alleged, by his answer, that he had continued to pay the rents of the mortgaged hereditaments from 1819 until April 1840, when the representatives of Prater took possession; that, by the end of 1826, a sum of £300

part of the £1000 had been paid off out of the surplus rents, but that in 1819 Prater returned that sum to Prior, upon an agreement made between them, as expressed in the memorandum of 1829, that the whole £1000 should continue to be secured upon the mortgaged hereditaments.

Mr. Bacon appeared for the Plaintiffs.

Mr. Twells, for the Defendants, contended that Prater, by accepting the trust deed of February 1819, had become bound to receive the rents of the hereditaments, and apply them in reduction of the £1000, and that if he had pursued that course, the whole, or nearly the whole, of the debt would now have been paid; and that, as the omission of Prater to do this amounted to a breach of trust, the representatives were not entitled to have the accounts taken in a more favourable manner than if such a breach of trust had never been committed. He then insisted that the Plaintiffs ought to account not only for what they or Prater actually received, but also for that which without his or their wilful default would have been received.

THE MASTER OF THE ROLLS [Lord Langdale] said that from the time when the representatives entered into possession, they must account, in the usual manner, as mortgagees in possession, for the rents and profits which they had received, or which, without their wilful default, they might have received, but that the Court could not make the Plaintiffs responsible for the rents which might have been received by Prater while he was not in possession [185] of the mortgaged estates, unless upon a cross-bill to have the benefit of the trusts of the indenture of February 1819. As the case now stood, the Plaintiffs could only be made to account for what they actually received prior to their taking possession in 1840, and for what might have been received by them since that period.

[185] RICHARDSON v. HORTON. March 10, 13, 17, 1843.

A. and B. were obligors in a *joint* bond: A., who was alleged to be the principal, died. Held, that his assets were not in equity liable upon the bond, but that the liability survived to B.

On the 8th of May 1810 Sir Watts Horton and Thomas Horton executed a bond for £6000 to Messrs. Griffen & Leathes, subject to a condition for making the same void, if they, their heirs, executors, or administrators, or any of them should not pay Messrs. Griffen & Leathes the sum of £3000 and interest on the 6th of January 1811.

It was said by the Defendants, that Thomas Horton was only surety for Sir Watts Horton, but this did not appear by the bond.

Sir Watts Horton died in November 1811, leaving his co-obligor Thomas Horton surviving him.

By the decree made in January 1832 the Master was directed to take an account of the debts of Sir Watts Horton. By a separate report, dated the 27th of February 1842, the Master found that a sum of £3513, 4s. 1d. was due to the representatives of the obligees, for principal and interest on the said bond debt, and for their costs.

[186] Both parties took exceptions to the Master's report, which now came on for argument.

Mr. Kindersley and Mr. Walpole, for the representatives of Messrs. Griffen & Leathes.

Mr. Pemberton and Mr. Koe, for Defendants interested in the estate of Sir Watts Horton.

Mr. G. Turner and Mr. Rogers, for the Plaintiff.

Copis v. Middleton (Turner & R. 224) was cited.

March 17. THE MASTER OF THE ROLLS [Lord Langdale]. It is objected to the Master's finding, that where two are jointly bound and one dies, the obligation survives to the surviving obligor; that no action can be maintained against the estate of the obligor who died first; and that, as an action cannot be maintained against

the executors upon the bond, the bond cannot be the foundation of a claim to a specialty debt in equity.

In answer to this argument, it is not alleged, that there was any antecedent joint liability of Sir Watts Horton and Thomas Horton, or that there was any agreement for a joint and several bond, or any mistake in preparing the bond; but it said, that it could not have been intended to release Sir Watts who was the principal debtor, and his estate, if he happened to die first, and that therefore the bond ought to be considered as joint and several.

[187] I do not think that this argument can prevail. If the bond had been made joint and several, Thomas Horton might have been sued upon it alone in the lifetime of Sir Watts; and there seems to be no reason, even for conjecturing, that he would have consented to this, or to do more than make himself jointly liable; and if joint liability was the intention of the parties, nothing is now to be rectified or altered, and the legal consequences must follow. The obligation, by virtue of the joint bond, survived to the surviving obligor, and there was no legal remedy upon the assets of the deceased obligor. There may be a legal debt arising out of the contract against the assets of Sir Watts Horton, but if so, it will not be a debt upon the bond, and must be established by means other than the mere production of the bond. (NOTE. See *Rawstone v. Parr*, 3 Russ. 424, 539; *Cowell v. Sikes*, 2 Russ. 191; *Towers v. Leor*, 2 Vernon, 98.)

[188] WATTS v. GIRDLESTONE. March 17, 20, 1843.

1 C. 12 L. J. Ch. 363; 7 Jur. 501. Followed, *Ames v. Parkinson*, 1844, 7 Beav. 385. See *Shepherd v. Moulds*, 1845, 4 Hare, 505.]

trustees are directed to invest trust money on Government or real securities, and they do neither, they are answerable, at the option of the *cestuis que trust*, either for the money or the stock which might have been purchased therewith. Husband and wife had a power to sell real estates, with the consent of the trustees; the monies were, with all convenient speed, to be laid out in the purchase of other lands; and until a convenient purchase could be effected, it was made lawful for the trustees, with the consent of the husband and wife, to invest the money in Government or real securities. A sale took place in 1811, and in 1816 the produce was lent by the trustees on personal security. Held, that the trustees were liable for the stock which the money would have produced in 1816. Held, also, that the trustees ought not to have consented to a sale without first providing the means of investing the purchase-money.

In this case land was vested in the trustees of a marriage settlement. The husband and wife, with the consent of the trustees, had power to sell the land, the money arising from the sale was, with all convenient speed, to be laid out in the purchase of other lands to be settled to the same uses, and, until a convenient purchase could be effected, it was made lawful for the trustees, with the consent of the husband and wife, to invest the money on Government or real securities.

The land was sold in the year 1811 for the sum of £2200, which was not laid out in the purchase of other land, or invested either upon Government or real securities, but, in the month of July 1816, it was lent to the husband on merely personal security.

The husband was unable to repay the money, but the full amount had now been paid by his sureties, and to this extent, the trustees had been relieved from their liability.

This bill was filed by the children of the marriage, and sought to charge the trustees with a breach of trust, and to make them responsible for the stock, which the money produced by the sale of the estate would have purchased at the time when it was received by the trustees.

[189] Mr. Pemberton Leigh and Mr. Hubback, for the Plaintiffs, the *cestuis que trust*, contended, that they were entitled to have made good so much Bank three per

cent. annuities, as might have been purchased with the money at the time when it was received by the trustees, or at the time when they lent it to the husband on personal security.

Hockley v. Bantock (1 Russ. 141), *Bateman v. Davis* (3 Mad. 98), *Cocker v. Quin* (1 Russ. & M. 535), *Dimes v. Scott* (4 Russ. 195), *Clough v. Bond* (3 Myl. & Cr. 496).

Mr. Kindersley and Mr. C. Bellamy, for the representatives of one of the trusts. Where trustees may invest in stock or on real security, and they lend on personal security, they shall be answerable for the principal money only, and not for the value of the stock which might have been purchased; *Marsh v. Hunter* (6 Mad. 295). The husband and wife had the power of electing whether the securities should be fluctuating, as the public funds, or invariable, as a mortgage. They have chosen the latter, and therefore the trustees are only liable for the fixed sum.

The trust for investment was not imperative; the trustees had no power to invest at all, except with the consent of the husband and wife, which they withheld; at all events, there was no breach of duty until 1816.

Mr. Drewry and Mr. Austen, for other parties.

Mr. Pemberton Leigh, in reply. The object of the parties was to reinvest the money in land; the investment in the funds, or on real security, [190] was merely temporary and until the money could be invested in land. It seems obvious that the trustees ought not to have risked a conversion of land into money, without providing themselves with an authority which would enable them to invest and produce. That alone would make them responsible for the purchase-money arising from the sale, though it might not, perhaps, make them liable for the stock.

The trustees having placed themselves in a position in which their option could be exercised, it may be a question if they were not bound to make the investment in such a way as the Court would have directed.

THE MASTER OF THE ROLLS. Whether the trustees are to be charged with the money or stock is a question of great importance, and I will consider it.

No sale could have taken place without the consent of the trustees; and I do say that it was a proper exercise of the discretion of the trustees, to consent to a sale of the real estate, without knowing beforehand what was to be done with the purchase-money. By not making a provision for the reinvestment, the whole control was left in the hands of the tenant for life, who might exercise his power in such a way as to induce the trustees to commit a breach of trust.

MARCH 20. THE MASTER OF THE ROLLS [Lord Langdale]. If trustees are directed to invest trust money on Government or real securities, and they do neither, I do conceive that they are answerable, at the option of the *cestuis que trust*, either for the sum which was to be invested, or for such amount of Bank three per cent. annuities as might have been purchased with the sum at the time when it ought to have been invested according to the trust.

In the present case, I think that, in a prudent execution of the trust, the *cestuis que trust* ought not to have consented to a sale, until they had first obtained the consent of the husband and wife, either to the purchase of other land, or to the investment of the purchase-money until other land could be conveniently purchased. The settlement, however, did not contain a plain direction for that purpose; the consent of the husband and wife not appearing to have been given, the trustees may have been under difficulties respecting the investment; and some time may have been improperly employed in endeavouring to obtain a proper real security. The circumstances are not explained; and during the time which elapsed between the receipt of the money and the loan to Mr. Watts, I do not think that there were sufficient grounds on which to charge the trustees with more than the amount of the money which they had received; but in lending the money to the husband without real security, they acted in direct violation of their duty, and committed a breach of trust; and for that breach of trust I think that they are answerable in the manner most beneficial to the *cestuis que trust*; upon that principle it appears that the Plaintiffs are entitled to have so much Bank three per cent. annuities as the sum of £2200 would have purchased on the 16th day of July 1816, when the money was lent to the husband.

[192] SELBY v. JACKSON. Jan. 24, 25, 28, 1843.

[S. C. 13 L. J. Ch. 249.]

The Court, under the circumstances of the case, refused to set aside deeds executed by one under restraint in a lunatic asylum, under medical certificates.

Then a party, without authority, but *bona fide*, assumes the management of the property of one mentally incompetent, this Court will not, on his recovery, restore to him his property without making an equitable allowance for the expenses and liabilities.

In a bill seeking to set aside deeds *in toto* and praying no alternative relief, the Court will not, adversely, grant an account on the footing of their vitality.

The object of this bill was to set aside as void two deeds executed by the Plaintiff, on the ground that they were executed by the Plaintiff at a time when he was under confinement as a lunatic under the circumstances after stated.

No replication had been filed, and the cause came on upon bill and answer. The answer being thus admitted to be true in all points, it appeared that, in 1822, the Plaintiff commenced business as a wine and spirit merchant, and that in 1831 he introduced into this country a wine called Masdeu, which he imported to a great extent. The speculation did not succeed, and in 1839 the Plaintiff having a very large stock of this wine on hand, found himself embarrassed in his circumstances. He appeared about this time to have contemplated submitting to a bankruptcy, but was dissuaded therefrom by the Defendants, the brothers of his wife.

The difficulties under which the Plaintiff was suffering preyed upon his mind, and, towards the end of 1839, this, together with mental and bodily exertion, brought on a mental disorder, attended with delusions, and occasional paroxysms of violence. In this state of things the Defendants, the father and brothers of the Plaintiff's wife, out of kindness and regard, came forward to the assistance of the Plaintiff and his wife's family. The Plaintiff's state of mind at that time did not appear to be such as to totally disqualify him from attending to his concerns. In January 1840 meetings [193] of his creditors took place, with the view of making some arrangement of composition; but before their completion it became necessary to place the Plaintiff in a lunatic asylum under the care of Dr. Allen. The Plaintiff's malady, to some extent, yielded to the medical treatment and quietude, and in February Dr. Allen thought he might return to London for a short time, by way of trial, and he was accordingly brought to town by one of the Defendants, and resided with him about a month, and, during part of this time, he was perfectly rational and collected, and during those periods was consulted on the affairs of his business.

The improvement in the Plaintiff's state of health unfortunately was not lasting, and it became necessary, on the 7th of March, to replace him under the care of Dr. Allen, where he continued till July 1841.

The Defendants in the meantime proceeded to complete the arrangements with the Plaintiff's creditors, and, from time to time, communicated to the Plaintiff the progress of their arrangements. The creditors ultimately agreed to release their claims, on receiving portions of the wine stock, and upon the Defendants entering into their own personal liability to secure certain payments. On the 14th of May, before the arrangements had been completed, a statement of the Plaintiff's affairs, and a proposition of what was intended to be done were given to Dr. Allen, in order to be communicated to the Plaintiff.

On the 14th of May deeds were prepared for the purpose of carrying into effect the proposed arrangement with the Plaintiff's creditors, and, on the 1st of July 1840, notice of their intended execution was given to Dr. Allen.

[194] On the 4th of July the Defendants attended the Plaintiff, who was still in the lunatic asylum, with the deeds for his execution, and the Defendants, being assured by Dr. Allen that the Plaintiff was, in fact, during the transaction, in a rational and competent state of mind to execute the deeds, carefully read over the deeds to him in the presence of Dr. Allen and his medical assistant, and some alterations were

made therein at the suggestion of the Plaintiff. The answer stated, that the Plaintiff fully understood the nature and effect of the said deeds, that he was fully competent to execute them, and was perfectly willing to do so. That he accordingly did execute the same, and in the presence of the two Defendants, his brothers-in-law, and of Dr. Allen and his assistant, who attested the execution thereof, and subscribed a certificate as follows, viz. :—"We hereby certify that the deed of assignment, bearing date the 20th day of May last was read over to Mr. Selby in our presence, he, at the same time, inspecting the deed of release of the same date. And we further certify that he fully understood the nature and effect of both instruments, and was perfectly willing and competent to execute them, and did so in our presence. As witness our hands this 4th day of July 1840."

The first of these deeds was a deed of composition between the Plaintiff and his creditors, whereby the latter accepted stock and promissory notes of the Defendant by way of composition for their debts.

By the second deed, the Plaintiff assigned the whole of his property to the Defendant, on trust to deliver to the creditors the stock agreed upon, and then to indemnify the Defendants from all liability under the composition deed, and pay the residue to the Plaintiff.

[195] The Defendants, the brothers-in-law, proceeded to carry the arrangement into execution, and they made the necessary advances to satisfy the creditors, and in this respect and in respect of their own debts a considerable sum became due, and was still owing to them.

On the 29th of July 1841 the Plaintiff was discharged from the lunatic asylum and a disagreement having taken place between him and the Defendants in consequence of the latter refusing for the present to permit the Plaintiff to interfere with the business until the matters had been more settled, the Plaintiff filed this bill insisting on the total invalidity of the deeds in question, and praying a declaration that the deeds so executed by the Plaintiff whilst under confinement for unsoundness of mind, were void and invalid, and that they might be set aside, and that the Defendants might account and answer for their wilful default.

The bill did not allege any fraud or contrivance on the part of the Defendants or that they were in any way actuated by considerations of personal benefit, and the bill contained no allegation that the arrangement was injurious to the Plaintiff.

The bill alleged, "that at the time of the execution of the deeds, the Plaintiff had his arms confined, and so fettered as to be unable to do any injury to himself or others, and just before being taken into the room where the Defendants were, his right arm was unfettered, but one or more keepers were, at the time aforesaid, in attendance; that in this condition he was requested to read the said deeds, which he accordingly read, but he had no certain recollection of the effect thereof, except that he understood that the object of the said deeds was to enable the said Defendants Andrew Jackson and John [196] Reid Jackson to manage the Plaintiff's affairs and to carry on his business of a wine and spirit merchant during the continuance of his malady, or if thought requisite, to wind up the said business, and to satisfy all claims and demands in respect of the same upon or against the Plaintiff. That the Plaintiff read over the said deeds in the presence of the said Defendants and Dr. Allen and Thomas Appleton Nowell Preston, and suggested some alterations therein, and that the same were, or was, altered according to his said suggestion, and that as so altered he was requested to execute the same (but what the nature of such alterations was, the Plaintiff was wholly unable to recollect). That the Plaintiff, being under the impression and understanding that the said deeds were intended only for the object and purposes last thereinbefore in that behalf mentioned, consented to execute the said deeds, and he accordingly did execute the same on or about the said 30th day of June 1848, and that immediately after the said deeds were executed by him, and on his removal to his own apartment, the restraints or fetters were replaced upon his right hand." On these allegations, and upon the allegation of mismanagement of the business by the Defendants, which, however, was denied, the Plaintiff seemed to rest his case.

With regard to the fetters, the answer stated, that the Plaintiff during his confinement in Dr. Allen's establishment had been subject to violent paroxysms, and

vinced a tendency to self-injury and violence, and that the Defendants had been informed and verily believed, that the Plaintiff, at his intervals of reason, had the impression of such affliction, and did occasionally, fearing a sudden return thereof, request his arms or hands to be secured. The Defendants also said, they believed that at the time they visited him with the deeds, "the Plaintiff, under [197] the circumstances thereinbefore appearing had, as the Defendants best recollected, and believed, his left arm partially confined by a leathern belt, but that he had not otherwise his arms confined and so fettered as to be unable to do any injury to himself and others." They said they were informed and believed, that it had been, as thereinbefore appeared, the Plaintiff's custom occasionally to have his arms confined: that on the circumstances aforesaid, they entertained no doubts, though they could not state the same of their own knowledge, that the Plaintiff had, at his own request, on a day in the bill mentioned, before the Plaintiff went into the room where the Defendant J. Jackson was with the deeds, his left arm confined in manner before mentioned. They said they believed, that at such time, there was not the slightest reason for any such restraint or precaution.

It appeared from the answer that on the same day on which these deeds were executed, the Plaintiff executed an indenture of apprenticeship of his son.

The cause now came on for hearing, when

Mr. Selby, in person, insisted on the total invalidity of the deeds in question. He argued that having been executed by him at a time when he was in confinement under medical certificates of his lunacy, and when he was not a free agent but in others, the same were in law wholly void.

He imputed no fraud to the Defendants, but complained of their injudicious course of management of the property.

Mr. Kindersley and Mr. Rogers, *contra*, contended that it appeared from the answer, which must be taken [198] to be true, that the Plaintiff was, at the time of the execution of the deeds, competent to understand and did understand their nature and effect. That it was an act of the greatest prudence, and that the Defendants were actuated by no personal motives in bringing about the arrangements. That they had incurred liabilities in order to affect the arrangement for the benefit of the Plaintiff, and though they were perfectly willing to account for their acts under the deeds, they submitted that the deeds ought not to be set aside without providing indemnity for all that they had properly done, and for what they had expended for the Plaintiff's benefit. That if the transaction were to be set aside *in toto*, the Defendants were entitled to stand in the place of the creditors to the full amount of their debts.

Mr. Selby, in reply.

Jan. 28. THE MASTER OF THE ROLLS [Lord Langdale]. In this case the Plaintiff by his bill prays, that certain deeds which are dated the 20th of May 1840, which he says were executed by him whilst under confinement for unsoundness of mind, were and are as against him invalid and void, and ought to be set aside. The rest of the prayer is for consequential relief.

By the deeds in question the property of the Plaintiff was assigned to two of the Defendants, and he seeks the relief which is asked for by this bill, on the ground that he was induced to execute the deeds whilst he was confined in a lunatic asylum, under medical certificates that he was a proper subject for such confinement—that his state of mind was such, that his person was fettered for the purpose of preventing him from doing injury to himself and [199] others—that he was required to execute and to execute the deeds in the presence of his keepers, and was, for the occasion, totally relieved from his fetters with an intent which was carried into effect, of his being immediately afterwards subjected to the former constraint.

The circumstances thus alleged are no doubt very important, and of themselves strongly calculated to invalidate the deeds; but when this Court is called on to set aside deeds, all the circumstances under which they were executed must be taken into consideration. In this case it is very remarkable that there is no allegation of fraud against the Defendants or any of them, no pretence that coercion was used, or any stratagem or any contrivance employed, to compel or induce the Plaintiff to do any act in any way tending to the personal benefit of any of the Defendants. There

is no pretence of any imposition—no allegation that the Plaintiff had not the means of understanding and was not capable of understanding the effect of that which he did. The Plaintiff so far from alleging that the act done was injurious to him or contrary to his interest at the time, or from insinuating that it was intended otherwise than for the benefit of himself and his family, has, at the Bar, frankly and no doubt properly and truly stated, that the Defendants were actuated by motives only of kindness towards himself and his family: that the act done, namely, the execution of the deeds, was, at the time, an act of the highest prudence and greatly to his advantage, and that all that the Plaintiff has since disapproved of, has arisen, not from any desire to injure the Plaintiff, but, as he alleges, from want of judgment, knowledge, and experience, in carrying on the Plaintiff's business; and the Plaintiff's principal ground of complaint, which he has repeatedly referred to, is his exclusion from the personal management of the business.

[200] The question however is, whether under all the circumstances of this case the Court is to set aside the deeds. The Plaintiff may undoubtedly be entitled to relief or to an account under the deeds supposing them not to be set aside, but such an alternative relief is even asked for in this case.

As the Plaintiff has not replied to the Defendants' answer, the answer is the only evidence in the cause—and the Defendants having been precluded by the Plaintiff from every opportunity of examining witnesses, the statements which are made in their answer must be taken to be, in all respects, true, so far as they are consistent with themselves.

Now what do the facts appear to be? [His Lordship referred to the facts of the case as appeared from the answer, and which it is not necessary to repeat.]

It is unnecessary to state the deeds further than this, that they appear manifestly and plainly to have been, what the Plaintiff himself had called them, deeds which were executed with the highest sense of prudence. He was manifestly in such a state of embarrassment in his affairs, in addition to the condition of his mind, which most probably had become unsettled by the difficulties in which he was placed by nothing else, that it was utterly impossible for him to proceed. He was insolvent, and as the Defendants state in this answer, deficient to the amount of seven thousand pounds. The arrangement consisted of a settlement with his creditors by the payment of a composition, the greater part of which was secured by his personal obligation and liability of the Defendants Mr. James Jackson and John Reid Jackson; by taking upon themselves that personal responsibility, they relieved him entirely from the [201] pressure of his creditors beyond his family, and they then, at their personal risk and liability, obtained a release for his benefit. In order to afford them an indemnity, which formed a part of their arrangement all through, it was agreed that he should assign his estate and effects to them, that they should apply the proceeds of it for their indemnity, after paying the proper expenses, and when their indemnity had been secured, they were to stand possessed of the whole surplus in trust for the Plaintiff. So that having gratuitously secured him the benefit obtained by means of their own personal liability, all that they asked in return was, that they should be indemnified in respect of that liability out of the property which he at that time possessed.

The question is this, are these deeds to be simply set aside, are these gentlemen to be left with the advances they have made upon the settlement with the Plaintiff's creditors uncovered and entirely at the mercy of the Plaintiff? Is he to be put into the absolute and uncontrolled possession of the property which remains, by setting aside these deeds? And is everything which has been done for his benefit upon this occasion to be entirely undone? The proposition, I must confess, seems to me to be of a very extraordinary nature. I can hardly believe from what I have seen of the Plaintiff on this occasion, who has conducted his own case not only with ability, with a very considerable and laudable degree of candour, that a gentleman who manifested the moral feeling as well as the ability he has done on this occasion, seriously mean that which this bill purports to aim at, namely, to take to himself the whole property, and the whole benefit which his relations have conferred upon him by their own personal liability, and leave them wholly unpaid and without remedy whatever. This, however, being manifestly the [202] purport of this

it is sufficient for me to say, that it is not a proceeding which this Court can sanction.

It must be admitted, that the Defendants did an act which can by no means be considered consistent with legal prudence; an act which exposed them to very considerable hazard, which made it incumbent on them to shew, at any time when they were called upon to do so, that their proceedings were entirely fair and disinterested, that there was not the slightest personal interest to be obtained, that there was not the smallest imposition practised on the other party. They placed themselves in a position which disentitled them to the ordinary presumptions which are given in the general transactions of mankind. The Plaintiff being in confinement under medical certificates justifying his being confined as a lunatic, and being at the same time under personal constraint, the burden of proof was thrown upon those who dealt with him; the Defendants are not, as I said before, entitled to the ordinary presumptions in their favour. But when the matter comes to be investigated, and it turns out that they have acted fairly and disinterestedly for the benefit of their relation, that they have sought no benefit for themselves, that they have done for him alone an act which was of the highest prudence, I say the deeds, and the circumstances under which the deeds were executed, become of comparatively trifling importance.

If they had assumed the management of this gentleman's property without any aid or anything of the kind, it would have been a very hazardous act; but if they had assumed the management of his affairs at a time when he was incompetent to manage them himself, this Court, at least, would then have taken into consideration the circumstances under which they did it, would have investigated with minuteness, and would in their [203] favour have considered the prudence and propriety of their conduct, and would not, when this gentleman recovered the possession of his reason, have taken from them the property which remained in their hands, without making them an equitable allowance for the expenses and liabilities to which they had subjected themselves for his benefit.

It is scarcely necessary for me to proceed further. It is very true that the presumptions against these Defendants are increased, in consequence of the state of this gentleman having been such as to prolong his confinement for a very considerable time after the date of the execution of these deeds. He was not released till a year afterwards, in the month of July 1841; his business was in the meantime carried on by the Defendants; and when this gentleman was released, he naturally and properly had a great anxiety to know the state of his affairs. He had naturally (but whether properly or not depends on other circumstances), a great desire to be restored to the full control and management of his property. If he had desired to be restored to the full control and management of the property, for the purpose of working out that which was to secure the residue to himself, it would have been quite well. He interfered, however, in a manner which interrupted the business as then carried on by the trustees.

The Defendants were trustees only for the benefit of Mr. Selby, and were accountable to him for the surplus, after indemnifying themselves; he had therefore a clear right to call them, and to keep them closely to account. He had the surplus interest, they had the interest to indemnify themselves, he had therefore a right to call upon them to account, but they, in the meantime, had the right to control and manage the property [204] for their interest and indemnity, provided they did it in such a way as was consistent with his ultimate interest. If they failed in that respect, Mr. Selby had a perfect right to call them to account, and might have filed a bill, not like this bill to set aside the deeds, but a bill, stating that these gentlemen who, subject to their right to indemnity, were trustees for him, were not carrying on the business in proper manner, and desiring the assistance and control of this Court to compel them to do so. If he could sustain his case by evidence, this Court would necessarily have interfered for his protection, and would not have permitted the trustees, because they had a personal interest for their own indemnity, to carry it on in such a way as would be injurious to their *cestui que trust*.

There is no such relief sought by this bill, the sole object aimed at by it is, to set aside the deeds, and to leave these gentlemen without any protection at all for the

advances they have made, or even for the payment of the composition on their own respective debts.

Under these circumstances I confess that I do not think the Plaintiff is entitled to any such relief as is sought for by this bill. Being, as I think entitled, if he think fit, to have an account of the receipts and payments of these gentlemen in the execution of their trusts, he must be under the necessity of filing another bill, unless the Defendants, by arrangement and for the purpose of getting rid of what I think is a troublesome business for them, will consent to have an account taken in this case; otherwise I must dismiss this bill.

Affirmed by the Lord Chancellor, 31st of January 1844.

[205] FULLER v. KNIGHT. Jan. 26, 27, Feb. 28, 1843.

[S. C. 12 L. J. Ch. 182. See *Butler v. Butler*, 1877, 7 Ch. D. 121.]

A trustee cannot, by contract, waive his right to resort to the life interest of a tenant for life, for the purpose of replacing a trust fund, which, in breach of trust, he lent to the tenant for life.

A trustee, in breach of trust, lent the trust fund to A. B., the tenant for life. The trustee afterwards concurred in a creditor's deed, by which A. B.'s life interest was to be applied in payment of his debts, and the trustee received thereunder a debt due to him from A. B. Before the other creditors had been paid, the trustee retained the income to make good the breach of trust. Held, upon a bill filed by the trustees of the creditor's deed, that this Court would not prevent such application.

By a settlement made in 1795, on the marriage of the Defendant Charles Fuller with Jane his wife, two sums of £20,000, and £16,000 consols were vested in trust upon trust for the husband for life, with remainder to the wife for life, with remainder to the issue of the marriage, with remainder on certain trusts, under which the husband was entitled to a contingent reversionary interest in a portion of the fund.

[206] In 1805 the trustees of the marriage settlement committed a breach of trust, by lending £9000 (the produce of £15,517 consols part of the trust fund) to the husband, on the security of certain leasehold property.

In 1816 Charles Fuller, the husband, executed a creditor's deed, whereby his interest in the leaseholds and under the marriage settlement, including the £9000 besides other property, were assigned to trustees for the payment of certain debts.

The Defendant Robert Knight, the surviving trustee of the marriage settlement, was one of the creditors of Charles Fuller, the tenant for life, whose debt was provided for by the creditor's deed.

Robert Knight concurred in that deed, and received his debt thereunder. He had lately and before the trust of the creditor's deed had been fully carried into execution, commenced proceedings by ejectment to recover the possession of the leasehold premises, and he threatened to apply the life interest of the tenant for life in reparation of the breach of trust, alleging that the leasehold security was inadequate.

The trustees of the creditor's deed, who were also unsatisfied creditors under the deed, thereupon filed this bill against Robert Knight and Mr. and Mrs. Fuller, praying to have the trusts of the creditor's deed carried into execution, and that the rents and interest on the trust funds and securities might be applied in payment of the monies thereby secured, and that Knight might be restrained from interfering therewith, and particularly with the rents of the leasehold property.

The only issue of the marriage had died without acquiring any interest in the trust funds, so that, subject [207] to the very remote contingency of issue of the marriage being born, Mr. and Mrs. Fuller were the only persons interested in the trust funds, but the interest of Mrs. Fuller therein was reversionary.

The Defendant Knight, by his answer, submitted, that it was his duty to receive the rents of the leasehold property and the interest of the settlement funds, and to apply the same towards replacing and making good the £15,517 consols lent to the Defendant Charles Fuller, the tenant for life, on the security of the leaseholds, which had become an insufficient security; and he submitted, that it was his duty as trustee of the said settlement, or at least, so far as he was trustee for the said Jane Fuller, to enforce his said claim against the Plaintiffs, as well as against Charles Fuller, notwithstanding he might have joined and concurred, as a creditor of the said Charles Fuller in the deed of 1816; for the Defendant was advised, that his joining therein as such creditor could not exonerate or preclude him from performing his duty as a trustee of the settlement of 1795.

Mr. Kindersley and Mr. Wood, for the Plaintiffs. The Defendant, Mr. Knight, having concurred in the creditor's deed and accepted the benefit of the trusts, has contracted for the application of the rents and profits in the manner thereby pointed out. He cannot, for the purpose of relieving himself from the responsibility he has incurred, insist on the application of the income in any other way, until the other creditors have been fully paid.

The husband and wife being of advanced age, and there being no issue, and no persons interested in the fund except themselves, there is not the remotest chance [208] of the trustees being exposed to any liability in respect of the breach of trust.

Both husband and wife are desirous that the former application of the income should be continued.

Mr. G. Turner and Mr. Shapter, for the Defendant Knight. This Court will not permit trustees to do an act which would be a breach of trust; *Mortlock v. Buller* 10 Ves. 292 and *Wood v. Richardson*, 4 Beavan, 174). So it will not order a trustee to abstain from an act which would repair a breach of trust already committed; it will not sanction an arrangement by which a trustee lessens the security of his *cestui que trust*. Here the interest of the tenant for life is primarily liable to replace the stock, and the *cestui que trust* will be left to the personal responsibility of the trustees, if this Court should prevent the Defendant's replacing the fund by means of the life-estate. The wife has but a reversionary interest in a chose in action. She is therefore incapable of binding it; and notwithstanding any act she may now do, she might the next day file a bill against the trustee for the restitution of the fund.

There is no estoppel in such a case as this; *Fairtitle v. Gilbert* (2 Term. Rep. 171), *Appendix v. Burgess* (4 East, 230).

Mr. Hoare, for Mrs. Fuller, supported the Plaintiff's case.

Mr. Kindersley, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. In this case, the circumstances and the relief sought are very peculiar. The bill asks that the indenture of [209] 1816 may be executed, and that the income of the trust property may be applied under the trusts of that deed. The Defendant Knight, against whom this prayer is directed, insists, that he has a right to apply that income towards the reparation of the breach of trust, in which he was led to join at the request of the Defendant Mr. Fuller.

The facts are shortly these:—Mr. Knight and other persons were trustees of the marriage settlement of Mr. and Mrs. C. Fuller of two sums of £20,000 and £16,000 stock. The settlement contained a power to sell the stock and lay out the money in the purchase of freehold estates. Unfortunately, in the year 1805, the sum of £15,517 stock was sold out, and produced a sum of £9000, which, instead of being properly laid out on freeholds, was lent to Charles Fuller on the security of his leasehold estates.

It is not denied that this was a breach of trust, and that the persons beneficially interested in this sum had a right to call on the trustees, at any time to make good the amount of stock sold out. Knight is the surviving trustee of the settlement, and he is subject to the liability. Under the circumstances which have taken place, Mrs. Fuller, the *cestui que trust*, having a reversionary interest in this property, an interest which she is incapable of dealing with, and cannot deprive herself of, has a power to enforce the right of having the breach of trust remedied according to the rules of this Court, and this has been the state of things since 1805.

In 1816 Charles Fuller, the tenant for life of the property, being indebted to several persons, executed the deed now in question; it was made between Charles Fuller of the first part, Richard Fuller and George [210] Fuller and Joseph Fuller of the second part, and several persons whose names are in the schedule of the third part. Knight's name occurs in the schedule, and he was a creditor who consented to be paid under the arrangement of the deed. The deed, so far as it is necessary to state it, recited the settlement, the subsequent transaction which is admitted to be a breach of trust, and the proposed arrangement for the benefit of the creditors; and the effect of that deed was to assign other property of C. Fuller and his life interest in the trust property to trustees, to be applied, in the way stated, in liquidation of the debts; this deed is sought to be enforced by this bill.

What is alleged by the Plaintiffs is this, that Knight being a creditor and party to the deed, has so far authorised and directed the application of the income of the trust property to the purpose mentioned in the deed, that he has no right to resort to the interest of Charles Fuller, for the purpose of performing the trusts of the settlement, and for repairing the breach of trust which had been committed.

It is admitted, and properly admitted, that the income of the husband ought to be applied in making good the breach of trust, and it is admitted that Mrs. Fuller, she thought fit, might file a bill by a next friend to have it so applied; but this bill, proposing to leave nothing but the personal liability of Knight for the reparation of the breach of trust, seeks to withdraw the liability of the life-estate, and thereby materially diminish the security of the *cestui que trust*.

The answer attempted to be given is this:—It is not proposed to deprive Mrs. Fuller of her right to file a bill for reparation of the breach of trust, and [211] decrees may be now made without prejudice to that right. It is said that Knight is a man of property, and well able to replace the fund, but it is forgotten that we are to look at the situation of the persons concerned, and that this Court must act on general principles.

What is asked is this, that the trustee shall be prevented applying the life-estate in making good the breach of trust; and thus leave to chance the reparation of the breach of trust, by confining the remedy to the personal liability of the trustee of the estates of the deceased trustee.

I cannot reconcile myself to the notion that this is a course which this Court could pursue. The Court, being apprised that a breach of trust has been committed, and that the trustee is desirous of repairing it, is required, for the benefit of all persons, to prevent his doing so, to withdraw the substantial means of repairing the breach of trust, and to leave the wife, who is now under the dominion of her husband, to her remedy against the trustees.

The question really comes to this, whether the trustee has done, or could do, what would be allowed by this Court to do an act which would fetter his power of performing his duty. His first obligation was to perform the trusts; he had erred in committing a breach of trust, and the instant he found he had done so, was it not his duty to repair it? And could he be permitted, in violation of his duty, to do an act for his personal benefit by which he deprived himself of the power of performing his duty?

I have no recollection of any such case as this; at the same time it does seem to me, that even if the trustee [212] had entered into a direct covenant, these Plaintiffs would not be permitted to require him to perform it, if it appeared that by the performance the security of the *cestui que trust* would be lessened.

There is another point. This gentleman is a mortgagee of the leaseholds, and supposing he is not entitled to what I think he is, namely, to have the fund restored out of the life interest, is he not entitled to make what he can of the mortgage-estate, and to know the extent of his liability?

Mr. Kindersley. I admit I cannot restrain the Defendant's rights as a mortgagee.

THE MASTER OF THE ROLLS [Lord Langdale]. I confess I cannot see my way to granting the relief asked, except by arrangement. It would be a matter of the most serious consequence to *cestui que trust*, if it were once held that a trustee could bargain away the power which is absolutely necessary for the performance of

erty, and that he could give up that power by contract or by incurring a personal liability.

If no arrangement can be made, the bill must be dismissed.

The cause stood over, in the hope that some arrangement might be come to between the parties.

[213] JOPE v. MORSHEAD. Jan. 27, 28, 1843.

[S. C. 12 L. J. Ch. 190. See *Bolton v. Ward*, 1845, 4 Hare, 533.]

independently of the 4 & 5 Vict. c. 35, s. 85, this Court has no jurisdiction to direct the partition of copyholds, nor of customary freeholds.

In a bill for a partition, when there is a small failure in proof of title, or when the shares of the parties are alone doubtful, the Court will grant an inquiry: but where there is a material omission in the proof of the Plaintiff's title, the bill will be dismissed with costs. This course was pursued, though the Plaintiff had recovered in ejectment a portion of the estate from the Defendant, it not appearing what were the circumstances of that proceeding, or whether the Plaintiff's title, as alleged, was herein proved.

The object of this suit was to obtain a partition of some property in Cornwall of tenure of customary freehold.

The Plaintiff alleged himself to be entitled to thirteen-ninetieths of the property, owner of three unexpired terms of 500 years, of 400 years, and of ninety-nine years determinable on lives. The first term was created in 1760; the second was a mortgage term for securing £20,000, derived out of the former, and was created in 1773, and the third term was created in 1798. The Plaintiff, by his bill, traced at length the devolution of these terms until they became vested in himself; and he alleged that the term of 400 years had long since, by lapse of time and otherwise, become irredeemable, and that the Plaintiff had become legally entitled to all the beneficial interest therein.

The Plaintiff, in 1837, recovered thirteen-ninetieths from the Defendant Grigg by ejectment, but the circumstances of that proceeding did not appear, or in what way the title of the Plaintiff was, upon that occasion, made out.

The Plaintiff, at the hearing, failed in establishing the devolution of the terms, and in shewing that they were legally vested in him.

The bill was filed in 1840, and therefore the recent statute did not apply. (1)

[214] Mr. Turner and Mr. Collins, for the Plaintiff. The statute of 4 & 5 Vict. c. 35, s. 85 (which passed the 21st June 1841), though inapplicable to the present case, shews, not that the Court has no jurisdiction to direct a partition of copyholds, but merely that "doubts were entertained whether by the practice of such Courts, the same can now be obtained." There are however authorities in support of the jurisdiction, as *Dodson v. Dodson* (2 Watkins on Copyholds, 123, n.; 1 Scriven (3d ed.), 123, n. (e)), *Treherne v. Nash* (Seton on Decr. 189).

If the title has not been fully proved, the Plaintiff is entitled to an enquiry before the Master as to his interest, as was done in *Agar v. Fairfax* (17 Ves. 533)

(1) 4 & 5 Vict. c. 35, s. 85, by which it is enacted, "That from and after the passing of this Act, it shall be lawful for any Court of Equity, in any suit to be hereafter instituted therein for the partition of lands of copyhold or customary tenure, to make the like decree for ascertaining the rights of the respective parties to the suit in such lands, and for the issue of a commission for the partition of the same lands, and the allotment, in severalty, of the respective shares therein, as according to the practice of such Court, may now be made with respect to lands of freehold tenure."

The Plaintiff has recovered the thirteen-ninetieths from the Defendant Grigg in the action of ejectment; Grigg, therefore, cannot set up a want of title in the Plaintiff.

Mr. Teed and Mr. Nevinston, for the Defendant Morsehead, did not object to the relief prayed.

Mr. Kindersley and Mr. Speed, for the Defendant Grigg. The Plaintiff has wholly failed in making out any title to the property; he is not therefore entitled to a relief or any enquiry. (*Marten v. Whitchel*, Cr. & Ph. 257.) To obtain a partition of freeholds, a Plaintiff must both allege and prove a clear and distinct title to the portion of the estate [215] claimed by him; a litigated or ambiguous title is insufficient. *Cartwright v. Pultney* (2 Atk. 380); in which case the title made by the original bill being suspicious, the bill was dismissed with costs. The reason requiring such strictness in the title is obvious; the title of the Defendant, after partition, would depend on the validity of the conveyance from the Plaintiff, and therefore on his title to convey. The Defendant might make a valid conveyance of his interest to the Plaintiff, and receive an invalid title in return.

A Court of Equity has no jurisdiction to decree the partition of copyholds: *S v. Fawcett* (1 Dick. 299), *Horncastle v. Charlesworth* (11 Sim. 315; 1 Mad. Pr. (2d ed. 248), Co. Litt. 187, a., note 2, Coke, Copyholder. It would be interfering with the rights of the lord in his absence, by dividing his tenements, altering the accustomed rents and services, and forcing upon him a different tenant. There cannot, for these reasons, be a partition without the intervention of the lord: *Oakeley v. Smith* (1 Eden, 261).

Copyholds are not within the Statutes of Partition (31 H. 8, c. 1, 32 H. 8, c. 8 & 9 W. 3, c. 31, 3 & 4 Anne, c. 18), Scriven on Copyholds (vol. i. p. 106, note 3d edit.), nor are customary tenements, *Burrell v. Dodd* (3 Bos. & P. 378), the freehold of which is in the lord, *Stephenson v. Hill* (3 Burr. 1273), and which fall within the same consideration as copyholds: *Doe d. Reay v. Huntington* (4 East, 271).

In *North v. Guinan* (1 Beat. 342) Sir A. Hart held that there could be no partition of leaseholds for years.

[216] The recovery by ejectment in no way proves the Plaintiff's title, nor does it appear that the title now set up by the Plaintiff was ever litigated in that proceeding. The title alleged by the Plaintiff is that of a mortgagee of the 400 years' term. Such an interest cannot, in the absence of the mortgagor, be made the foundation of a decree for a partition.

Mr. Bacon, for a mortgagee of Grigg's share, opposed the partition.

Mr. Turner, in reply.

The jurisdiction of this Court in cases of partition is quite independent of the statutes. *Scott v. Fawcett*, *Oakeley v. Smith*, and *Horncastle v. Charlesworth*, were cases of copyholds, and not of customary freeholds, and they are opposed to *Dodson v. Dodson* and *Treherne v. Nash*.

North v. Guinan was a different case from the present; there there was a tenant subject to covenants, and the Court would not direct a partition which would have involved the commission of a waste and have prejudiced the landlord.

The Plaintiff has an equitable title, which for the present purpose is sufficient. *Cartwright v. Pultney* (2 Atk. 380).

THE MASTER OF THE ROLLS [Lord Langdale]. In this case there is really no proof at all of the facts alleged in the bill as constituting the Plaintiff's title, and the facts if true are easy of proof.

This is a bill for a partition, and a party who is tenant in common or joint-tenant of freehold property has a right [217] to a decree for a partition upon proving his title; but in this case two objections have been raised:—First, that the suit relates to customary freeholds, and that the Court has no jurisdiction to order their partition; and secondly, that even if the subject be one over which the Court can exercise jurisdiction, still that the Plaintiff has not proved his title. This property seems clearly to be of the tenure of customary freehold, and I have always understood that the Court has constantly declined directing a partition of copyholds and, for similar reasons, of customary freeholds. Two cases have been produced; they may be consistent with the general rule if there had been both freeholds and copyholds to

vided, and the Court had directed such a partition, as to give the entire copyhold to one party, and the freehold or a part of the freehold to the other.(1)

[218] It is said, that although the property is customary freehold, yet the case is tended with circumstances which make it proper to have a partition; and it is held that the Defendant ought to have stated express circumstances which would relude the Plaintiff's right thereto. It appears, however, to me that if the Plaintiff relies on his case being an exception to the general rule, it is his duty to allege and set out the circumstances under which he is entitled to the exception.

The next objection to this bill is, that the Plaintiff has not made out his title. It has been admitted that the title is not fully made out; but it is alleged that it is far made out, that this Court will afford the Plaintiff an opportunity to enable him to complete the proof of his title, and that there are instances in which the Court is allowed a Plaintiff so to do. I can conceive that where there has been a small omission, the Defendant would scarcely object to the Plaintiff's having an opportunity to supply it; and I can conceive that the Court, seeing a slight omission or error in the proof, would say that such an objection shall not prevail, and that an opportunity must be given to supply the defect. Though instances have occurred in which the Court has given the Plaintiff an opportunity to complete his title, it is my opinion that a Plaintiff who brings forward his case imperfectly, is not, as of right, entitled to such an indulgence at the expense of a delay to all the other parties. It has been supposed that it was almost of course to refer the matter to the Master, and reference has been made to the cases in which it was done, but the cases only go to this:—That if it appears that the parties to the cause are entitled to the estate between them, but the shares are uncertain, the Court will, almost of course, direct an inquiry before the Master as to their respective interests; but that is for the common benefit of all.

[219] The Plaintiff, it is plain, must make out his title, because he calls on the Defendant to accept a legal conveyance in exchange. If he proves no title he is not entitled to a partition. Here the Plaintiff has undertaken to make out his title to thirteen-ninetieths of the property, but has failed.

It is said that he has recovered judgment at law; but under what circumstances does not appear. I collect that the Defendant was in possession of the entirety, and that the Plaintiff recovered thirteen-ninetieths. It does not, however, appear, whether, in that proceeding, the Plaintiff proved his title or if the case was ever tried.

The Plaintiff has failed here for want of proof of title; and I think this case must, therefore, in its result, be treated as in the nature of a non-suit. He has failed in proving his title; but it has not been proved that he has none.

(1) The following was a case of this description:—

Dillon v. Coppin. June 28, 1833.

In a suit previous to the 4 & 5 Vic. c. 35, s. 85, for a partition of freeholds and copyholds, the Court directed the copyholds to be allotted in entirety to one of the parties.

The freehold and copyhold estates of the intestate, Mr. Plura, had descended to three coparceners.

The Plaintiff, being one of such coparceners, filed this bill against the other two, for a partition of all these estates; and the Defendants, by their answer, objected that the Court had no jurisdiction to make a partition of the copyholds.

Mr. James Campbell, for the Plaintiff.

Mr. Beavan, for the Defendants.

Sir John Leach, M. R., to obviate the objection, directed a commission "to divide the freehold and copyhold estates and premises in question into three equal parts," &c., and ordered "that the copyhold part of the estate should be allotted in entirety to one of the said parties." (Reg. Lib. 1832, A. fol. 2179.)

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The bill must, therefore, be dismissed with costs, but without prejudice to the Plaintiff's filing a new bill.

[220] THE ATTORNEY-GENERAL v. THE CORPORATION OF SHREWSBURY.
Feb. 17, 18, May 1, 1843.

[S. C. 12 L. J. Ch. 465 ; 7 Jur. 757.]

The Crown, in consideration of the past services of the town, the situation and importance of the place, the injury and damage to be expected from the King's encroachment from the current of water, and from the traffic on the bridges, and the ruin likely to take place, if the means of repairing were not provided, granted certain tolls to the Corporation of Shrewsbury, to be applied in reparation of the bridges and without yielding any account or reckoning thereof. Held, that the grant was made to the corporation for its own benefit only, as a reward for prior service, that it was the duty of the corporation to apply so much of the receipts as might be required for the purposes stated :—That this was a gift for a public and general purpose for the benefit of the town, in aid of a general charge or burden to which the burgesses and inhabitants of the town were liable, and that it was a gift for charitable uses under the statute of Elizabeth, and was therefore subject to the jurisdiction of this Court.

This information prayed for a declaration, that a sum of £2176, 17s. 5d. stock which had arisen from the sale of certain tolls belonging to the corporation, was part of the capital stock of the Corporation of Shrewsbury, and that the dividends and produce thereof were applicable, in the first instance, in and towards the repair and support of the bridge called the Welch Bridge, and also of another bridge called the English Bridge, and also those parts of the walls of the town which now remain and required support ; and that the capital stock was not applicable towards the current expenses of the corporation, nor towards the payment of any debts incurred subsequently to the passing of the Municipal Corporation Act. The information further prayed for an injunction to restrain the corporation from applying the stock in a manner inconsistent with the right alleged by the information.

The sum of £2176, 17s. 5d., 3 per cent. annuities, which was in question in the suit, arose from the investment of a sum of £2000, which, in the year 1792, was received by the Corporation of Shrewsbury as the consideration for the release of certain tolls, to which the corporation was entitled under several charters from the Crown.

[221] The principal questions were, first, whether those tolls were held by the corporation subject to a charitable trust to be executed in this Court ; and if so, secondly, whether the stock in question was now held subject to the same charitable trust.

The town of Shrewsbury was held of the Crown at a fee-farm rent and by fealty and by a grant dated the 22d of September in the forty-first year of the reign of King Henry III., the custom, formerly granted for the amendment of the walls of the town from things coming to the town for sale, was continued to the end of a term of seven years. By another grant dated the 12th of February in the twelfth year of King Edward I., after reciting a former grant of the 15th of March, of the reign of King Edward I., whereby in aid of repairing and amending the Welch Bridge, the corporation were, for three years, to take by the hands of persons in whom they could confide, and for whom they would be willing to account, from things for sale coming to the town, the several customs therein mentioned :—it was granted, that after the expiration of the three years, the corporation might take by the hands of those in whom they might confide, and for whom they would be willing to answer, in aid of the repair of the Welch Bridge, and also of paying the town, the customs aforesaid, unto the end of five years from thence next following.

By a mandate or precept directed to the Lord Chancellor by King Richard II. the 4th of June in the 15th year of his reign, after referring to a former grant of the

custom of murage from his liege men passing by the town with their merchandizes or three years which were nearly run out, in aid of the inclosure of the walls and repair of the bridges and gates of the town, it was recited, that on the application of the burgesses, the [222] king had granted to them the same custom of murage for four years from the feast of St. John the Baptist next coming, for the safety of the town and in aid of the inclosure of the walls and repair of the bridges and gates hereof, and of other the necessary occasions for the defence of the town; so always, that the profits arising from the same custom were employed about the works aforesaid, and thereupon the Chancellor was commanded to cause letters to be made under the Great Seal; and letters patent, dated the 20th day of the same month of June, were accordingly made.

The next charter was one dated the 6th of November in the 7th year of King Henry IV., and thereby, in consideration that the town was situate near Wales, on account whereof it required to be fortified and strengthened, the better to resist the king's enemies; it was granted, that in aid of the fortification of the town and repair of the walls of the same, the corporation, from the date of the grant unto the end of three years, should take from things for sale coming to the town by land or by water, any good, sufficient, lawful and faithful men, whom for that purpose they should order to be deputed, and for whom they should be willing to answer, the custom therein particularly mentioned; and it was commanded, that the corporation should apply, and convert and apply, the said customs about the fortification and repair of the walls of the town, and not to any other uses, by the survey and control of the Abbot of the town or his deputy, and at the end of three years the customs were to cease.

There was a like grant, dated the 9th of October in the seventeenth year of the reign of King Henry the Sixth, and another dated the 15th of March in the twentieth year of the same king, and by the last, the [223] grant was continued for twelve years from the date thereof.

In the fourth year after the date of the charter dated the 15th of March in the twentieth year of King Henry the Sixth, whereby the customs were granted for twelve years, the charter, upon the construction of which the principal question in his cause depended, was granted. It was dated the 12th of January, in the twentieth year of the reign of King Henry the Sixth, and after granting to the corporation cognizance of pleas and jurisdiction over various matters therein mentioned, it proceeded, in substance, as follows:—"Further, we, considering after what manner the town is situate adjacent to parts of Wales, and the marches of the same, and which, in the times of our progenitors, and especially in the time of King Henry the Sixth, stood for the defence and fortification of the people of England against the rebels of Wales, and which also by Owen Glendower, with great multitude, by sacking the town and burning the suburbs had taken the town, and great part of the county of Salop, and other adjacent counties, in like manner, had been burnt and destroyed, if it had not been defended by the people within the town, upon the bridges, gates, towers, and walls of the same then being defensible, and as yet very likely, in a similar case hereafter, may be burnt and destroyed by such rebellion, unless the same bridges, gates, towers, and walls shall be repaired, kept and maintained, in a state of defence; and also considering after what manner the bridges are made, viz., one towards Wales, and another towards England upon the Severn; and so small damages have happened to the arches and stonework of the same bridges, by the rapid course of the water there, and also by carriages passing over the same, and greater damages are likely to happen to the same in process of [224] time, and the ruin thereof, to the destruction of the town and county and the country there, may be feared, unless they are repaired and amended in a short time, as it is said, and we, desiring to provide these opportunities for the repairing, amending, fortifying, calling and defending the bridges, gates, towers and walls, to the resistance of the rebels of Wales and other malefactors willing to injure the town; also considering the letters patent of the 15th of March, anno 20, and the several customs thereby granted" (which were stated at length), "which same sums of money yearly arising from the customs, during the term aforesaid, greatly fall short for the sufficient or reasonable reparation of the town walls, bridges, gates and towers aforesaid, as we are now more fully informed, we, for the reasons aforesaid, have granted for ourself

and our heirs, to the bailiffs and burgesses of the town aforesaid, their heirs and successors for ever, that they, by the hands of lawful men whom they shall from time to time depute for that purpose, may, from time to time for ever, take all the customs aforesaid, in manner aforesaid yearly to be taken, for the reparation, amendment, and fortification of the bridges, gates, towers and walls of the town, to the resistance of the rebels of Wales, and the marches of the same, and the same sums of money yearly arising from the said customs to apply and expend, from time to time, about the reparation, amendment and fortification of the bridges, gates, towers and walls aforesaid, to be made for the strengthening the same towers, without yielding account or reckoning thereof to us or our heirs, or of the receipts of the same in any wise." And the grant contained a discharge of all arrears of accounts and receipts, "and of other causes whatsoever which had accrued, or thereafter might have accrued to His Majesty for the premises or any of them, against the said bailiffs or the successors in any wise howsoever."

[225] The grant was afterwards confirmed by charters of Henry the VII. and Charles the I.

The corporation continued to receive the tolls down to the year 1789, and they kept the Welch bridge in repair. Shortly afterwards the bridge became so damaged that it became necessary to rebuild it, and it became desirable to the neighbours to widen the bridge, and to abolish the tolls.

In 1792 the corporation agreed to abolish the tolls, in consideration of the sum £6000, which was raised by subscription; of this they applied £4000 towards building the bridge. The residue was invested, and now consisted of the sum £2176 stock, standing in the names of three of the members of the borough council.

The corporation, after the passing of the Municipal Corporation Act (5 & 6 W. c. 76), being indebted to their former town clerk for compensation under that Act, were about to apply the fund in question in payment of that debt, and this gave rise to the present information.

Mr. Pemberton Leigh, Mr. Turner, and Mr. Romilly, in support of the information, argued, that the charters of the Crown had devoted the tolls to a public trust. That the trust was of such a nature as to come within the charitable uses mentioned in the statute of Elizabeth (43 Eliz. c. 4); and, therefore, that the Court had jurisdiction to see to the due application of the fund.

That the stock, being the produce of and substitute for the tolls, was affected by similar trusts, and that its [226] application in the way proposed by the corporation would be a diversion of it from the legitimate purposes, and a breach of trust, which this Court would prevent.

Mr. Kindersley, Mr. Walker, and Mr. Kenyon, *contra*, for the Defendants, contended that, under this charter, the corporation became absolutely entitled to the customs thereby granted, free from any trust: that although the grant might make them liable to the duty of making the repairs, the means of making which were given by the grant, yet that the duty was not and could not be annexed to the receipt of the customs, and could not be enforced by compelling them to apply the customs to the purpose intended; and that the duty, if to be enforced at all, was to be satisfied by some other means.

They also contended that the grant was made as a reward for past services; and from the exemption from the duty to render any account, it was plain, that the corporation was not intended to be, and ought not to be held accountable to the Crown, or to the King's Courts for the application of any part of the money; and further, that if the corporation were entitled to the tolls for a public purpose of that purpose was not civil but military, and therefore that the Crown only, and not the Court of Chancery, could direct the application.

The Attorney-General v. The Haberdashers' Company (1 Myl. & K. 420), *The Attorney-General v. The Mayor of Galway* (1 Molloy, 103, Beat. 298), *The Attorney-General v. Corporation of Carlisle* (2 Sim. 437), were cited.

[227] May 1. THE MASTER OF THE ROLLS [Lord Langdale]. From the several charters anterior to that of the twenty-fourth of King Henry the VI., it appears that grants were made for some public purpose affecting the welfare or safety of the town, such as the amendment of the walls, the repair of the Welch Bridge, the paving of

own, the safety of the town, the repair of the bridges and gates, and other necessary occasions for the defence of the town. The customs were to be taken by the hands of persons in whom the corporation could confide, and for whom they were willing to answer. In the three last charters, the grant is in aid of the fortification of the town and repair of the walls, and the money was to be applied under the survey and control of the Abbot of the town or his deputy, or, as the two last charters say, of John Ashfield, and a time was limited for the cesser of the customs.

By the last charter of the twenty-fourth of King Henry the VI., we have a grant in perpetuity, instead of a grant for a short term of years. The king exempts the corporation from rendering any account or reckoning; the corporation is not subjected to any special survey and control in the expenditure of the sums to be received; but, in consideration of the past services of the town, the situation and importance of the place, the injury and damage to be expected from the King's enemies, from the current of water, and from the traffic on the bridges, and the ruin likely to take place if the means of repairing were not provided, the grant was made, expressly, that the money might be applied and expended about the reparation, amendment and fortification of the bridges, gates, towers and walls to be made for the strengthening of the town.

[228] The Defendants contend, that under this charter, the corporation became absolutely entitled to the customs granted, free from any trust: that although the grant might make them liable to the duty of making the repairs, the means of making which were given by the grant, yet that the duty was not, and could not be annexed to the receipt of the customs, and could not be enforced by compelling them to apply the customs for the purpose intended; and that the duty, if to be enforced at all, was to be so by some other means. Assuming, as I must do for the purpose of this case, that the Crown had power to grant the customs in question, I can have no doubt that the corporation, by accepting the grant, became liable to the performance of the duty thereby imposed; the money to be received was, according to the express direction contained in the grant, to be applied for the purposes therein mentioned; and I am of opinion, that it was the duty of the corporation so to apply so much of the receipts as was required for those purposes.

The Defendants have contended that the grant was made as a reward for past services, that, from the exemption from the duty to render any account, it is plain that the corporation was not intended to be, and ought not to be, held accountable to the Crown, or to the King's Courts, for the application of any part of the money, and further, that if the corporation were entitled to the tolls only for a public purpose, that purpose was not civil but military, and therefore that the Crown only, and not the Court of Chancery, could direct the application.

It appears to me that the argument, that the grant was made to the corporation for its own benefit only, as a reward for prior services, is contrary to the plain terms of the charter, which, whilst recognising the past services of the burgesses, states, as the inducement for [229] the grant, the necessity of providing for the future defence of the town, and accordingly directs the money to arise from the customs to be applied for that purpose.

It further appears to me, that the customs, or the right to levy them, were considered as belonging to the king, and to be capable of being granted by him for public purposes; that in the former grants, the burgesses were held to be accountable to the Crown, for the sums which they received and their application thereof, but that the charter of the twenty-fourth Henry VI. in exempting the corporation from the account, only released the corporation from the beneficial interest which the Crown had, or was supposed to have, in the customs received, but did not release the corporation from the right which the Crown had, for the benefit of the subject, of seeing that the duty, for the performance of which the customs were granted, was performed. I conceive that the reparation of the bridges and walls ought to be considered as the duty of the burgesses, that the expense of performing the duty was a common burden upon the burgesses and inhabitants; that if there had been no grant of the Crown, either in aid or expressly for the purpose, the whole burden would have fallen upon the burgesses and inhabitants; that the grants were therefore made, *pro tanto*, in relief of the burgesses and inhabitants, and in diminution of the

collection or assessments, which, in some form or other, would have been made upon them; and that to whomsoever the duty of directing the construction of the walls and fortifications might have belonged, the raising the money was a civil duty, and the relief afforded by the grant was the relief of a civil burden.

Now the statute of Elizabeth (43 Eliz. c. 4) enumerates among gifts to charitable uses, gifts for the "repair of bridges, [230] ports, havens, causeways, churches, seabanks, and highways," and for "aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers and other taxes;" and Sir John Lee expressed himself to be of opinion, that funds, supplied from the gift of the Crown or from the gift of the Legislature or from private gift, for any legal, public, or general purpose, are charitable funds to be administered by Courts of Equity. Some doubt has been thrown upon the generality of this position, but I am not aware of a decision by which it has been impeached. A question, however, is made upon the subject of the gift; and the case of *The Attorney-General v. The Corporation of Glamorgan* before Sir Anthony Hart, is referred to (1 Molloy, 103, 104, 108; Beatt. 298). In that case Sir Anthony Hart felt a difficulty, in consequence of the tolls which were the subject of the gift having been created *de novo* for the purpose of the grant; but he thought that if the Crown, being entitled to tolls, grants them to a charitable use, they are subject to all the incidents of other property so granted. Now in this case it appears that the customs granted in the twenty-fourth of Henry VI. were not created: the origin of them is not shewn, but they had been the subject of grant to the Crown for nearly 200 years before; and, as I have before stated, it appears to me for the purposes of this cause, I ought to presume that the Crown had a right to make the grant.

On the whole, I think that this was a gift for a public and general purpose; that it was given for the benefit of the town in aid of a general charge or burden to which the burgesses and inhabitants of the town were liable; and that it was a gift, which, under the equity of the [231] statute of Elizabeth, ought to be considered as a gift to charitable uses.

The subsequent charters of Henry VII. and Charles I. do not appear to me to affect the question. The customs, or tolls as they were called, continued to be received by the corporation till the year 1792. Sometime previously the inconveniences arising from the narrowness of the bridge and from the toll, had become subject of complaint, and an arrangement was made for the abolition of the tolls, in payment to the corporation of £6000, of which £4000 was to be applied towards building a new bridge, and the remaining sum of £2000 was to be paid to the corporation. This arrangement was carried into effect. The corporation actually received the sum of £2000, which was lent at interest to a person of the name Loxdale, who had an account with the corporation, upon the balance of which sometimes more or sometimes less than £2000 was due. The debt of £2000 was called in in the year 1837, and invested in the purchase of the sum of £2176, 17s. Bank 3 per cent. annuities now in question. The information was occasioned by an avowed intention, on the part of the corporation, to sell the stock or part of it in order to raise money for the purpose of liquidating debts contracted by the corporation. As it is not denied that the £2000 invested in 1837 represents the £2000 paid to the corporation in 1792 as part of the consideration for the tolls, I think that the annuities must be subject to the same trust, which, as it appears to me, was attached to the tolls.

I must therefore declare, that the 3 per cent. Bank annuities were held by the corporation in trust to apply the dividends in or towards the repairs of the bridge and walls; and that the injunction, &c., already granted ought to be continued.

[232] BLACHFORD v. KIRKPATRICK. Nov. 16, 19, 1842.

[S. C. 12 L. J. Ch. 108.]

Even after great delay and acquiescence, the Court will not compel a purchaser to complete, if the title appears to be manifestly bad.

The right to the tithes of an allotment generally follows the right to the old tenement, in respect of which the allotment is made.

Contract for the purchase of tithes not signed by the party chargeable, Held, under the circumstances, to have been taken out of the Statute of Frauds.

Messrs. James and Joseph Kirkpatrick were owners of a renewable lease, under Manchester College, of a farm called St. Cross, in the parish of Carisbrooke; to this there was appurtenant a right of common over the forest of Parkhurst.

In 1812 an Act passed for enclosing the forest; but the right to tithes was not thereby interfered with. Under the powers of this Act, Messrs. Kirkpatrick had granted, in respect of the St. Cross farm, 130 acres of the forest situate in the parish of Carisbrooke.

In 1812 the Plaintiffs, or parties represented by them, assuming to be entitled to the tithes of the allotment of 130 acres as lay impropriators of the parish of Carisbrooke, agreed to sell to the Kirkpatricks the rectorial tithes of such allotment for the sum of £700. It did not appear that any agreement in writing was signed by the purchasers. An abstract of title was delivered, and the purchasers prepared a conveyance, which, in 1819, was submitted to and approved of by the vendors. It was not however executed; the reason for which did not however appear. Interest had been paid on the purchase-money down to 1835, at the rate of 4 per cent.

The purchasers died, and the matter being mooted in consequence of the discontinuance to pay interest, the abstract was, in 1836, found, when it appeared that, by deed of 1758 under which the vendors claimed, the tithes of St. Cross farm were excepted out of the grant to them of the rectorial tithes of the parish of Caris[233]-brooke. The Defendants thereupon contended that, as the vendors had no title to the tithes of St. Cross farm, they had none to the allotment made in respect of the farm.

In 1838 this bill was filed for a specific performance, and for a declaration that the purchasers had accepted the title.

The Defendants said, that the farm consisted of North St. Cross and South St. Cross; that the former was tithe free, and that the tithe of the latter had been purchased by the Kirkpatricks in 1810. That no tithes were therefore payable in respect of the allotment, though the parties had acted under the erroneous supposition to the contrary. They insisted that there had been no contract in writing signed by the purchasers, and claimed the benefit of the Statute of Frauds.

Mr. Pemberton and Mr. Prior, for the Plaintiffs. The Plaintiffs are at once entitled to a decree for payment of the purchase-money, without any reference as to title. The Defendants have accepted the title; and there has been such a course of conduct on their part, as to disentitle them to any further investigation of it. See *Wood v. Green* (15 Ves. 594), *Margravine of Anspach v. Noel* (1 Mad. 310), *Haydon v. Bell* (1 Beavan, 337), *Hall v. Laver* (3 Y. & Coll. 191).

As to the Statute of Frauds, there has been a sufficient acquiescence and part performance to take the case out of that statute. There has been a possession and payment of the tithes since 1812, a payment of interest on the purchase-money, an approval of the title [234] and a settlement of the conveyance. It is now too late to say that there is no contract in writing.

It does not appear that the allotment was made in respect of the farm, or whether it was made for lands alone in the parish of Carisbrooke, and the defence is not properly raised by the answer. They also cited *The Bishop of Carlisle v. Blain* (1 Y. & Coll. 123).

Mr. Boteler, Mr. George Turner, and Mr. Piggott, for the Defendants. The abstract, even if valid, was entered into under a mistake, and on the supposition that the vendors, and not the purchasers, were entitled to the tithes. The Court would never in such a case, even after payment of the purchase-money. *Bingham v. Braham* (1 Ves. sen. 126).

If the Plaintiffs have no title, it would be a strong measure of equity to compel a purchaser to pay his purchase-money without receiving the property in return. This Court would not force a bad title on a purchaser. *Warren v. Richardson* (Younge, 1).

It is plain that the vendors have no title. The tithes of the allotment belong to the party entitled to the property in respect of which the allotment is made, *Steele v. Manns* (5 B. & Ald. 22). It appears from the deed of 1758, which is the root of the Plaintiffs' title, that the tithes of the St. Cross farm did not pass to them; and it appears further, that, so far as tithes were payable, they were purchased in 1810 by the Kirkpatricks.

There is no sufficient signed contract, nor has there been an acquiescence, the delay in completing has most [235] probably arisen from this very objection. There has been no possession taken; for tithes were never payable in respect of the allotment, and therefore cannot be said to have been retained.

Mr. Hale, in the same interest.

Mr. Pemberton, in reply.

Nov. 19. THE MASTER OF THE ROLLS [Lord Langdale]. I confess, I feel very considerable difficulty as to part of this very singular case, considering the great length of time which has elapsed since the contract was entered into.

The Plaintiffs are asking for a conveyance, in pursuance of a contract entered into in the year 1812. The Defendants have set up several defences, which, upon the best consideration I can give them, and having regard to the great length of time which has elapsed, and to the acquiescence of the party in the terms of the contract during the whole of that time, I think cannot be sustained. It appears to me, that there is sufficient proof of the contract being entered into in this case by Joseph, on behalf of Joseph and James. It is sufficiently proved, as it appears to me, that both parties intended to complete this contract in the year 1816; and that, at that time, both parties had approved of the title, and had acquiesced in it in a most extraordinary and emphatic manner, there being on the one side a payment of the interest of the purchase-money, avowedly as such, and on the other side, the constant acceptance of the interest, as the interest of the purchase-money.

[236] Now without meaning to say that the single circumstances here set forth would, in themselves and without the lapse of time, be held to be an acquiescence in and confirmation of the contract, and a sufficient proof of the existence of a valid contract, yet, having regard to the length of time, I must say, that, in my opinion, they must be so held. This does not get over the difficulty I feel in the present case; for if the parties delay asking for the specific performance of a contract and for a conveyance of the legal estate, as they might do, and in the interval before the contract is completed, and while the purchase-money is in the hands of one party, and the legal estate in the other, it should turn out, that that title which had been supposed to be good, was really a bad title, I am not prepared to say, that this Court, knowing the title to be bad, would order the party to accept it, and pay the purchase-money for it. That is what is alleged at the Bar to be the case in the present instance, though it is by no means stated on the pleadings in a way that such a defence, in my opinion, ought to have been stated.

Having read these answers, I find nowhere an intimation of a mistake, except in the answer of James Kirkpatrick; there is there an intimation of a mistake which both parties were under, that, although St. Cross farm might be free from the payment of tithes, and although a portion of the tithes of St. Cross farm might have been purchased by the Defendants, yet nevertheless, it was believed that the impropiator or the person entitled to the tithes of the forest would be entitled to the tithes of the allotment. This, it is suggested, was the mistake on which both parties at the time proceeded.

On that point, it seems to be now stated, that a conveyance of the tithes of the farm of South St. Cross had, [237] in the year 1810, been made to the Kirkpatricks. It is alleged that the North St. Cross farm was free. That had nothing whatever to do with any allotment; but the contract is for the sale of the tithes of the allotment: both parties, as it is said, then thinking, that the tithes of the allotment remained in the Blachford's, although the tithes of St. Cross farm or part of St. Cross farm might belong to somebody else.

It is said that the case of *Steele v. Manns* (5 Barn. & Ald. 22) was decided after the date of the contract, and after the negotiation between these parties, and that there was some new law propounded. I do not think it was. It was clear law that

the tithes of an allotment follow the fate of the tithes of the land in respect of which the allotment is made, unless there be some special circumstances.

Then it is said there are some special circumstances here. The right of the Blachfords to the tithes and the right of common of the persons who were entitled to the old tenement named Carisbrooke, extended over three different parishes, and certain extra-parochial places. It might therefore have happened, that the allotment was not made in the parish of Carisbrooke, where the old tenement was, but might have been made in other parishes, or in the extra-parochial place. It is stated, however, in answer, that it appears the allotment was made in the parish of Carisbrooke. I must, however, say it appears to me, that if the party intended to rely on these circumstances, they ought to have been brought forward in a manner more distinctly than has been done. I will not presume to say what was the real state of this title, but this I think I must state, that [238] if it did appear to the Court that there the vendor had no title at the time this contract was entered into, and the matter being left by the acquiescence of both parties, as it certainly must have been, in the same state, the money being in the hands of the purchasers, and the legal estate, such as it was, in the hands of the sellers, this Court would not, knowing there was a bad title, order a conveyance to be made and accepted.

I think the best course I can pursue upon it is this: take it for granted at this moment, that the Plaintiffs suppose they can make out that in the year 1819 a good title could have been made. If a good title could have been made at that time, then I think all the rest is proved here, and that there ought to be a payment of money and conveyance; but if it should turn out that in the year 1819 a good title could not have been made, I do not know what would be the effect of the length of time that has since elapsed. Whether a good title could have been made at the time when that abstract was examined by these parties, is the question. I think there ought to be a reference to ascertain whether a good title could be made in 1819, if the Plaintiffs desire or are willing to take it, rather than have the bill dismissed. If the bill is to be dismissed, it ought to be dismissed without costs.

Declare that there was a binding contract, which ought to be performed, if a good title could have been made on the 18th of June 1819, and refer it to the Master to ascertain that fact.

[239] MATTHEW v. BRISE. *March 11, 1843.*

[S. C. 12 L. J. Ch. 263. Affirmed on appeal, 15 L. J. Ch. 39; 10 Jur. 105.]

Where a trustee has trust money in his hands which he is authorised to lay out in the public funds or on real security, he is justified, pending the necessary delay in completing a contemplated mortgage security, in investing the money in Exchequer bills.

A trustee properly invested trust-money in Exchequer bills, but he left them undistinguished in the hands of a broker; upon a misapplication of them by the broker: Held, that the trustee was personally liable.

A trustee was empowered to invest in the public funds or on real security. He had in his hands a sum, which, in the interval between receiving and investing in a contemplated real security, he invested in Exchequer bills, which he left in the hands of a broker, who misapplied them. Held, that the trustee was liable for the value of the Exchequer bills at the time of the loss, and not for the stock which the money would have purchased.

The Defendant Brise was the sole executor and trustee under the will of the testator, who died in 1834. The Defendant, in 1839, realised part of the estate of the testator, which he deposited with a banker. The Defendant, who by the will was empowered to invest this sum in Parliamentary stock or public funds of Great Britain, or on real securities in England, had, previous to receiving the money, entered into arrangements for lending a portion of it on a mortgage security. In order to make

the money profitable in the meantime, he directed the investment of £5600 in Exchequer bills. This investment was accordingly made on the 4th of March 1840, by Messrs. Wakefield, who were brokers, but acted in some respects as bankers, and had to some extent enjoyed the confidence of the testator in his lifetime. The Exchequer bills were left, undistinguished from others, in the hands of Messrs. Wakefield.

Various delays occurred in the perfecting the mortgage, and before it was completed, and in April 1841, Messrs. Wakefield became bankrupts, when it was discovered that they had sold £4000, part of the Exchequer bills, and had applied the produce to their own use.

This bill was filed by the children of the testator, to make Mr. Brise, the executor and trustee, responsible [240] for the loss which had occurred by the failure and misconduct of Messrs. Wakefield.

The cause came on upon bill and answer.

Mr. Pemberton, Mr. G. Turner, and Mr. Chandless, for the Plaintiffs. The question is this:—Was the Defendant justified in keeping a large portion of the trust funds invested in Exchequer bills for a period of twelve months, in the expectation of completing a mortgage security? The will authorised him to invest in Parliamentary stocks or public funds, or on real securities in his name; but the Defendant had no authority to invest in Exchequer bills. He made no investment authorised by the power, and, therefore, he is liable to replace the stock which might have been purchased with the money.

Again, supposing him justified in investing the money for a temporary purpose in Exchequer bills, still he acted without due care in allowing them to remain in the custody and power of another person; and without taking care to have them distinguished from other Exchequer bills in the possession of the brokers. In *Clough v. Bond* (3 Mylne & Cr. 496), Lord Cottenham says—"It will be found to be the result of all the best authorities upon the subject, that, although a personal representative, acting strictly within the line of his duty, and exercising reasonable care and diligence, will not be responsible for the failure or depreciation of the fund in which any part of the estate may be invested, or for the insolvency or misconduct of any person who may have possessed it, yet, if that line of duty be not strictly pursued, and any part of the property be invested by such personal re-[241]-presentative in funds or upon securities not authorised, or be put within the control of persons who ought not to be intrusted with it, and a loss be thereby eventually sustained, such personal representative will be liable to make it good, however unexpected the result, however little likely to arise from the course adopted, and however free such conduct may have been from any improper motive." And, after referring to the cases of unauthorised securities, his Lordship adds (page 497), "So when the loss arises from the dishonesty or failure of any one to whom the possession of part of the estate has been entrusted. Necessity, which includes the regular course of business in administering the property, will, in equity, exonerate the personal representative. But if, without such necessity, he be instrumental in giving to the person failing, possession of any part of the property, he will be liable, although the person possessing it be a co-executor or co-administrator; *Langford v. Gascoyne* (11 Ves. 333), *Lord Shipbrook v. Lord Hinchinbrook* (11 Ves. 252, and 16 Ves. 477), *Underwood v. Stevens* (1 Mer. 712)."

The Defendant is, therefore, liable to replace the stock which would have been purchased with the money lost by the failure of the brokers. They also cited *Hambury v. Kirkland* (3 Sim. 265).

Mr. Kindersley and Mr. Phillips, for the Defendant. The Defendant had the power of investing in real securities; some delay must necessarily occur in completing a mortgage transaction; and the question is, what was to be done with the money intended to be invested in the interval? Was it to lie idle at the [242] banker's? Would it have been prudent to have invested it in the funds, incurring the double expense of investing and selling out, and running the risk of a fall in the price of stocks, or was it not more proper and prudent to invest the amount in the least fluctuating of Government securities?

If the money had been left in the hands of the bankers, the Defendants would have incurred no liability. Is the case to be dealt with differently, because the

Defendant invested the money in a better, viz., a Government security? The Defendant would have been justified in paying the money into the bankers generally and unmarked, why he is not equally justified in placing, in the same way, the Exchequer bills in the possession of a banker or broker both for safe custody, and to receive the interest and exchange the bills when paid off.

In all cases of this description the question is, whether the trustee has used the ordinary degree of caution and prudence which he would exercise in his own case, and in respect to his own property. In *Ex parte Belchier* (Ambler, 218), Lord Hardwicke says, "where trustees act by other hands, either from necessity, or conformable to the common usage of mankind, they are not answerable for losses. There are two sorts of necessities; first, legal necessity; second, moral necessity. As to the first: a distinction prevails, &c.; second, moral necessity, from the usage of mankind, if a trustee acts as prudently for the trust as for himself, and according to the usage of business. If a trustee appoints rents to be paid to a banker at that time in credit, and the banker afterwards breaks, the trustee is not answerable."

[243] So in *Bacon v. Bacon* (5 Ves. 331), where one executor remitted to another a sum of money for payment of the testator's debts which he misapplied, Lord Loughborough thought the former not liable; he said (page 334), "If the business was transacted in the ordinary manner, unless there was some circumstance to awaken suspicion, surely the allowance is fair."

If the Defendant is liable, he is answerable only for the money, and not for the stock. There was no selling out of stock, and no breach of trust committed by the purchase of the Exchequer bills. The default, if any, must be taken as at the last proper investment, when the trust property consisted of money.

THE MASTER OF THE ROLLS [Lord Langdale], without hearing a reply said:—Cases of this kind are certainly very painful. In this particular case, the Defendant acted throughout, with an anxiety to do that which was best for his *cestuis que trust*.

It has not been attempted to throw the slightest imputation upon him; and, however unfortunate the issue of this matter may be, he has the consolation that he goes out of Court with his character perfect, and his honour unimpeached.

The Defendant was the trustee for the Plaintiffs. A sum of money to the amount of £6000 came into his hands, a portion of which he thought it would be most beneficial to the family to lay out on mortgage security. This was entirely within his power. The mortgage security could not of course be perfected without some delay, for it was obviously necessary, in a prudent and proper management of the business, that some things [244] should be done before it could be safely completed. Pending the interval, the Defendant laid out a considerable portion of the money in the purchase of Exchequer bills. This investment was of such a nature that it might be converted into money at any time, and during the time which must necessarily elapse, that is, from the period when the money was lying dead in the hands of the bankers, down to the time when it would become fruitful upon the mortgage, it would by these means make some interest for the benefit of the family.

I am of opinion, under these circumstances, that the Defendant was very well justified in laying out the money in Exchequer bills during that interval. He, however, unfortunately left them entirely under the control of other parties, and intrusted to them the possession. Instead of securing them in the ordinary mode, he permitted them to remain undistinguished in the hands of brokers, who, in some respects, acted as bankers, who held them and had the absolute power of disposing of them; was it right or was it to be justified, that a trustee should leave such securities as Exchequer bills in the hands of a banker or broker, who acquires the power of disposing of them as he may think fit? Was it not transferring to those persons that trust and confidence for which he was answerable? It is said, that this was just the same thing, as if the Defendant had left a balance in the hands of the bankers. It is to be observed, however, that he did not do so, and I don't think that it is necessary on this occasion to consider how long a trustee may keep money which he is desirous to employ for a particular purpose in the hands of a banker. When the Defendant had purchased Exchequer bills, he might have kept them perfectly safe, either in his own hands, or he might even have kept them in the hands of those persons, distinguishing them, however, [245] from the other property they had; and

though they would still be liable to lose by fraud or embezzlement, still they would have been free from that species of misapplication which was resorted to upon the present occasion.

It seems to me to be a case of very great hardship; and it is impossible to feel anything but regret at the loss which falls upon this gentleman; but it would be a greater regret if the loss were to fall upon those depending upon his vigilance and care for their protection. The Defendant has made himself liable, because he omitted to take due and proper precaution for the protection of the fund. Having omitted to take it, and having transferred the confidence which was vested in himself to other persons of his own appointment, for whose conduct, it appears to me, he is personally answerable, I think I am bound to decree in favour of the Plaintiff in this case; and this gentleman must make good the money, and must also pay the costs of this suit.

The Defendant was charged with the value at the bankruptcy of the £4000 Exchequer bills, with interest thereon at 4 per cent.

[246] SANDON v. HOOPER. March 14, 15, 1843.

[S. C. 12 L. J. Ch. 309; Affirmed on appeal, 14 L. J. Ch. 120. See *Tipton Gran Colliery Company v. Tipton Moat Colliery Company*, 1877, 7 Ch. D. 194. Commented on, *Shepard v. Jones*, 1882, 21 Ch. D. 469. Applied, *Bright v. Campbell*, 1885, 54 L. J. Ch. 1079. Cf. *Henderson v. Astwood* [1894], A. C. 150.]

A mortgagee in possession, held liable for a damage occasioned by his pulling down two cottages on the property.

A mortgagee in possession will be allowed for repairs necessary for the support of the property, and for doing that which is essential for the protection of the title of the mortgagor. If he has got the consent of the mortgagor or has given him notice in which he acquiesces, he may be allowed for money laid out in increasing the value of the property, but he is not justified in increasing the value of the estate by improvements so as to cripple the mortgagor's power of redemption.

Mortgagee in possession, claiming upon a bill for redemption, to be allowed for substantial repairs and lasting improvement, but adducing no proof of any such expenditure, held not entitled to any enquiry on the subject.

This was a suit for redemption.

In 1830 the Plaintiff mortgaged some property to the Defendant, a solicitor, for £300; and, in 1836, he executed to him a further charge, for a sum of £140, part of which consisted of a bill of costs due from the Plaintiff to the Defendant, and other part of arrears of interest and money paid.

Default having been made in payment of interest on the mortgage, the Defendant, in 1838, by an action of ejectment, recovered possession of the mortgaged property.

After the Defendant had taken possession, he pulled down two cottages on the premises and made some alterations.

By his answer, the Defendant stated that he had laid out £300 in substantial repairs and lasting improvements; but of this no evidence was given.

Mr. Chandless, for the Plaintiff, contended, first, that there ought to be a taxation of so much of the Defendant's demand as consisted of professional costs, *Wragg v. Denham* (2 Y. & Col. (Exch.) 117); secondly, that the mortgagee was liable [247] for the damage done by pulling down the cottages, *Wragg v. Denham*; and, thirdly, that the Defendant ought to pay the costs of the suit, it having been occasioned by his improper conduct in refusing to render accounts. *Detillin v. Gale* (7 Ves. 583), *Taylor v. Baker* (Daniell, 71), *Harvey v. Tebbutt* (1 Jac. & W. 197); and see *Wilson v. Cluer* (4 Beavan, 214).

Mr. Kindersley and Mr. Stevens, for the Defendant, did not oppose the taxation, but contended that the Defendant was entitled to an inquiry as to the substantial repairs and lasting improvements, and to be allowed the amount; and that the Defendant was entitled to the costs of suit, and of the ejectment.

Mr. Chandless, in reply. There is no proof of any substantial repairs or lasting improvements; the Defendant, therefore, is not entitled to any inquiry.

THE MASTER OF THE ROLLS [Lord Langdale]. It is objected on behalf of the Plaintiff, and properly objected, that so far as the sum of £140 consists of the bill of costs, which is payable to the Defendant, it ought only to stand as a security for so much as will be properly due upon taxation. That is not disputed by the Defendant; it has been very properly conceded to the Plaintiff, that he is entitled to have that investigated.

In the year 1838 the Defendant obtained possession by an action of ejectment, and after he came into possession, he pulled down two of the cottages which were upon the premises, and he says, in his answer, that he laid out a considerable sum of money, to the amount of [248] about £300, for repairs and substantial improvements, which he alleges were done with the privity and knowledge of the Plaintiff. First, with respect to the dilapidations, they are proved; and there is not an attempt made in evidence for the purpose of shewing that it was proper. I am therefore of opinion, that the Plaintiff is entitled to an account of any loss occasioned by pulling down those houses.

The next question is, whether the Plaintiff is entitled to anything for the improvements which he alleges to have been made. With respect to what a mortgagee in possession may do with the mortgaged property, several cases have occurred at different times, shewing what he ought, and to some considerable extent, what he ought not to do. Such repairs as are necessary for the support of the property he will be allowed for. He will not only be allowed for repairs, but he will be also allowed for doing that which is essential for the protection of the title of the mortgagor. Further, if he has got the consent of the mortgagor, or has given him notice, in which he acquiesces, then he may be allowed for sums of money which are laid out in increasing the value of the property; but he has no right to lay out money in what he calls increasing the value of the property, which may be done in such a way as to make it utterly impossible for the mortgagor, with his means ever to redeem; this is what has been termed, improving a mortgagor out of his estate—an expression which has been used both in this argument, and on former occasions. The mortgagee has not a right to make it more expensive for the mortgagor to redeem than may be required for the purpose of keeping the property in a proper state of repair, and for protecting the title to the property.

[249] Now, in this case, it has also to be considered, whether it is a matter of course to direct an inquiry whether any money has been laid out in lasting improvements. Many such inquiries have been directed where the fact of any money having been laid out has been proved and brought to the attention of the Court. I quite agree with the argument that has been used on this occasion, that it was not necessary for the Defendant to prove the items of sums of money laid out in the permanent improvements alleged to have been made; but, in this case, there is, as to that, a total absence of all evidence whatever. There is evidence, on the part of the Plaintiff, to shew that what was done deteriorated the property, and there is not one word in evidence, on the part of the Defendant, in support of his allegation, that he has laid out any money for lasting improvements, or that anything he did was done with the privity, consent, or knowledge of the Plaintiff. In the absence of all proof, it is not at all within my authority to direct an inquiry to enable him to supply that in the Master's office, which he has already had an opportunity of doing. (See *Marten v. Whichelo*, Cr. & Ph. 257.) He may have done something towards the improvement of the estate; and if he had entered into any general proof without going into the items, it is very probable that the proof might have been such as would have induced the Court to direct an inquiry upon the subject; but there is no such proof brought forward.

Another point has been raised in this case as to the refusal of the Defendant to account. To excuse his refusal, the Defendant alleges that he was under a mistake as to the party on whose behalf the application was made; but I think the circumstances sufficiently shew there was no mistake.

[250] Under these circumstances I shall direct no inquiry as to lasting improvements: I think the Plaintiff is entitled to an inquiry, as to the loss sustained in

consequence of pulling down the cottages: he is entitled to a taxation of the bill of costs, which formed part of the consideration for the further charge; and, considering the course the Defendant has taken, I think he is liable to pay some of the costs of this suit. I cannot, however, take it for granted, that this suit would not have occurred if the estate had not been dealt with as it appears to have been; I cannot therefore say, that the Plaintiff is to be excused from the whole costs of the suit up to the hearing. I think the Plaintiff must pay the costs, except those which relate to the claim for lasting improvements—those relating to the Plaintiff's claim for compensation for the dilapidations, and those which have arisen from the evidence, which the Plaintiff has been obliged to enter into for the purpose of shewing the refusal to account. There must be an inquiry taken of what is due to the Defendant for principal and interest, and for the costs payable by the Plaintiff.

Mr. Kindersley asked for the costs of the action of ejectment.

THE MASTER OF THE ROLLS. The Plaintiff is entitled to those costs: that has often been decided.

[251] WARD v. WARD. March 16, 1843.

The name of a person who had been made the next friend of an infant Plaintiff without his authority, ordered to be struck out, but liberty was given to the Co-plaintiff to amend by naming a new next friend.

As to the liability of the next friend in such a case as regards the Defendant.

In this case, an infant had been made a Co-plaintiff with several other persons, and Mr. Johnson his father had, without any authority, been named his next friend by the Plaintiff's solicitor. It was now moved, that the bill might be amended by striking out the name of the infant by Mr. Johnson his next friend, or by striking out the name of the next friend, and that the solicitor might exonerate the next friend from any costs to which he might be liable.

The Plaintiffs and the next friend had already been ordered to pay the costs of the Defendants of some interlocutory application, and *subpoenas* for costs had issued.

Mr. Kindersley, in support of the motion.

Mr. Selwyn, for some of the Defendants, asked, that in any order which might be made, the Defendants' interest might be protected as regarded the costs; and also that there might be no further delay in bringing the suit to a hearing.

Mr. Parsons, for the solicitor, objected to the form of the notice of motion, and contended what was proposed to be done could not be considered an amendment. He insisted that Mr. Johnson had, after knowledge of his being named next friend, acquiesced in and sanctioned the proceeding. That the infant was a proper person to be made a Co-plaintiff, and ought not to have [252] been made a Defendant; and in *Hosbing v. Nicholls* (1 You. & Col. (C. C.) 478) extra costs, occasioned by an infant being made a Defendant who ought to have been made a Plaintiff, were not allowed. *Wilson v. Wilson* (1 Jac. & W. 457) was also cited.

THE MASTER OF THE ROLLS [Lord Langdale]. The objections made to this application are, first, that it is wrong in point of form, that it is not the usual simple application to strike out a name from the record, but an application to amend by striking it out; but though perhaps it is not strictly an amendment in the sense in which the word has been used in the argument for the Respondent, still I do not think that this objection can prevail.

It is then said, that the infant was a proper party to be a Co-plaintiff, and that his father was the most proper person to be his next friend and guardian. This I will assume, still the solicitor ought to have applied to the father in the first instance for his consent, and ought not to have relied, as he seems to have done, on the representations and instructions of other persons. Where the interest of a person is such that he ought to be a Co-plaintiff on the record, and being applied to, refuses to join in the suit, and in consequence of such refusal he is made a Defendant, whereby additional and unnecessary costs are thereby occasioned, it is a very proper subject for consideration, at the hearing, whether he shall be allowed those additional costs.

that I understand was the question raised before Vice-Chancellor Knight Bruce in the case which has been referred to. But because it is convenient to the other Plaintiffs that another person should be joined with them on the record, can it be for a moment contemplated, that any party whatever has a right to use the name of another person without his authority or against his consent, and thereby expose him to the risk of being subjected to the costs of the suit? It could not be considered for a moment. Precarious indeed would the situation of every man in this country be, if he could, in a case in which other persons thought it right and convenient to join him in the suit, be made subject to all the costs, in case of the failure of the suit.

The question is, therefore, to be considered upon its merits. Was authority given to Mr. Johnson to the solicitor to file this bill, and if not, has there been such subsequent acquiescence in the proceedings as to entitle the Court to say, that from such subsequent sanction an authority must be implied? In this case, it is admitted that there was no previous authority, and having attended to the affidavits throughout, I think there is nothing in them from which I can collect that he ever acquiesced in the use of his name as a party prosecuting this cause; under these circumstances, without interfering in respect of this infant, I think that the name of this gentleman next friend of the infant must be struck out. The other Plaintiffs may then procure another next friend to be inserted. This will not occasion any great delay, though the suit cannot be prosecuted until a new next friend has been appointed.

Then comes the question, what is to be done with regard to the costs? Now I think that there are precedents in similar cases which I will look at before I make any order as to costs, in order that I may make an order in this case, as far as circumstances will allow me, in conformity with the former orders. The Court has been obliged in the confidence it must place in solicitors to assume that there has been no ill practice, [254] and the consequence has been, that Defendants have been held entitled to be protected; the Court in more than one case has said, that when a party who has been made a Plaintiff without his authority, afterwards procures his name to be struck out from the record, he shall still as against Defendants remain responsible for what has happened. (*See Wade v. Stanley*, 1 W. 674, and *Hood v. Phillips*, 6 Beav. 176.) I wish to see the orders before I determine what ought to be done about the costs.

Mr. Kindersley. Should the form of the order be such as to leave Mr. Johnson under his present liability to the Defendants?

THE MASTER OF THE ROLLS [Lord Langdale]. That is one of the points as to which I wish to see what has been done in former cases.

EXTRACT FROM THE ORDER.—Order the name of Mr. Johnson to be struck out. The Plaintiffs have liberty within a fortnight to amend, by inserting the name of A. W. as next friend of the infant. Order the solicitor to pay to Mr. Johnson all the costs as have been occasioned by his being named next friend (including his costs of this application), and to pay the Defendants the costs of this application.

[254] LOPEZ v. DEACON. *March 16, 1843.*

admission of the possession by an agent on behalf of the Defendant and other persons who are not parties to the cause, of documents relating to the matters in question, does not entitle the Plaintiff to an order for their production.

In 1814 the father of the Plaintiff and certain order parties, by their tin bounders' letters, granted to William Smith Amies, as the agent of the Defendant [255] Deacon, and of other persons his co-adventurers, the right of working tin mines within tin bounds, rendering by way of royalty one-twentieth of the tin risen, clear of

The bill in this case was filed by the representative of Lopez alone against the Defendant Deacon, and against the co-grantors for an account of the dues, but it did not make the other co-adventurers parties.

The Defendant Deacon by his answer stated, that the original "sett" was in the

hands of the bankers of himself and his co-adventurers, and had been deposited by him and his co-adventurers jointly; and he admitted that certain documents were in the possession of the captain of the mine, but he stated that they were held by the captain, and that the original sett or licence was also held by the bankers for him jointly with his said co-adventurers, and the same ought not to be produced in the absence of such co-adventurers; he stated the names of some, and gave the description of others of his co-adventurers, and insisted they were necessary parties to the suit.

A motion was now made, that the Defendant might produce the documents.

Mr. Pemberton and Mr. Shafter, in support of the motion. The lessor has a clear title to the inspection of these documents, in order to ascertain the extent of his right.

The production of the documents is a mode of obtaining the discovery of the matters, much less expensive than that which results from requiring them to be set out at length in the answer. A statement by a Defendant that papers are in the joint possession of himself and other persons, is not a sufficient excuse for his not setting out [256] the contents, unless he shews that he has used his best endeavours to set them forth, and that it is practically impossible for him so to do, *Stuart v. Lord Bell* (11 Simons, 442, and 12 Simons, 460, affirmed by the Lord Chancellor, March 1849; *Taylor v. Rundell* (Cr. & Ph. 104; 1 Y. & Col. (C. C.) 128; and Phil. 222). If, therefore, the Defendant is bound to discover these matters by answer, he is equally bound to give the same discovery by their production.

Mr. G. Turner and Mr. Neate, *contra*. The right to the production of documents depends on principles quite different from those which regulate questions of the sufficiency or insufficiency of an answer. To entitle a Plaintiff to the production of documents, you must have a clear admission of the Defendant that they are in his possession, and also of his exclusive right to them. You cannot order A. to produce documents in the joint possession of himself and B., nor can you, in the absence of B., order A. to produce documents in which B. is interested. This was laid down by Lord Cottenham in *Murray v. Walter* (Cr. & Ph. 114), where the Defendant, by his answer, stated, that certain books relating to a concern in which the Plaintiff claimed to be a partner with the Defendant, were in the possession of the treasurer of the concern, on behalf of the several shareholders in it, many of whom were not parties to the suit. It was held that the Defendant could not be ordered to produce the books in question. Lord Cottenham said (Cr. & Ph. 124, 125), "The only order which could possibly be made, would be an order against that Defendant who has made this admission; but to order him to produce these documents, would be contrary to what I have always understood to be the practice of the Court. When documents are stated in the answer to be in the [257] possession of A., B. and C., you cannot order that A. shall produce them, and that for the best possible reason, namely, that he could not produce them." Lord Cottenham afterwards added, "It is perfectly true, that if documents are in the hands of an agent, the principle of the Court is, that the possession of the Defendant's agent, is the possession of the Defendant against whom the order is made. But here the agent is the agent not only for the Defendant against whom the order is prayed, but also for other Defendants. The Defendant against whom the order is prayed, has not the possession of the documents either personally or through an agent. I have always understood the rule to be that, under such circumstances, the Court would not make an order for the production."

So in the case cited of *Taylor v. Rundell*, Lord Cottenham said (Cr. & Ph. 111), "It is true that the rule of the Court, adopted from necessity, with reference to the production of documents is, that if a Defendant has a joint possession of a document with somebody else who is not before the Court, the Court will not order him to produce it, and that for two reasons: one is, that a party will not be ordered to do that which he cannot, or may not be able to do; the other is, that another party not present has an interest in the document, which the Court cannot deal with."

Mr. Pemberton, in reply, referred to *Walburn v. Ingilby* (1 Myl. & K. 78, 79).

THE MASTER OF THE ROLLS [Lord Langdale]. If this were a case of a lessor filing a bill against one of the lessees, who being the sole manager of tin mines [258] for himself and other co-adventurers, had possession of the documents, either by himself or by a person whom he had appointed captain of the mine, or the agent of himself and all the co-adventurers, I should be very much disposed to think, that

According to the old practice of the Court, the Plaintiff would be entitled to an order for the production of these documents.

I do not think that the case is so stated in the answer. What is stated is, that here are other persons besides the Defendant who are interested in the accounts, and that these books are partly in the possession of the Defendant, and partly in the possession of another person, who is appointed on the behalf of himself and all the other co-adventurers. That may be an evasion, but that is the effect of the answer as I understand it.

Lord Cottenham, in the cases cited, states distinctly that you cannot order the production of papers on the admission of one person, if other persons are interested in them. I cannot, therefore, in the face of those decisions, make an order for the production of these papers. The effect will be merely to increase the expense of the suit; for, in one or two ways, the contents of these papers may certainly be had. The Plaintiff may either make all the persons interested parties to the suit, or he may press the Defendant for a full discovery of the contents of these documents by his answer. I think that, if the power of the Court is to be really restricted in the way that is alleged, the only effect will be to increase the expense of obtaining that discovery which a Plaintiff is entitled to.

I cannot make the order, the costs must be costs in the cause.

[259] HEWETT v. FOSTER. *March 17, 1843.*

[S. C. 7 Beav. 348.]

The testatrix gave her personal estate to A. and B., subject to debts and legacies, upon certain trusts, and she appointed A. alone executor. A fund, over which the testatrix had a power of appointment, was transferred into the names of A. and B. A., the executor, representing that a considerable part of the fund was wanting to pay debts and legacies, induced B. to join in selling out the fund, promising to give a mortgage security for what might not be wanted for debts, &c. A. received the whole, but applied a very inconsiderable sum in payment of debts, &c. Held, that B. was liable to replace so much of the stock as had not been applied in payment of debts, &c., and to account for the dividends.

The testatrix, Jane Pinkey, being entitled to a sum of £2194 consols, standing in the names of two trustees, by her will, dated in 1835, gave and appointed unto Daniel Grigg Hewett and John Foster, all her stocks, &c., and personal estate, subject to the payment of her debts, &c., upon trust to invest on Government securities, and pay the dividends to Sarah Hewett for life, with remainder to her children; and she appointed D. G. Hewett alone executor.

The testatrix died in August 1835, and Hewett alone proved the will. The trustees, in whose names the fund was standing, transferred it into the joint names of Hewett and Foster. On October 1835 Hewett "applied to Foster, and represented to him, that the whole, or some considerable part of the sum of £2194, 5s. 8d., would be required for the purpose of discharging the testatrix's debts, and funeral and testamentary expenses, and the legacies given by her will; and he also represented, that it had been the testatrix's intention that the said Bank annuities should be lent to him D. G. Hewett; and he stated that it would be more for the advantage of the parties entitled to the testatrix's residuary estate, that the whole of the sum of Bank annuities should be sold at one and the same time, and that after applying so much of the proceeds thereof as should be required for that purpose, in payment of the debts, funeral and testamentary expenses and legacies, the residue hereof [260] should be retained by him, Daniel G. Hewett, upon his giving an adequate mortgage security for the same, which he undertook to do."

Foster thereupon executed a power of attorney to Hewett, enabling him to sell out the stock. Hewett sold it out, and received the produce, amounting to £2002, and after applying £55 in payment of debts, &c., he retained the remainder. Hewett

afterwards gave a security to Foster for £1947, being the surplus. Hewett fell in difficulties, and the securities could not be realised.

This suit was instituted by the children of Sarah Hewett, to make the trustee liable for a breach of trust.

Mr. Pemberton and Mr. Beavan, for the Plaintiffs, asked that the Defendant Hewett and Foster might be declared liable to make good the stock.

Mr. Kindersley and Mr. W. H. Clarke, for the Defendant Foster, contended that the executor had a right, in the first place, to possess himself of all the assets, and that as the debts and legacies of the testatrix were charged on the fund in question and were payable thereout by Hewett, the sole executor, Foster was justified in placing, and would not have been justified in refusing to place, the fund in question in his hands, to be administered by him. That if Foster were responsible at all, was merely liable for the amount of the money, and not to replace the stock.

Mr. Chandless, for Hewett, the other trustee.

Mr. Twells, for other parties.

[261] THE MASTER OF THE ROLLS [Lord Langdale] said that the fund, doubtless, formed assets for payment of the funeral expenses, debts, and legacies of the testatrix; and if the exigency of the case demanded its application therefor, and Hewett had required it to be transferred to him for that purpose, this would have been a sufficient justification to Foster for so doing; but here the application made to Foster by Hewett was, that after payment of the debts, &c., the residue should be lent to him, Hewett.

That he was of opinion, that Foster was answerable for the breach of trust, so much as had not been applied in payment of debts or legacies, that he was therefore, be decreed to replace so much of the stock as had been unnecessarily paid out, must account for the dividends from the death of the tenant for life, and the costs of this suit.

[261] PARKER v. YOUNG. *March 21, 23, 1843.*

[S. C. 12 L. J. Ch. 335. See *Bolton v. Powell*, 1851, 14 Beav. 286.]

Where no proceedings have been taken to put an administration bond in suit, a debt due from the administrator at his death to the estate of the intestate, is not a specialty debt.

This was a creditor's suit for the administration of the estate of John Young, reference being made to the Master to take the usual accounts, &c., the Defendant Bullpett was found to be a creditor of the estate of John Young to the amount of £3094, under the following circumstances:—

On the 22d of January 1833 letters of administration of the personal estate of James Young were granted to his brother John Young, on his executing to

[262] Ordinary an administration bond in the form directed by the Statute in relation to Administrations. (1)

The clear residue belonged to John Young and his brother William Young, lunatic.

John Young collected the personal estate of James, rendered an account, &c., to the Ordinary but to the Stamp Office, and on the 29th of May 1839 he retained his own share of the residue; he died largely indebted to the estate of James Young.

On the 11th of September 1841 letters of administration of the estate of John Young, unadministered by John, were granted to the Defendant Bullpett, a committee of William Young, who was found by the Master to be a creditor of the estate.

(1) 22 & 23 Car. 2, c. 10, s. 1. The conditions of the bond are first to make an inventory, &c.; secondly, well and truly to administer according to law; thirdly, to make a true account of the administration, and pay the residue to the person appointed by the Court; and, fourthly, to render the letters of administration if a will should thereafter appear.

John Young to the amount of £3000 and upwards, the amount due from him to the estate of James at the time of his death.

Under these circumstances Bullpett claimed to be a specialty creditor to this court, alleging that the conditions of the bond were broken, that the Ecclesiastical Court ought *ex debito justitiæ*, to order that the bond be attended with on the trial of an action, and that the Ordinary ought to be considered as a trustee for the administrator *de bonis non*.

Mr. Pemberton and Mr. Willcock, for Bullpett.

Mr. Wray and Mr. Glaase, *contra*.

[263] *The Archbishop of Canterbury v. Tappen* (8 B. & C. 151), *The Archbishop of Canterbury v. Robertson* (1 Cr. & M. 690), *The Archbishop of Canterbury v. Tubb* (3 Bing. C. 789) were cited.

March 23. THE MASTER OF THE ROLLS [Lord Langdale]. The question is, whether the administrator *de bonis non* ought now to be considered a specialty creditor John Young upon the administration bond, and I think that he is not.

The bond is taken pursuant to the Statute of Distributions, and remains subject to the control of the Ordinary.

In the case of *The Archbishop of Canterbury v. Tubb* (3 Bing. N. C. 789) it was determined, that an action on the bond could not be maintained, even in the name of the Archbishop, without production of the bond, as by that means the control of the Ecclesiastical Courts over suits on administration bonds would, in effect, be destroyed.

An action upon the bond can only be maintained in the name of the obligee, and the administrator *de bonis non* has no independent right to sue upon it;—it remains to the judicial discretion of the Ecclesiastical Court, to determine according to the circumstances, whether the order that the bond shall be attended with shall be granted or not. In the absence of all authority on the subject, it does not appear to me that any one can be a specialty creditor under a bond which he does not produce, which is not under his control, which was not [264] executed to him or to his intestate, nor was executed to a public officer, and remains subject to the judicial control of the Ecclesiastical Court, which has discretion to determine whether the bond shall be put in or not, and on what terms.

I am of opinion that the administrator *de bonis non* is not a specialty creditor.

[264] CHIDWICK v. PREBBLE. April 1, 3, 1843.

The Plaintiff does not, by obtaining an order to amend, between the time of giving notice of a motion for the production of documents and its being heard, deprive himself of his right to their production.

The Defendant, by his answer, admitted the possession of certain documents, and the Plaintiff gave notice of a motion for their production. Before the motion came to be heard, the Plaintiff obtained an order to amend his bill.

Mr. Pemberton and Mr. Dixon now moved for the production of the documents.

Mr. Bloxam, *contra*. The Plaintiff having obtained an order to amend, cannot call for the production of the documents until the amended bill has been answered. The Defendant may now by his answer protect himself from discovery, and the Plaintiff, by his amendment, strike out the only equity on which his right to production depended. He cited *De la Torre v. Bernales* (4 Mad. 396).

[265] THE MASTER OF THE ROLLS [Lord Langdale] overruled this objection and ordered the production of some of the documents.

See *Goulthwaite v. Rippon*, 1 Beavan, 54, and *Martin v. Fust*, 8 Sim. 199.

[265] RIGBY v. RIGBY. April 3, 1843.

Traversing note, obtained *ex parte* by the Plaintiff, with notice that the Defendant's answer had been sworn, discharged, but the Defendant ordered to pay the costs.

The answer of the Defendant had been sworn in October 1842, but the Defendant had neglected to file it.

On the 28th of February 1843 the Plaintiff's solicitor, having notice of the circumstance, applied for and obtained the traversing note under the Twenty-first and Twenty-second General Orders of August 1841. (Ord. Can. 170.) This he did without giving notice to the Defendant.

Mr. Kindersley applied to discharge the order for the traversing note, to enable the Defendant to file his answer to the bill.

Mr. James Parker, *contra*.

THE MASTER OF THE ROLLS [Lord Langdale] disapproved of the practice of retaining the answer after it had been sworn, but said that the Plaintiff's solicitor, knowing the answer was ready, ought not to have obtained the traversing note without first communicating with the other side. That [266] he could not allow the Defendant to be deprived of every opportunity of properly making his defence, and that he should remove the obstacle of the traversing note upon payment by the Defendant of the costs.

[266] EVANS v. SALT. April 4, 1843.

[Disapproved, *De Beauvoir v. De Beauvoir*, 1852, 3 H. L. C. 556; 10 E. R. 219. *In re Rootes*, 1860, 1 Dr. & Sm. 228; *Hamilton v. Mills*, 1861, 29 Beav. 198. *De* see *In re Stevens' Trusts*, 1872, L. R. 15 Eq. 114.]

Gift of personality to A. for life, and afterwards to his children, and in default to the heirs of B. Held, that the next of kin were entitled under the ultimate limitation.

James Salt, by his will, among other things, gave to Sarah Evans his reputed natural daughter, for her use and benefit only, during her life, and after her death to be equally divided amongst her children, the sum of £1000 3 per cent. consols, and also to James Salt Brown, his reputed natural son, the sum of £1000 3 per cent. consols for his own use and benefit, during his life, and at his death to his children equally, or in default of issue to the heirs of the above-named Sarah Evans.

James Salt Brown died on the 26th day of September 1842, without having been married; Sarah Evans died in September 1837. The Plaintiff William James Evans, her eldest son and heir at law, claimed the fund on which the £1000 had been invested.

The Petitioners, the next of kin of Sarah Evans, also claimed the fund under the ultimate limitation to the heirs of Sarah Evans.

Mr. Pemberton, in support of the petition, contended that having regard to the nature of the property, which was personality, the word "heirs" must be construed "next of kin."

[267] Mr. C. J. Selwyn, *contra*, contended that the heir of Sarah Evans was entitled. He cited *Mounsey v. Blamire* (4 Russ. 384) where a testatrix amongst other pecuniary legacies gave "to her heir £4000" and it was held that the heir at law and not the next of kin was entitled.

THE MASTER OF THE ROLLS [Lord Langdale] was of opinion that the next of kin were entitled and ordered accordingly.

[267] LOCKHART v. HARDY. April 6, 27, 1843.

Under a decree in an administration suit, certain parties only were allowed to attend before the Master. The Master approved of some suits being instituted by the receiver who was to be indemnified out of the estate. The funds appearing by affidavit to be "abundantly ample," the Court ordered the institution of the suits, and the payment of costs out of the fund standing to the general credit of the cause, upon service on those only whom the Master had authorized to attend him on the reference.

John Wastie had devised estates upon trust for sale, in aid of his personal estate pay debts, and left other estate to descend on his heir at law; he died in 1825.

Four suits were instituted by creditors and legatees against the executor and heir at law of the testator, and a decree for taking the usual accounts was made in all the

The Master, under the authority of the fifty-first of the General Orders of the 3d April 1828 (Ord. Can. 22), determined that the parties entitled to attend the future proceedings were, the Plaintiff in the first cause, who was a legatee and had the benefit of the decree, the executor, and the heir at law.

[268] The heir at law presented a petition founded on the Master's report, that the receiver in the causes might be directed to institute certain suits which had been moved of by the Master, in the name of the executor, against debtors to the estate, that the executor should be indemnified out of the estate, that the receiver's costs should be allowed in passing his accounts, that it should be referred to the Taxing Master to tax the costs of obtaining the Master's report and of this application, and that the amount might be paid out of the fund in Court standing to the general credit of the four causes.

The only parties served with the petition were the Plaintiff in the first cause and the executor; but the order was made.

The registrar, on an application to draw up the order, objected, that all the parties in the four causes ought to have been served with the petition, since the general fund was to be affected.

Mr. Shapter in support of the petition now applied for the direction of the Court. Mr. Kindersley, for the Plaintiff and executor.

THE MASTER OF THE ROLLS said, that inasmuch as the executor and heir at law (if the estate was more than sufficient to meet the demands upon it) interested themselves in the fund; he would, if the petition were amended by stating that the funds were sufficient to pay the debts and legacies, and that statement was properly proved by affidavit, make the order as prayed without requiring the other parties to be served.

[269] It appearing by affidavit that the fund was upwards of £10,000 beyond the debts,

April 27. THE MASTER OF THE ROLLS [Lord Langdale] this day made the order.

[269] ENGLAND v. DOWNS. Dec. 14, 16, 17, 1842.

[S. C. 12 L. J. Ch. 85; 6 Jur. 1075.]

Goodwill of a victualler's business held, under the circumstances, to be incident to the stock and licence, and not to the premises on which the business was carried on.

Now carried on the business of a licensed victualler on premises held by her from year to year. Prior to her second marriage, she assigned her household goods, furniture, stock-in-trade, brewing utensils, and all other her effects upon trusts including her husband. She married. Held, that the goodwill of the trade, which was afterwards sold, passed by the deed as incident to the stock and licence, and not to the husband with the premises.

A husband carried on the business of a victualler with stock, &c., which formed the separate estate of the wife; in carrying on the business he disposed of the consumable stock, and substituted similar articles, and at a subsequent period he sold the stock and business. By the decree an account was directed against the husband of the stock comprised in the settlement and sold. Held, that the Master properly included the substituted stock in the account.

A witness was examined for the Plaintiff and cross-examined by the Defendant on other matters. Held, that his further evidence on behalf of the Defendant could not be received, upon an inquiry before the Master, except by order of the Court.

This case is reported (2 Beavan, 522), where it will appear, that on the 5th August 1818, Mrs. Mason, who married the Defendant Broad on the 26th of October following, executed a voluntary settlement of her property in favour of herself and the daughters of her first marriage, to the exclusion of the husband.

That the husband took possession of the property and carried on the business of a victualler until August 1822, when he sold the business, stock and effects.

His wife died in 1833, and the property was claimed under the settlement by three daughters; viz., the Plaintiff, Mrs. England, and the Defendants Mrs. Broad and Mrs. Davies. The claim was resisted on the ground that the settlement had been made without his knowledge, pending the time he was paying his ad-[270]-dress to Mrs. Broad, and was therefore a fraud on his marital rights and void. This defence failed, and it was referred to the Master to take an account of the household goods, stock-in-trade, and effects comprised in the indenture of settlement, which were sold by the Defendant John Thiery Broad in the month of August 1822, and of the value thereof, and of the application of the money arising from the sale thereof.

The Master by his report found, that the household goods, stock-in-trade, and effects conveyed or assigned by the indenture of settlement, or so much thereof as were then remaining in the possession of Mr. Broad, were, in August 1822, sold by him to Davies; but the stock-in-trade being fluctuating, he found that certain articles which were assigned by the indenture of settlement were not included among the articles so sold to Davies, and that other articles were then sold to him, which were not assigned by the said indenture. And he found that the household goods, stock-in-trade, and other effects sold to Davies were valued and appraised, together with the goodwill of the business on the premises in which the business of a retail victualler had been carried on at the sum of £902, 6s. 5d., which was made up as follows:

Household goods, furniture, fixtures	£408
Stock-in-trade	284
Goodwill of the business	210
	<hr/>
	£902

which sum was received by the Defendant, and with which (after deducting the debts of the Master charged him.

[271] The Defendant Broad took several exceptions to this report. By the fifth, he, in different forms, objected that the Master had not taken the accounts of the household goods, stock-in-trade, and effects comprised in the settlement and sold by the Defendant in 1822, &c., as directed by the decree.

By the sixth, he objected to the Master's having charged him with the £210. The seventh and eighth related to the evidence.

By the ninth, he complained that the Master had not allowed him the £210 for the goodwill.

The remainder referred to items of payments disallowed to the Defendant, amongst them a sum of £123 for money laid out during the time the trade was carried on, and £178 for the increased value of the stock beyond that belonging to Mrs. Broad on her marriage.

With respect to the goodwill of the business, it should be stated, that the business was carried on at premises in Cider House Passage, held from year to year, and that the house was not specifically assigned by the settlement; that if it passed at

whereby, it must have passed under the words, "All and every her household goods, furniture, plate, linen, china, books, stock-in-trade, brewing utensils, and all other the effects of her, Joan Mason," set forth in the schedule, and no schedule was added to the deed.

Mr. Kindersley and Mr. Chandless, for Mr. Broad, in support of the exceptions, intended, that the Master had not taken the accounts directed. He was directed to take an account of the stock-in-trade comprised in [272] the settlement and sold by road, whereas he had included the after-purchased stock, and all the stock which existed at the time of the sale, whether included in the settlement or not, and had improperly charged the Defendant with the amount.

As to the goodwill they argued that the Cider House to which it was attached could not pass under the settlement by the words "stock-in-trade, &c., and other effects" in the schedule, and therefore did not become subject to the trusts, but passed to the husband *jure mariti*. In *Portman v. Willis* (Cro. Eliz. 386), it was held, on the authority of a case of 4 Ed. 6, Grants 51, that a leasehold would not pass by a grant of "*omnia bona*." That the goodwill was not therefore comprised in the settlement by the decree, and belonged to the husband.

Mr. Pemberton and Mr. Dixon, for the Plaintiff. The decree was taken in its recent form in order to save the expense of taking the account of receipts and payments, and the Master has pursued the direction of the Court according to the spirit and meaning of the decree and of the parties.

The inquiry directed, is not only of the goods, &c., comprised in the settlement, but of those sold, and as the stock-in-trade consisted of consumable articles, in lieu of, and from the produce of which, others were bought, it was considered that the substituted articles came in the place of those which were sold.

The goodwill depended on the fixtures, furniture, and stock, and not to the house in which the parties had no beneficial interest. If a party assigns all his property [273] and all benefit thereof, surely the goodwill which is attached to the property passes with it. Suppose the trustees had been called on to account as for a breach of trust, would they not be liable to account for the money received for the goodwill?

As to the several sums disallowed, the Defendant seeks to charge the trade debts, without accounting for the profits. He is made liable for the stock only, he cannot charge outgoings, unless he gives credit for his receipts.

Mr. Turner and Mr. Elderton, in the same interest for Mrs. Barton, another daughter, and

Mr. Spurrier, for Mrs. Davies the third daughter.

Mr. Chandless, in reply. The decree only directs an account of the goods comprised in the settlement. If it had been the intention of the Court to charge the Defendant with the substituted goods, it would have been expressly declared by the decree. The goodwill is inseparable from the house, which did not pass by the deed.

THE MASTER OF THE ROLLS [Lord Langdale]. This litigation has taken a course which has somewhat disappointed me. At the hearing, it seemed to be perfectly understood what was best and for the advantage of both these parties, and the accounts were directed with reference to that which was then understood to be, and was the only question between the parties.

This lady, during her widowhood, made a settlement, by which, amongst other things, the stock-in-trade and [274] furniture were assigned to trustees for her separate use, free from the control of any future husband; at a future period the stock-in-trade and the other things were to be sold, and the money was to be appropriated to certain uses and upon certain trusts. I think nothing could be more manifest, having regard to the nature of the property thus assigned, than that it never was or could have been intended, that precisely the same articles of which the stock-in-trade then consisted, were to continue subject to those trusts that were then created. It is impossible to suppose that the publican's stock-in-trade, as ale, beer, and such sort of things, the only value of which was in their consumption, and which would be entirely deprived of their value if not consumed, were to be preserved in specie so long as the trust continued.

Mrs. Broad, having executed this instrument, and being herself in possession of the whole of the property conveyed and assigned by it, intermarried with the

Defendant Mr. Broad. Mr. Broad, if he did not know of the settlement previous to the marriage, did, very soon afterwards, become perfectly well aware of it, and acquiesced in it. I have a strong recollection of there being proof in the cause, of his having, upon more than one occasion, actually resorted to the trust deed, and acted under it. But though he acquiesced in it for certain purposes of his own, he nevertheless, for his own purposes, claimed title against it, and dealt with the property as if it were his own. The business was put an end to in the year 1822, and then the stock-in-trade was sold. The wife lived some years afterwards, and, upon her death, the persons beneficially interested, subject to her life interest, claimed to be entitled to the benefit of the money arising from this sale, and Mr. Broad having resisted their claim, this bill was filed for the purpose of having it established.

[275] It seemed to me perfectly clear, that the persons interested under that trust were entitled to have the benefit of it; and the Defendant having stated in his answer that he had sold the goods and stock-in-trade for a certain sum and made certain payments thereout, it was certainly a very natural object of every one interested, and desirous to see that these persons did not injure themselves by a prolonged litigation in a matter not likely to lead to any benefit to them, that the account there stated should, if possible, be taken to be the account between these parties, and that that matter might be settled on that footing. It would have been very well if it had been so, but not being able to come to an agreement at the time, the decree was made, in the form in which it now is. It is argued that the decree means simply that an account was to be taken of those specific and individual articles assigned by the deed and which had been sold. I am quite certain it was not in the contemplation of either of the Court or any of the parties that such could have been the meaning of the decree. The Master has taken an account of the goods, &c., sold in 1822, and states the value as consisting of the sum of money for which they were sold, and this the difficulty has arisen. He finds "that certain articles which were assigned by the said indenture of settlement, were not included among the articles so sold to said Richard Davies, and that other articles were then sold to him which were assigned by the said indenture."

That may be perfectly consistent with what was intended, and in this way:—carrying on the business in the ordinary way, some articles were substituted for others; certain articles being sold, the money arising therefrom was laid out in purchase of articles of the like kind, and which, as existing from time to time, constituted the stock-in-trade which was the subject of the trusts of the deed.

[276] I think that this, in substance, was what was meant:—during the time the trade was carried on, the stock-in-trade, of necessity, was known to the parties to consist of fluctuating articles, and in the course of that fluctuation, the stock-in-trade as it ultimately subsisted at the time of the sale, did not consist of the same articles as the stock-in-trade at the time of the marriage, or when the deed was executed, still it was that stock-in-trade which was contemplated by the deed, and intended to be the subject of the trusts of the deed.

I think, therefore, that it was right in the Master to come to the conclusion which he did on that subject. This applies to the first six exceptions.

As to the ninth exception, the Master has allowed as against the Defendant the sum of £210, being that part of the purchase-money which was paid by the purchaser for the goodwill of the trade. Mr. Chandless has experienced a difficulty, which I believe everybody feels, in accurately defining what is meant by the expression, "the goodwill of a trade;" it is not at all easy to do it. Here is a trade carried on upon premises by means of certain stock-in-trade and furniture, which are by a settlement set apart to the separate use of the wife, the husband not being entitled in any way to interfere therein. The business is carried on in a house which has a licence (which licence creates some difference between the goodwill of a publican's trade and that of other trades), the husband is not to interfere with the furniture or with the stock-in-trade which is to be for the separate use of the wife, and the wife possesses on those premises the stock-in-trade and the furniture; by the use of that, she obtains a certain custom and the probability of the continuance of that custom. This, in one way of looking at it, is the goodwill. It is the chance or probability that custom will be had at a certain place of business in consequence of the way in which that business

been previously carried on. By this deed that business was to be carried on by the use of the furniture and the stock-in-trade which belonged separately to the wife, and with which the husband was not to interfere. I must own my opinion is, that the goodwill belonged to the wife, and was a part of that settled property, as annexed and incident to the things which were comprised in the deed, and that whether the particular interest she had in the leasehold premises was distinctly comprised in the deed or not.

As to the other exceptions, I think there are considerable difficulties. The question is not whether a trust of a fluctuating property is to extend to that, which from time to time is substituted for it; but whether such a trust must not be considered as maintained, if the value of the original settled property is kept up.

Here the wife was entitled for her separate use, she might have received the profits of this trade, and either spend them or lay them out in increasing the capital. If she laid out those profits in increasing the capital, which would be for her separate use, could her husband, at any time, have the right to say that the increase of capital should be for his benefit, and not continue for the purpose for which she intended to increase the capital belonging to the trade? Mr. Chandless very forcibly put the case, how would it be as to the wife herself. If the wife herself had received the different sums of money which became due in the course of the business, and instead of spending that money, had thought fit to lay it out upon increasing the capital, would it not have been necessary for her to say, "I intend this increase of the capital as a permanent investment for the benefit of the trust?" I think that is a question of some [278] difficulty. I do not think that is quite so clear as it has been considered to be in argument.

There is this specialty in the case, that this increase of capital was not, in point of fact, created by the wife or by her agent, but by the husband claiming, in opposition to the wife and to her exclusion, the possession of this property for his own benefit. Could he, by interfering with the trust property in this way, appropriate to his own use the profits arising from the trade, and if he could not, does it make any difference whether he laid it out in the purchase of additional capital or not? I think there is some considerable difficulty in that question.

The two sums of £178 and £123 require further consideration. The remaining exceptions depend upon Mr. Broad being entitled to charge for the outlay which he made. It is perfectly clear that if an account had been directed to be taken of profits, he would have had the benefit of that outlay. The injustice which is alleged on his part would cease, if he has been in the receipt of profits exceeding the several sums charged. On the other hand, if all the profits he has received in carrying on the trade have been less than the sums of money with which he is sought to be charged, is that right? I cannot say I think it is.

This brings me to the consideration whether, in point of fact, the decree does do strict justice between the parties, whether by directing an account to be taken of the capital and of the application thereof, you really do that which is necessary to be done before strict justice can be administered between these parties, whether you ought not to take an account of what he has received and paid, charging him with the amount of the receipts and giving him the benefit of payments in [279] the shape of just allowances, and taking from him everything but that which he has expended, and can prove that he has expended. I have some difficulty how to deal with those exceptions, and I think I must look over these papers and take a little time to consider how they are to be dealt with. I think the first eight must be overruled. I must dispose of the rest until this cause has been heard on further directions, that I shall then see the whole merits of the case.

The cause was heard on further directions, when it was, amongst other things, argued that as the suit had become necessary by the conduct of Mr. Broad, he ought to pay all the costs consequent upon the litigation, and, amongst them, the costs of the Co-defendants.

Dec. 17. THE MASTER OF THE ROLLS [Lord Langdale]. I think that I cannot give any costs of this suit to those who are in the same interest with the Plaintiff. I must not make the Plaintiff pay for them, and I do not think it is a case in which Broad ought to be called on to pay them over.

With respect to the trustees, I do not think they are entitled to costs, because they have utterly neglected their trust, they executed the trust deed, and ought to have taken care that the schedule was annexed; their neglect of that duty has been followed by such very serious consequences, I think it is utterly impossible to give them any costs of these proceedings. There is certainly some doubt with respect to the other points, and I shall be sorry if it should turn out to be necessary to investigate the facts further.

This gentleman carried on the business which was settled on his wife, and the proceeds of which, after [280] keeping up the stock, would be at her disposal. He might have consented to her husband's applying the profits to his own use, or he might have said "it shall be laid out in increasing the stock." Under the circumstances, it does not appear to me to be unreasonable to presume that the increase of stock was made by the application of what constituted the profits; was the increase of stock subject to the trusts of the settlement? That is one of the questions of looking at it. It would be very difficult to permit the husband, who was carrying on this trade, selling the stock, receiving money, and applying it in the purchase of other stock-in-trade, to say, "I have spent so much money in the business, I must recoup out of the stock." I scarcely know on what principle that could be done. The exceptions as to the sum of £123, contain an express assertion that he is entitled to be re-imbursed for money laid out during the time the trade was carried on, and I find very great difficulty in allowing it. Then there is the sum of £178 which he claims as being the value of the increased stock, malt, and things of that sort, got up for the purpose of carrying on the business; how can he have that, if the whole of the stock was subject to the trust? There is a difficulty in allowing that.

There are other sums of money, amounting in the whole to £44, 2s. 7d., which were debts in the trade and sums of money which he had to pay at a time when it appears he could not, by any means have been receiving the proceeds of the stock-in-trade. I confess I feel some difficulty in saying in strictness he might not be entitled to those sums of money. I must, if the parties cannot agree, consider the matter further, and give a decision upon it. Without however binding myself, I think I may say that my impression is against the exceptions as to the £123 and £178, and rather in favour of the others, unless it can be shewn the Defendant had no means of paying them.

NOTE.—The case was afterwards compromised.

Another point relating to evidence was raised upon these exceptions, which is as follows:—Mr. Davies had been examined in the cause on the part of the Plaintiff, and cross-examined by the Defendant Broad, but the points to which he was cross-examined by the Defendant did not arise out of his examination-in-chief.

Upon the enquiries before the Master, two affidavits of Mr. Davies were taken in evidence on behalf of the Defendant Broad, but no order of the Court had been obtained for leave to examine him upon the enquiries, the Master received his evidence, which was also stated to be on points on which he had been previously examined.

Mr. Chandless contended that as he had not been examined in chief by the Defendant, an order was not necessary. He cited *Melford v. Peters* (8 Sim. 104) in which it was held, that a witness who had been examined before the Master may be examined before the Master for the other side without the leave of the Court.

Mr. Pemberton and Mr. Dixon, *contra*, contended that the case cited did not apply, for the witness had been examined on the part of the Plaintiff, though nominally he had been cross-examined only. That the [282] ordinary rules of law therefore prevail which was, that witnesses examined in the cause cannot be examined by the Master without leave of the Court.

Smith v. Althus (11 Ves. 564), *Willan v. Willan* (Cooper, 291), *Smith v. Gell* (2 Swan. 264), *Rowley v. Adams* (1 Myl. & K. 545) were cited.

THE MASTER OF THE ROLLS [Lord Langdale]. The 7th and 8th exceptions relate to the evidence rejected by the Master, and upon that I have no objection whatever. The Defendant says that this witness had not been examined on his

and that he was merely cross-examined. This however was not cross-examination upon the matters to which the Plaintiff had examined the witnesses, but was a direct examination-in-chief, though under interrogatories which were nominally cross-interrogatories. It was a direct examination-in-chief of this witness by the Defendant, to establish his own case, as alleged by the answer; and that being so, I am of opinion, according to the ordinary rules and practice of the Court, not that the witness was excluded, but that the Master was not at liberty to examine this witness to receive his further evidence without the leave of the Court.

If, subsequent to the time the witness had put in his examination to the interrogatories filed in the cause, it had been discovered that new evidence could be given by him and it was therefore desirable to examine him, for the purpose of bringing forward such new evidence in support of the case made by the Defendant, it would have been easy for the Defendant to have applied to the Court, stating and shewing such circumstances as [283] would have induced the Court to give leave to have that examination, and he might then have had it.

It has been stated, that the Master being of that opinion, gave an opportunity to the party to apply to the Court, which he did not think fit to take advantage of, but he preferred running the risk of succeeding upon exceptions to the Master's report.

The 7th and 8th exceptions must therefore be overruled. (See *Whitaker v. Wright*, Hare, 321.)

[283] WATSON v. PARKER. Feb. 16, 22, 1843.

[S. C. 12 L. J. Ch. 221; 7 Jur. 143.]

voluntary covenant is sufficient to support a creditor's suit against the representatives of the covenantor.

covenanted with B. to transfer stock into the names of C. and D., or some other person to be named by A., upon trust for B., his wife and issue. Afterwards B. became absolutely entitled to the fund. In a suit by B. against the representatives of A. to obtain satisfaction out of his estates in respect of the covenant, Held, that C. and D. were not necessary parties.

This case came on upon demurrer to the whole bill for want of equity and for want of parties.

The bill in substance alleged, that a Mr. Oswald married in 1811, and that previous to the marriage, Thomas Shipman, being intimately acquainted with both parties, agreed with them that in the event of the marriage being solemnised he would make such provision for them and their issue as mentioned in the indenture hereinafter stated.

[284] That in pursuance of the agreement, Shipman, by deed dated the 20th of August 1811, after reciting that previous to the marriage he had "promised and agreed that in case such marriage should take place he would make a provision for the said Sarah Simson and the issue of such marriage, in consideration of such marriage," and Shipman, "for the better confirming the said promise and engagement made by him, and for the making and securing a settlement and provision for the said Sarah Oswald and the issue of such marriage, and in consideration of the sum of 10s.," &c., covenanted with Oswald and wife, that he would, in his lifetime or by his last will and testament, give, direct, limit and appoint unto the said Thomas Oswald and Sarah his wife, and George Lee and Joseph Thorpe Shipman, or unto some other person or persons to be by him the said Thomas Shipman in such will or settlement named, the full sum of £3000 of 5 per cent. Navy annuities, upon trust for the wife, husband, and the issue of the marriage.

According to the statements of the bill the husband alone became, in the events which happened, entitled to the fund.

Shipman died without having performed this covenant; and this, which was a creditor's suit, was instituted against his representatives, to enforce its performance

out of the testator's real and personal assets. Lee and Joseph Shipman were not made parties to the bill.

To this bill, the Defendant (the executor and devisee in trust of the testator) demurred for want of equity, and for want of parties.

Mr. Steere, in support of the demurrer.

[285] By the Statute of Frauds (29 Car. 2, c. 3, s. 4) no action shall be brought whereby "to charge any person upon any agreement made upon consideration of marriage," &c., "unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised."

Previous, therefore, to this marriage there appears to have been no agreement in writing; there was therefore a mere *nudum pactum* which gave no cause of action. *Wain v. Warlters* (5 East, 10); another objection to it is, that the consideration must appear on the face of the agreement.

If no binding obligation existed at the time of the marriage, no subsequent recognition would give it validity. In *Randall v. Morgan* (12 Ves. 67) a question arose whether a letter written after marriage, sufficiently recognised an agreement before marriage to give a marriage portion; and Sir W. Grant observed (page 73) "Supposing, however, that this letter refers to some parol promise before the marriage, I doubt extremely, whether this would be sufficient to entitle the Court to construe this into an acknowledgment of a debt; for the promise being in itself nullity, producing no obligation, a written recognition, after the marriage, would give it no validity. Otherwise the construction of the fourth section of the statute would be just the same as the seventh, which requires only that a trust shall be manifested by writing. Upon that clause it is not necessary, that the trust shall be constituted by writing. It is sufficient to shew [286] by written evidence the existence of the trust. But the fourth clause requires the very agreement to be in writing, and signed by the party, to be charged therewith."

The covenant is purely voluntary, and the covenantee would recover merely nominal damages at law: it cannot therefore be made the foundation of a creditor's suit in equity.

Lee, also, to whom the money is to be paid, and who is the legal owner, is a necessary party to this suit.

Mr. C. Hall, in support of the bill.

This is not the case of a voluntary engagement on the part of a stranger: the consideration of marriage is a valuable consideration, and sufficient to support such an agreement.

Whether the agreement prior to the marriage could be enforced or not, still the deed executed after the marriage imports a consideration, and an action at law could be sustained on it, *Tuffnell v. Constable* (7 Ad. & E. 798); the Plaintiff is therefore in equity, entitled to have satisfaction out of the assets.

Lee and Joseph Shipman, having no duties to perform, are not necessary parties to the suit; the covenant is not entered into with them, and it is to transfer to them or some other persons, to be named by Thomas Shipman.

Mr. Steere, in reply.

[287] THE MASTER OF THE ROLLS. As to the demurrer, for want of parties, I am of opinion that it cannot be sustained. I will not decide the demurrer for want of equity, until I have read the case of *Randall v. Morgan*.

Feb. 22. THE MASTER OF THE ROLLS [Lord Langdale]. This case stood over, in order that I might have an opportunity of reading the case of *Randall v. Morgan* which was referred to in the argument. Having read the case, I am of opinion that it has no bearing on the question raised by this demurrer.

By the bill it appears, that the testator, by deed, signed, sealed, and delivered, promised and agreed with Thomas Oswald and his wife, that he would, in his lifetime or by his last will, direct and appoint to certain persons, or to persons to be by him named, the full sum of £3000 5 per cent. Navy annuities, upon the trusts and for the purposes in the deed mentioned.

By the promise and agreement under seal, a covenant is constituted; but the defendant contends that the deed was executed without any consideration, and that no damages, or only nominal damages could be recovered for a breach of the covenant; and therefore they argue, that the Plaintiff cannot sustain a suit framed as this is. There are however several cases in which a breach of covenant to do a particular act has been held to constitute a debt, as in the case of *Musson v. May* (3 V. & B. 194), where Mr. Justice Williams held it to be settled, that if a covenant is broken, though the damages are [288] unliquidated, the covenantee is a specialty creditor; and in the case of *Wright v. Wright* (2 Myl. & K. 769), where the testator had entered into a voluntary covenant to settle certain leasehold and copyhold lands, it was held by Lord Cottenham that the Plaintiffs, who claimed under the covenant, were to be considered as creditors, and that although (as volunteers) they were to be postponed to all creditors for valuable consideration, they were entitled to be paid out of the assets in due order; and it was referred to the Master to enquire into the amount of the damage they had sustained.

I am therefore of opinion that, even supposing the deed to have been voluntary, the bill may be sustained, and that the demurrer must be overruled. (See *Clough v. Lambert*, 10 Sim. 174.)

[288] THE ATTORNEY-GENERAL v. FOORD. Feb. 20, 21, 22, 1843.

[S. C. 12 L. J. Ch. 238.]

Lease of charity property for ninety-nine years, at a fixed rent, containing no contract to repair or lay out any money thereon, set aside.

Building lease of charity property for more than ninety-nine years, cannot stand unless there be some special grounds on which it can be protected.

Some property at Whitstable, was held by trustees of a charity for the poor of the parish.

In 1791, the trustees demised the charity property, consisting of about half an acre of land, a public-house called the Hoy, and two cottages and a stable, for ninety years, at a yearly rent of 20s. The demise was [289] expressed to be made in consideration of a former lease therein mentioned to be cancelled, and of the premises being repaired, but no evidence was given in the cause of that being the fact.

The present value was £60 a year.

This information, filed without a relator, sought to set aside the lease for ninety-nine years, and also the under-leases which had been granted, but the latter part of the relief was, in the course of the argument, abandoned.

It appeared that during the progress of the suit, Mr. Foord died and his representatives having proposed a compromise of the suit, a petition was presented for the purpose of effecting it; but the trustees of the charity opposed the arrangement, thinking it would be disadvantageous to the charity. In consequence, not only was a bill of revivor filed, but a supplemental bill, stating all the matters as to the compromise, and again putting in issue the very points raised by the original cause.

Mr. Pemberton and Mr. Blunt, in support of the information.

Mr. Turner and Mr. Shebbeare, for the trustees, supported the information. They cited *The Attorney-General v. Kerr* (2 Beavan, 420), and *The Attorney-General v. Attingham* (3 Beavan, 91).

Mr. Tinney, Mr. Elderton and Mr. Dixon, for the sub-lessees.

[290] Mr. Kindersley and Mr. Simpson, for the representatives of Foord.

Feb. 22. THE MASTER OF THE ROLLS [Lord Langdale]. Upon the real question in the case, I am of opinion that the lease of 1791 cannot stand. The only ground upon which it was contended that it could be sustained was, that it contains certain recitals, which, if true, would shew that there was a consideration given for this lease, a consideration which would have been beneficial to the charity. It is not a building lease, and one of the rules laid down in this Court has been, that a building lease for longer term than ninety-nine years cannot stand, unless there be some special ground on which it can be protected. This is a lease for ninety-nine years, containing no

covenants to keep the premises in repair, and no covenants as to laying out any money upon them: I am therefore of opinion, that it cannot stand.

The Attorney-General does not desire to disturb the sub-lessees, and therefore they will retain their interest. The only question as to them is whether they are entitled to costs; I cannot say that I think they are entitled to costs; this is not a case in which costs can be ordered to be paid out of the charity, and they have made out a case to entitle them to costs as against Mr. Foord.

There is another question raised with regard to the costs, which involves a matter in great perplexity. This cause having been at issue, a proposal was made by the representatives of Mr. Foord to compromise the suit. They were willing to compromise the suit on certain terms. The Attorney-General thought, and after all that has taken place, I am not sure the Attorney-General was not right, that it would be expedient, and for the benefit of the charity, to stop the litigation, and obtain for the charity the increased rent for the future, together with the costs of the suit, by which means the beneficial objects of the charity would be immediately brought into exercise; but the trustees represented that this compromise would be very disadvantageous; that the value of the property was such, that to accept the increased rent for the remainder of the time would be injurious to the charity. In that state of things it seems to have been absolutely necessary that the matter should undergo some subsequent investigation; perhaps by a reference to the Master to enquire whether it was beneficial; but the course adopted was to bring the matter to a hearing. If publication had then passed, which I suppose it had, witnesses could not have been examined in the original cause without an order; but no order was obtained, and not only was a bill of revivor filed to bring Mr. Foord's representatives before the Court, but also a bill of supplement, stating all the matters as to the compromise, and putting in issue again those very points raised in the original cause. It has been stated, that these proceedings took place for the purpose of having the decision of the Court on the costs of the petition. I confess, after hearing all that has been said, that I am by no means satisfied that it was necessary. It was clearly put in issue in the original information that the value was above £60 a year. The answer stated it was £44 a year. The trustees alleged that the answer was wrong, that if the information were proceeded in, it would establish that the value was greater. All that might have been proved in the original information, and I am very much at a loss to discover on what ground the representatives of Mr. Foord are to be called upon to pay the costs of that proceeding. [292] I certainly do not think that it is a sufficient justification of the proceeding, to say that that was necessary for the purpose of bringing the point to a decision. The point in issue was the value, and the question raised by supplement was the costs of the petition, which might have been determined on the point being brought on with the cause.

I find some difficulty in dealing with those costs. I think that the right course will be, that the costs of the supplemental information be deducted from the costs of the original information which Mr. Foord must pay, the costs which then remain due to the Attorney-General should be thrown on the charity.

In the present state of the thing, I cannot say the trustees were wrong in suggesting and bringing forward the point. If they had been, they ought to have been personally charged with the cost; but I cannot say I think they were. (See *Attorney-General v. Pargeter*, 6 Beav. 150.)

[293] COCKELL v. PUGH. March 3, 16, 1843.

The executor of a surviving trustee declined stating whether he would or not perform the will, and neglected for thirty-one days after notice to transfer trust property standing in the name of his testator. Held, that he was a trustee within the Statute, 1 W. 4, c. 60, and a transfer was ordered to new trustees.

The Court, if perfectly satisfied, will make an order to transfer under the Trustee Act without a reference.

Under a marriage settlement, the sums of £7694 consols, and £4000, were vested in Dampier, Hopkins and William Pugh, upon the usual trusts.

The suit was instituted in 1833, respecting the sum of £4000 only. Pending the suit, Dampier and Hopkins died. Pugh, who survived, had by his answer admitted the trust; he afterwards absconded, and died abroad. He appointed Buckley Pugh his sole executor, who, as executor of the surviving trustee, having applied to in writing, in August 1842, to transfer the trust fund to the new trustees appointed under the settlement, declined to say whether he would or not obey the will, and stated he would prefer the matter taking its own course.

A petition being presented by the parties beneficially interested, it was referred to the Master to ascertain whether William Pugh was a trustee of the sum of £7694 in the meaning of the Act, and for whom.

The Master found in the affirmative, and a petition was now presented to confirm the report, and that the secretary of the bank might transfer the fund to the new trustees of the settlement.

Mr. Rogers, in support of the petition, relied on *Ex parte Winter* (5 Russ. 284), *Ex parte Hagger* (1 Beavan, 98).

Mr. James Parker and Mr. W. H. Clarke, *contra*, objected that the reference to the Master ought not to have [294] been whether William Pugh was a trustee, but whether William Buckley Pugh was a trustee. They cited, in the matter of *Anderson* (L. & Co. 27).

Mr. Rogers, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. The objection to the reference is a matter of form. The reference is made for the satisfaction of the Court, and the Court is perfectly satisfied of the facts, the order may be made without any reference, or the reference will be confined to those facts only, as to which the Court does not feel satisfied without a reference.

I will look at the cases cited.

March 16. THE MASTER OF THE ROLLS [Lord Langdale] made the order for the reference, observing that there appeared to be no entry in the registrar's book of the matter before Lord Lyndhurst.

[295] EARL NELSON v. LORD BRIDPORT. April 1, 6, 1843.

[S. C. 7 Beav. 195.]

When a party takes his state of facts into the Master's office, and obtains leave to examine witnesses and completes the examination, his opponent's state of facts may, at any time before publication, be amended by leave of the Master.

The Plaintiff and Defendant took their states of facts into the Master's office. The Plaintiff completed the examination of his witnesses, and was about to obtain an order to pass publication, when the Defendant, with the Master's permission, carried into the Master's office an amended state of facts. Held, not irregular, and a motion in the alternative to suppress it and the subsequent proceedings, or that the Defendant might pay the costs occasioned, was refused with costs.

Certain inquiries had been directed by the decree, and the cause being in the Master's office, the Plaintiff, on the 8th of December 1841, carried in his state of facts, and on the 10th of February 1842 it was decided that evidence should be taken in support of it.

The Defendants carried in their state of facts on the 29th of April 1842, and on the 6th of July 1842 it stood over to save expense by admissions.

On the 8th of August 1842 the Plaintiff served an order which he had previously obtained for an interpreter, and on the same day commenced examining his witnesses, at an expense of £720, he had brought over from Sicily. Having completed the examination, the Plaintiff, on the 23d of January 1843, gave notice of motion for publication, but before the motion had been heard, and on the 10th of February 1843, the Defendants carried an amended state of facts into the Master's

office, which was permitted by the Master, who, on the 16th of March 1843, certified that a commission was necessary to prove the amended state of facts. On this certificate, an order for a commission was obtained on the same day; and, on the same day, the Plaintiff's motion to pass publication was refused; but the Defendants were ordered to pay the costs.

It was now moved, on behalf of the Plaintiff, that the amended state of facts, the certificate and the order for [296] a commission might be suppressed, or that the Defendants might be put on terms to pay the Plaintiff's costs of joining in the commission, and of the proceedings under the same and occasioned by the amendments.

Mr. Tinney and Mr. Gardner, in support of the motion, contended, that after the Plaintiff had commenced the examination of his witnesses in August, it was no longer competent for the Defendants to carry in an amended state of facts, and thus alter the issue tendered by them, and render nugatory the evidence taken on behalf of the Plaintiff, who might have been proceeding under a wrong impression as to the issue raised by the Defendants. They argued that such was the usual practice of the Masters' offices, and in conformity with the rule, that after issue joined no amendment is permitted.

Secondly, they insisted, that if, by the indulgence of the Court, these proceedings were to stand and the Defendants were to retain their commission to examine their witnesses in Sicily, they ought to indemnify the Plaintiff the expenses he had been put to, or would be put to, in consequence of the negligence and delay of the Defendants, and who, coming for an indulgence, ought to pay for it. They cited Lord Clarendon's Orders. (Beames' Orders, 192.)

Mr. Pemberton Leigh, Mr. Turner, and Mr. Bowyer, *contra*, argued that there was no such rule of practice as that alleged by the Plaintiff, and that until the evidence had been made known, either party was at liberty, with the sanction of the Master, to bring in an amended state of facts, and to proceed to examine witnesses thereon. That if it were otherwise, one party, by un-[297]-due haste, might effectually prevent his opponent from properly bringing forward his case upon the enquiry.

That it was evident, that the negotiation as to admissions had caused the consideration of the Defendants' original state of facts by the Master, to be postponed and had created the delay; that it was not right that the Plaintiff, who was party to that proceeding, should now take advantage of the delay.

That the matter was properly within the discretion of the Master, who necessarily possessed an extensive control over the proceedings in his office; and that it did not appear that any extra expense had been or would be incurred by the Plaintiff.

Mr. Tinney, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. This is certainly a very unusual application, and one which does not, on the face of it, appear to me to be very reasonable. Here is a most important and complicated enquiry pending before the Master. Both parties have carried in their respective states of facts, one has examined witnesses, and, before the publication of the evidence, the Master, who has the conduct of this enquiry, has given leave to the other side to amend his state of facts, and has certified as to the propriety of issuing a commission to examine witnesses abroad, for the purpose of enabling the party to prove that amended state of facts, and upon the Master's certificate, an order has been obtained for issuing such commission.

This motion seeks to set aside the amended state of facts and the proceedings subsequent upon it, on the [298] ground of irregularity. Whether there has been an irregularity or not, is a matter which I certainly should not like to decide on my own judgment, without first enquiring as to the usual practice in the Master's office in that respect.

The Plaintiff's state of facts was taken into the Master's office on the 8th of December, and he obtained leave to examine witnesses in the ordinary course. He might have witnesses examined in London by procuring the attendance of his witnesses from abroad; but there was nothing to preclude either party from having a commission to examine their witnesses abroad.

No state of facts was brought into the office on behalf of the Defendants Lord and Lady Bridport until five months afterwards, namely till the 29th of April. Now if

argument were to prevail, that a party is not entitled to amend a state of facts, when the other party has commenced the examination of his witnesses, then as the Plaintiff had commenced the examination of his witnesses on the 9th of December, Defendants would have been precluded bringing in any state of facts at all.

(THE MASTER OF THE ROLLS proceeded to state the circumstances of the case, which it is unnecessary to repeat, and proceeded):—

In this state of things, it is asked, in the first place, that Lord and Lady Bridport be precluded from alleging those facts which are necessary to establish their case for the enquiry. Under the circumstances which have taken place in this case, it is utterly impossible, and cannot be seriously thought of. It is then said that these proceedings are so irregular, that if the Defendants are desirous of being relieved therefrom, [299] they must pay all the costs; besides this, it is said that there has been very great and very unreasonable delay on the part of the Defendants. I will make some enquiries as to the course of proceeding before the Masters in these cases before I decide this case; but if one party thinks fit, and finds it for his advantage, in order to secure testimony which might or might not be in danger of being lost, to commence, with all the diligence he is master of, the examination of his witnesses, is he, from the moment he commences the examination of his witnesses, to be at liberty to preclude his opponents from bringing in an amended state of facts, any state of facts at all, and that, though he has given him no notice further than that which is usually given in the course of the examination? If he is, we must consider that rule, and the consequences which the Defendants desire to be relieved

from. A state of facts may be amended over and over again according to the circumstances of the case. The Master, who, upon an enquiry of this kind, has a large discretion, which the Court is by no means disposed unnecessarily to interfere, may consider it necessary for the purpose of conducting the enquiry, and give leave to do it. Then the party who proceeds with diligence and with strict propriety in the examination of witnesses for himself, but without any *constat* on the part of the Master as to the regular period from which the parties shall be bound by their states of facts, or as to the parties are to be considered at issue, and without any intimation to the other side, by examining witnesses one day to have a right to preclude his opponent from bringing forward an important fact the next day? If that be the state of things, it certainly requires some consideration; I will enquire, but I have no doubt that I will refuse this motion in the terms in which it is made.

[300] With respect to the costs, I will consider how far the parties may be relieved from the consequences of any irregularity that has occurred. If there is to be a division, it will be directed for the purpose of giving a real, fair, and *bonâ fide* examination of witnesses to the satisfaction of both parties. Though granted for the benefit of one, still the other party must have the opportunity of attending with all the facilities.

I am strongly of opinion, that if the Plaintiff in this case is advised that he ought to bring forward a supplemental state of facts, to enable him to give evidence of something of which he was first apprized by the amendment, justice requires that he should have the opportunity of doing it. If the Defendants bring forward new facts by amendment, the Plaintiff must have an opportunity of meeting them; natural justice requires that he should have that opportunity. Anything contrary to that would seem to be so abhorrent to fair dealing that it could not be allowed.

Both sides are engaged in a contest of great complication and great difficulty, requiring close and exclusive attention for a long time; I do not wonder that the natural zeal which is engendered in the course of this matter should lead to some excess. It has been a great satisfaction to me to have heard from each side testimony in favour of fair dealing of the other.

I will endeavour to communicate with the Masters in the course of to-day, and I will mention the case on Wednesday.

[31] April 6. THE MASTER OF THE ROLLS [Lord Langdale]. I have had a communication with some of the Masters, and though I do not find among them a perfect conformity of practice, yet most of them say, distinctly, that there is not the same degree of irregularity in this proceeding, and that it has been quite in con-

formity with the practice of their offices; though there is some doubt on the part of other Masters, yet they all think that special circumstances may arise, which might make this mode of proceeding perfectly proper.

I have considered the case with all the attention that I could, and I certainly am of opinion, that under the circumstances of this case, it is in conformity with the practice in the Master's office to receive an amended state of facts before publication and to go into new evidence. The subject was discussed before Lord Eldon in a case of *Willan v. Willan* (19 Ves. 589; and see *Napier v. Staples*, 1 Molloy, 228). In that case publication had passed, and on the ground that publication had passed and the depositions had become known to all the parties, he was clearly of opinion, in conformity with what is now the ordinary practice, that there could not be a further examination without special leave of the Court; but it does not seem to have been stated by anybody, that there might not, at any time prior to the publication, have been an examination of witnesses, and, as preliminary to such examination, a statement shewing the facts which were to be the subject of that examination.

There was a case before Lord Cottenham, which has not been reported, which does not bear on this directly, but it certainly shews what is the view taken of the matters. It was a case of an enquiry as to the next of [302] kin, a state of facts having been carried in, witnesses had been examined on both sides, and the examination it would appear, entirely brought to a close; the evidence was not however taken on interrogatories, but on affidavits, which makes a great difference, because the production of every affidavit is the same as publication; the evidence having been gone through, and the Master being prepared to make his report, another fact was brought forward, and it was said that the parties were not then at liberty to prove it. The Master thought it was too late, and that he ought not to admit any fresh examination. In that state of circumstances application was made to Lord Cottenham, and he referred it back to the Master to review his report, thinking, that under the circumstances, a party ought not to be precluded from bringing forward fresh facts which were material to be enquired into. Certainly the case is not sufficiently strong to make the one an authority for the other, but it shews the view taken in a case of this kind.

On looking at this matter with all the attention I can give to it, I do not find any irregularity in the proceeding, and I must add further in this case, that if in the proceeding there had been a deviation from what might be considered the ordinary practice of the Master's office, I think the special circumstances here were sufficient to justify it. It is perfectly clear to me, that after that meeting of the 6th of July 1842, it must have been in the expectation of everybody, that some further proceeding was to take place with reference to the state of facts brought in by Lord and Lord Bridport; whether that proceeding was postponed merely for the purpose of making whether admissions of documents could be made, or whether it was postponed for the purpose of considering, between the parties, what mode of proof on the subject of the inquiry at large was to be adopted, [303] still something, of necessity, was to be done, and if the parties could not come to an agreement respecting it, there must necessarily have been a further proceeding before the Master on the state of facts which was under his consideration on the 6th of July. That never was brought under his consideration at all. The other party could not, by proceeding to examine witnesses, preclude the Master from going into a subject, the consideration of which had been merely postponed, and preclude him from the right to have it fully investigated. I think that the matter was left in a state that gave to the other party a right to proceed; and if the Defendants, having that right, found they could proceed with greater advantage by amending their state of facts, I know of no rule and no principle of practice that would preclude them from so doing.

I am of opinion that this motion is entirely mistaken, and I think it must be refused with costs. At the same time justice must be done to the other side; I am not aware that it will be in the least degree necessary for me to make any order on the subject, but new allegations having been brought forward on the amended state of facts, there must, on that new matter, be a just, fair, and regular litigation between the parties; it being the right of the Plaintiff to put in a bill of particulars proper to meet the allegations now brought forward by Lord and Lord

report. I do not think it will be necessary for me to interfere in the matter, but the Master entertains any scruple, upon an application made here, I should require strong reasons to induce me to refuse to the Plaintiff liberty to meet those new in every way that justice may require.

[304] CATTELL v. SIMONS. April 19, 24, 1843.

[See *In re Bank of Hindustan, China and Japan*, 1867, L. R. 3 Ch. 126, n.; *Roberts v. Bude*, 1878, 8 Ch. D. 200.]

be receivable and payable by two parties, ordered to be mutually set off, without regard to the lien of the solicitors.

The Master of the Rolls has jurisdiction to direct costs which have been ordered by the Lord Chancellor to be paid by the Defendant to the Plaintiff to be set off against costs ordered by the Master of the Rolls, to be paid by the Plaintiff to the Defendant. The order may be obtained on motion, and the notice of motion may be given before the taxation.

The Lord Chancellor on the 8th of November ordered the Defendant to pay costs to the Plaintiff, but the order was not completed till the 23d of December. The Master of the Rolls on the 15th of December ordered the Plaintiff to pay costs to the Defendant, and on the 19th the Plaintiff offered to set off the costs. The Defendant in January following issued an attachment for the costs. Held, that the Plaintiff, notwithstanding he was in contempt, might, under these circumstances, have to set off the costs.

This case, which is reported in a former volume (5 Beavan, 396), now came on for a motion by the Plaintiffs, that costs ordered by the Lord Chancellor to be paid by the Defendant to the Plaintiffs might be set off against costs ordered by the Master of the Rolls to be paid by the Plaintiffs to the Defendant. The circumstances conveniently appear by the following chronological statement:—

On the 8th of November 1842 the Lord Chancellor ordered the Defendant to pay costs to the Plaintiffs.

On the 8th of December the minutes being mentioned to the Lord Chancellor, an order was directed to be made.

On the 15th of December the Master of the Rolls ordered the Plaintiffs to pay costs to the Defendant Flecknoe.

On the 19th of December the Plaintiffs gave notice to the Defendant that they were willing to set off the costs they had to pay against those they had to receive.

[305] On the 23d of December the minutes of the Lord Chancellor's order were read.

On the 11th of January following, the Defendant issued an attachment against the Plaintiffs for £10, 16s. 4d. part of costs under the Master of the Rolls' order.

On the 13th of January the Defendant issued a *subpoena* for £24, 19s. 8d., the remaining costs under the same order.

On the 14th of January the *subpoena* for costs was served on the Plaintiffs, and on the same day the Plaintiffs gave this notice of motion to set off the costs.

On the 16th of January the Plaintiffs' costs under the Lord Chancellor's order were taxed at £38, 14s.

Under these circumstances, £35, 16s. being due from the Plaintiffs to the Defendant and £38, 14s. from the Defendant to the Plaintiffs, this motion was now brought on.

Mr. Teed and Mr. W. T. S. Daniel, in support of the motion.

Mr. Pemberton and Mr. Chandless, *contra*, objected, first, that interlocutory costs should not be ordered to be set off so as to defeat the right of the solicitor; secondly, that such an application ought not to be made by motion; thirdly, that the notice of motion could not be given until the amounts had been ascertained by taxation; and, finally, that the Plaintiffs being in contempt, could not be heard in support of a

motion; and lastly, that the Lord Chancellor having by his order specifically directed that the costs should be paid by the Defendant to the Plaintiffs, this Court had no jurisdiction to alter or vary that direction.

[306] *Taylor v. Popham* (15 Ves. 72), *Ex parte Rhodes* (*Ibid.* 539), *Wright v. Mide* (1 Sim. & S. 266), and *Hawkins v. Hall* (4 Myl. & Cr. 282) were cited.

Mr. Teed, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. Where a party owes another £35, 16s. for costs, and at the same time is entitled to receive £38, 14s. from him for other costs, nothing would seem more reasonable than that these sums should be set off one against the other. Several objections have, however, been made to this application.

First, that it interferes with the rights of the solicitor, but I have no doubt whatever of the rule, that the lien of the solicitor for costs, is not to interfere with the rights of the parties. I have already had occasion to consider the point; and I think the case is reported. (*Bastree v. Watson*, 2 Keen, 713.)

Secondly, it is said, that the application ought not to be made by motion, but I cannot see why the Court is not to proceed upon motion; or why the parties are to be put to the trouble and expense of attachments, and other proceedings, to work out their rights, when there is a plain equity to have the costs set off. If I had been aware of the circumstances when the order was made here, I should, if I had jurisdiction, have ordered the costs to be set off. I am of opinion, that the application is not improper by motion.

Thirdly, it is said, that the Plaintiffs' costs had not been ascertained until after the notice of motion had been given, but I am of opinion, that it was not necessary to wait until the amount of the costs had been ascertained.

The fourth objection is, that an attachment had issued against the Plaintiffs prior to the notice of motion, and that being in contempt, the Plaintiffs cannot be heard. I think, however, under the circumstances, the objection ought not to prevail, seeing that the offer to set off was made on the 19th of December, that the Lord Chancellor's order was not ultimately settled until the 23d of December, and that the attachment was issued on the 11th of January. (See *King v. Bryant*, 3 Myl. & Cr. 191, and *Wilson v. Bates*, *Id.* 197.)

The last is the only serious objection, namely, that the order asked for will interfere with the Lord Chancellor's order, and that the Plaintiffs ought to have applied to the Lord Chancellor on the subject, when the matter was before him on the 23d of December. It does appear to me, that the Lord Chancellor had jurisdiction over the matter, and might either have ordered the costs to be set off, or have directed that the order should not be carried into execution, until an opportunity had been given to the Plaintiffs to apply; I must reserve the point as to the interference with the Lord Chancellor's order.

April 24. THE MASTER OF THE ROLLS [Lord Langdale]. By an order made by the Lord Chancellor, the Defendant was ordered to pay costs (the amount of which has been ascertained to be £38, 14s.) to the Plaintiffs. By an order made at the Rolls, the Plaintiffs were ordered to pay costs (the amount of which has been ascertained to be £35, 16s.) to the same Defendant. [308] The Defendant, who has not paid the £38, 14s. due from him, claims to be entitled to compel the Plaintiffs to pay the £35, 16s. due to him. And the Plaintiffs ask, that one set of costs may be set off against the other, and that the Defendant may not be permitted to enforce the payment of the costs due to him, without paying the costs due from him.

It appears to me, that in making this application, the Plaintiffs do not seek to vary the order made by the Lord Chancellor in their favour, but claiming against the Defendant the duty of his obedience to that order, and admitting in favour of the Defendant the duty of their own obedience to the order made here, they ask, that the Defendant may not be at liberty to enforce obedience to the order made here, without, on his part, obeying the Lord Chancellor's order, and they offer to accept what is due to them in satisfaction *pro tanto* of what is due from them. They do not ask for the costs of this application, which (under the circumstances to which I adverted at the time when the motion was made), I should not have been disposed to grant. I think that the order must be made to set off the costs due to the Defendant.

under one order, against an equal amount of the costs due from the Defendant under the other order. (See also *Harmer v. Harris*, 1 Russ. 155; *Taylor v. Cook*, Younge, 401.)

[309] LLOYD v. CLARK. April 20, 21, 28, 1843.

B., very soon after coming of age, was induced by C. D., his superior officer, to accept bills for £3000 at two months, for his accommodation, which were handed by C. D. to E. F., a moneylender, in payment of a debt of £2590. E. F., who was privy to the transaction, afterwards agreed to arrange the renewal of these and another bill for £500 for twelve months in consideration of A. B.'s promissory note for £2500 payable in three years, which sum E. F. charged for his expence and trouble. E. F. was, under the circumstances, restrained till the hearing, from suing for the £2500.

In this case the common injunction had been obtained for want of answer, training the Defendant from proceeding at law on certain negotiable securities.

The answer having been filed, a motion was now made to dissolve the injunction.

Mr. Pemberton Leigh and Mr. Bates shewed cause.

Mr. Kindersley and Mr. Daniel, in support of the motion to dissolve.

Mr. Pemberton Leigh, in reply.

THE MASTER OF THE ROLLS postponed giving judgment.

April 28. THE MASTER OF THE ROLLS [Lord Langdale]. In this case, the Plaintiff alleges, that the Defendant Mr. Clark has obtained from him several securities for money, to the amount altogether of about £6257, 10s., and by his bill prays, that it may be declared that the securities were obtained from him by the fraud and imposition of Mr. Clark, and that the same may be delivered up to be cancelled; and that Mr. Clark, and also Mr. Argent, into whose hands one of the securities has come, may be restrained from prosecuting any [310] action against the Plaintiff in respect of the matters in question.

An injunction was obtained for want of answer, and the answers being filed, the Plaintiff shews cause upon the answer of Clark, why the injunction against him should not be dissolved. It is admitted that, upon the answer of Argent, the injunction against him cannot be sustained.

The case appears to be, that, before the month of June 1841, extensive pecuniary transactions took place between Capt. Byng and the Defendant Clark, who is a moneylender by profession; that Capt. Byng had the confidence of the Plaintiff, who is a cornet in the regiment in which Capt. Byng was captain; that Byng, being harassed and indebted to the Defendant Clark, procured the acceptance of the Plaintiff for his accommodation, and that under these circumstances, the Plaintiff, without any consideration paid to him, was induced, for the accommodation of Capt. Byng, his superior officer, and to facilitate Byng's transactions with Clark, to accept the bills of exchange for £1000 each, drawn upon him by Capt. Byng. These bills were delivered by Capt. Byng to Mr. Clark. Two of them were dated on the 1st of June 1841. The date of the third does not distinctly appear, the bill stating that it, as well as the other two, was dated the 12th of June, but the answer so stating the matter, as to leave it doubtful and to afford some reason for thinking, that it was dated two or three months earlier, and at a time when the Plaintiff had not attained his age of twenty-one years. However this may be, I think it cannot be doubted, upon the answers and the correspondence, that Mr. Clark well knew, that the acceptances had been given by the Plaintiff for the accommodation of Capt. Byng. The bills were payable in two months, they amounted together to £3000, and, according to the answer, the sums due from or payable by Capt. Byng to Mr. Clark, amounted together to £2590, and thus Mr. Clark was to obtain £410 for discount, or for forbearance for two months.

In this way, the Plaintiff became liable upon three bills of exchange, amounting in the whole to £3000. He had very recently attained his age of twenty-one years (in May 1841), and became alarmed, not only at the responsibility which he had

incurred, but also lest his father should become acquainted with his conduct in these matters.

According to the answer, the Defendant Clark had negotiated one of the bills for £1000, and had deposited another of them for the sum of £700, but the other bill remained in his own hands. He told the Plaintiff, however, that all the bills were out in the world, or were in the hands of *bona fide* holders thereof. The Plaintiff became anxious to get in and conceal from his father the bills, all of which he supposed to have been negotiated and to be outstanding, and he offered the Defendant Clark any security in his power, if he would get in the bills, and he wished the bills (which he called bonds) to be consolidated into one.

On the same 23d of June, on which the Plaintiff expressed his wish that the bills should be consolidated, Mr. Clark says, that he advanced to the Plaintiff £450, and took from him an acceptance for £500; he has not stated when this acceptance was payable, but from the nature of the dealing, it must have been in a short time.

[312] The Plaintiff now, as surety for Capt. Byng, whose debt upon this transaction is stated to be several sums, amounting in the whole to £2590, and as debt himself to the amount of £450, had become liable to pay £3500, and he is said to have been desirous that the securities should be consolidated; Clark alleged some trouble in getting in the outstanding bills, and the expense of insurance, and he agreed to extend the time for payment of the £3500 for twelve months. For this agreement and the trouble and expense, he says, the Plaintiff agreed to give him a promissory note for £2500, payable at the end of three years; and, on the 31st of July 1841, the Plaintiff gave to Clark a promissory note for £3500 payable in twelve months, and another for £2500 payable in three years, and a warrant of attorney confess judgment was signed on the 5th of July.

The promissory note for £3500 has been given to the Defendant Argent, who is at liberty to sue the Plaintiff upon it; the note for £2500 is in the hands of the Clerk of Records and Writs for the inspection of the Plaintiff, and the Defendant says, that he is ready to deal with it as the Court may direct.

Not being in the possession of the note for £3500, and not being able, at present, and professing not to wish to sue on the note for £2500, it does not appear why, to these sums, the Defendant desires to dissolve the injunction, or how he can reasonably expect that the Plaintiff, whilst he remains liable to the suit of Argent, should, as the price of the injunction, pay the sum of £3500 into Court; but after carefully reading the answers and the admitted correspondence, I am of opinion, that the injunction as to these sums ought not to be dissolved. The answers appear to me to contain an unsatisfactory account of the transactions: several [313] of the statements appear to me to be inconsistent with the correspondence: it does not clearly appear, but may certainly be doubted, whether the Plaintiff was ever legally liable to pay one of the acceptances for £1000, the giving up of which was part of the consideration for the note for £3500: it appears to me, that upon further investigation, and upon evidence to be taken in the cause, it may not improbably appear, that the Plaintiff was induced to give the note, by misrepresentation as to the extent of his previous liability, and by misrepresentation as to the nature and extent of Clark's services, and I think that the fact of the note for £2500 being taken upon such a pretended reason, from a young man placed in the situation which Mr. Clark knew the Plaintiff to be, and acting under the influence of his superior officer, whose accommodation the whole transaction was commenced, throws such a suspicion upon it, that the Plaintiff ought to have an opportunity of proving the alleged facts before the Defendant can be permitted to sue him upon this note.

[314] GREENWOOD v. CHURCHILL. Feb. 3, 22, 23, April 29, 1843.

A. B. was entitled to a legacy, which was charged on real estates devised to C. D. by a deed, to which C. D. was a party, and which recited that it had been agreed that the legacy should remain on the security of the estate, assigned to E. F. A. B., without the concurrence of E. F., afterwards released the charge upon the estate, and A. B. and C. D. together afterwards mortgaged the estates, first

Lord C. and afterwards to the Plaintiff, a judgment creditor, who released his judgment. Held, that the Plaintiff had priority over E. F. mortgage was made, "subject to prior incumbrances." Held, under the circumstances, that a prior equitable charge was not included, it being unknown to the mortgagee, and it not appearing to have been the intention of the mortgagors to include it.

Samuel Churchill the elder, by his will dated the 17th of April 1808, gave to his Benjamin Churchill a legacy of £8000, to be paid within twelve months after the testator's death, with interest at 4 per cent. in the meantime, and he charged all real estates in Doddington with the payment of that legacy. Subject to the charge, the estates in Doddington (which were said to comprise Clifton) were devised Samuel Churchill the son in fee.

The testator died in April 1808. The will was proved by Samuel Churchill the elder, who was sole executor; and in October 1809, Benjamin Churchill being entitled to receive the legacy of £8000, and being about to marry Eliza Harriot Frome, an indenture of settlement, made between Benjamin Churchill of the first part, Eliza Harriot Frome of the second part, Theodosia Frome of the third part, John N. Bakerly and John Churchill of the fourth part, and Samuel Churchill of the fifth part, was executed by the several parties thereto; and thereby, after reciting the will of Samuel Churchill the elder, and that the legacy of £8000 was unpaid, and that in respect thereof, Samuel Churchill had agreed to pay interest at 5 per cent., in lieu of interest at the rate of 4 per cent. as directed by the will; and that upon the treaty of the intended marriage between Benjamin Churchill and Eliza Harriot Frome, and the considerations therein [315] mentioned, the said Benjamin Churchill had proposed and agreed to settle the sum of £6000, part of the legacy of £8000 (which had been agreed should remain at interest upon the security of the estates of the Samuel Churchill, and then of Samuel Churchill, party to the indenture, charged herewith), upon the trusts in the indenture mentioned, it was witnessed, that Benjamin Churchill assigned £6000, part of the legacy of £8000, to the trustees, on trusts of the settlement, and the better to enable them to recover the £6000, they were appointed the attornies of Benjamin Churchill for the purpose.

The legacy was not paid, and under the circumstances aforesaid, by the will of the testator, and the agreement of the devisee, the devised estates were charged with and retained as a security for the payment.

Samuel Churchill the devisee, having become embarrassed in his circumstances, executed indentures of the 17th and 18th days of July 1826, made between himself of the one part, and Benjamin Churchill and James James of the other part, and he thereby conveyed his freehold estates, *subject to the incumbrances affecting the same*, to Benjamin Churchill and James James, in fee upon trust to sell the same, or raise money by mortgage thereof as therein mentioned.

Whilst this deed was in preparation, Mr. James discovered, that the legacy of £8000 to Benjamin Churchill, and another legacy to the like amount to John Churchill had not been paid, but remained as charges on the estate of the testator Samuel Churchill, and he thereupon required that releases should be obtained; and accordingly, and without any reference to the settlement of October [316] 1809, by indentures respectively dated the 14th and 15th of July 1826, those legacies were released by John Churchill and Benjamin Churchill respectively.

Under these circumstances, and on the 8th of August 1826, Benjamin Churchill and James James executed a mortgage of the estates to Lord Carrington, to secure him the payment of £5000, and the legal estate was now vested in him.

Samuel Churchill and Benjamin Churchill, being parties to the settlement, were aware of it, but it was said, that Mr. James did not know of it till towards the end of September 1826.

During these transactions, Samuel Churchill was indebted to the Plaintiffs or to Mr. Greenwood, in the sum of £2200, to secure the payment of which, he executed a bond, dated the 24th of April 1826, and the condition of the bond being broken, Mr. Greenwood commenced an action against him, and in or as of Trinity term 1826, obtained judgment against him for the sum of £2273 and costs of suit, and

thereupon, Samuel Churchill and his trustees Benjamin Churchill and James James, for the purpose of preventing execution on the judgment, proposed to Mrs. Greenwood to execute to her a mortgage or security on the estates in question, if she would acknowledge satisfaction upon her judgment. This proposal was accepted, and thereupon, an indenture, dated the 27th of October 1826, and made between Benjamin Churchill and James James of the first part, Samuel Churchill of the second part, and Mrs. Greenwood of the third part, was executed by the parties thereto, and Benjamin Churchill, James James, and Samuel Churchill, subjected and charged the estates, which, by the indentures of the 17th and 18th of July 1826, were [317] conveyed to Benjamin Churchill and James James (but subject and without prejudice to the incumbrances affecting the same estates respectively), to and with the payment of the sum of £2200 to Mrs. Greenwood, with interest at the rate of 5 per cent.

In this state of things, a suit being instituted by Mrs. Greenwood, it was referred to the Master to ascertain the priorities.

The Master, by his report dated the 24th day of November 1841, found that the Plaintiff Mrs. Greenwood, in respect of the principal and interest due to her as in the report mentioned, was entitled to a first charge upon the estates mentioned in the fourth schedule to his report.

To this finding an exception was taken by John Nicholas Fazakerly and John Churchill, the trustees of the settlement made on the marriage of Benjamin Churchill, who alleged, that the Master ought not to have found that the Plaintiff Mrs. Greenwood, in respect of the principal and interest due to her as in the report mentioned, was entitled to a first charge upon so much of the estates mentioned in the fourth schedule as were situate in Doddington and Clifton, because, as they said, by the settlement, they were entitled to a charge prior to that of Mrs. Greenwood upon such parts of the estates mentioned in the fourth schedule as were situate in Doddington, and also upon such parts thereof as were situate in Clifton, and were, at the time of the death of Samuel Churchill the elder, parts of his estate.

The question therefore was, whether the charge of the trustees or that of the Plaintiffs had priority.

[318] Mr. Kindersley, Mr. Turner, and Mr. Calvert, in support of the exception. Assuming the effect of Benjamin's release to have been this:—That as between the trustees of his settlement and a subsequent incumbrance for valuable consideration without notice obtaining the legal estate and relying on the validity of such release, the latter would prevail, still that principle will not affect the present question. Here neither party has the legal estate, both have mere equities, and therefore that which is prior in time is prior in charge. The legacy was charged on the estate both by the will and the settlement. The owner of the estate, who was a party to the settlement, contracted to give an equitable charge on it, and the assignment afterwards executed by Benjamin could not prejudice the rights of the trustees; it could not have a more extensive operation than the first assignment. The charge of the trustees was originated in 1808, that of Mrs. Greenwood in 1826; the former must therefore have priority.

Again the Plaintiff took "subject to prior incumbrances," and consequently subject to the equitable charge of the trustees. Besides this, she had notice of their charge, or must, in equity, be assumed to have had notice of it, for if she had made due inquiry, she would necessarily have been led to a knowledge of the interest claimed by the trustees.

Mr. Pemberton and Mr. Cole, *contra*, for the Plaintiff.

This is not a case in which the parties have an equal equity; the equity of the trustees is inferior to that of the Plaintiff.

The legacy was only an incumbrance in the event of the personal estate proving deficient, and until that fact [319] had been established, Benjamin had no right to resort to the real estate for payment. The assignment to the trustees was, at law, a mere nullity, the interest could not at law be passed by an assignment, and after its execution, Benjamin still remained the only person who, at law, was entitled to receive the legacy, to give a discharge, and to release the estate. He effectually released the estate, and Samuel became, at law, the absolute owner. A mortgage was

then executed to Lord Carrington, which is admitted to be the first charge; the Plaintiff who had a legal charge by judgment affecting the estate, and on which she might have taken the estate in execution, gave it up for a mortgage of the equity of redemption of that estate which remained after satisfying Lord Carrington's mortgage, namely, of an estate discharged of the legacy.

The Plaintiff has what is equivalent to a declaration of trust of the parties who are entitled to the equity of redemption of an estate discharged from the legacy. Where equities are equal, time decides priorities, but where one has got in the legal estate, or an assignment of a term, or a declaration of trust, or anything equivalent, his right will prevail.

It is said the Plaintiff takes subject to the trustees' claim, because she took "subject to prior incumbrances," but was this legacy an incumbrance? Had it not been legally released? It is clear also that it was not in the contemplation of either party.

Mr. Geldart, for other parties.

Mr. Kindersley, in reply. Both parties have mere equities, the Plaintiff has no greater right to call for the legal estate than the trustees. It is said that the [320] charge could not be assigned but has been released. If the charge was equitable, it could no more be released than assigned.

The judgment only affected the interest of the owner, and it has been released.

The following authorities were referred to during the argument: *Jones v. Jones* (8 Simons, 633), *Beckett v. Cordley* (1 B. C. C. 353), *Wilkes v. Bodington* (2 Vern. 599), *Ex parte Knott* (11 Ves. 609), *Frere v. Moore* (8 Price, 475), *Jones v. Smith* (1 Hare, 43), *Evans v. Bicknell* (6 Ves. 174), *Willoughby v. Willoughby* (Ambler, 282).

April 29. THE MASTER OF THE ROLLS [Lord Langdale]. The question is, whether the trustees of the settlement of 1809 or the Plaintiffs, in respect of their several charges, are entitled to priority of charge upon the estate.

For the exception to the report it is said, on behalf of the trustees of the settlement, that by the will of the testator, and also by the agreement of Samuel Churchill the devisee, the legacy was charged on the estates, and that the charge was never released, Benjamin Churchill having assigned his interest before he executed the release in July 1826: that Mrs. Greenwood had no claim against the estate till October 1826, and that she then acquired a merely equitable charge, which was subject to all prior incumbrances affecting the estate: that the legal estate is now vested in Lord Carrington (and [321] which the claimant of a merely equitable charge cannot disturb), subject to one equitable charge vested in the trustees, and another vested in Mrs. Greenwood: and that the common rule, "*qui prior est tempore potior est jure*," must be applied, unless something has occurred to disentitle the first in time to the preference.

There is a question of form, the exception suggesting that the Master has given to Mrs. Greenwood priority in respect of both Doddington and Clifton, whereas, in fact, he has only given her priority in respect of so much of Doddington as was not Clifton, and there being no exception to that part of the report, which finds the trustees to be second incumbrancers on Doddington; and a question was raised, whether any of the estates in the fourth schedule were derived from Samuel Churchill the testator; but, in substance, the question seems to be, whether the trustees and Mrs. Greenwood can be said to have equal equities upon the estate or equity of redemption vested in the trustees of the indentures of the 17th and 18th of July 1826. If they have, the trustees, claiming under a security prior in time, may be entitled to the advantage.

The legacy, as such, was charged on the land, and, in defect of the personal estate, might, at the suit of the legatee, have been raised out of the land after the testator's death; by the settlement, Samuel Churchill, the devisee, agreed that the legacy should remain on the security of the land, and after a long period of time, Benjamin Churchill the legatee, who had indeed assigned the legacy, but at law remained entitled to receive or release it, did actually execute a deed, whereby the land was purported to be released from the legacy; and, in this state of things, Samuel Churchill conveyed the legal estate to his trustees; the mortgage to [322] Lord Carrington was executed by them, and it is now admitted, that Lord Carrington's

charge has priority over the claim of the trustees of the settlement. Lord Carrington's mortgage left the equity of redemption in Benjamin Churchill and James James, and they having the equity of redemption, gave the equitable charge to Mrs. Greenwood.

Mrs. Greenwood, therefore, claims, as against those trustees and Samuel Churchill, who acquired their title to convey free from charges by the release of Benjamin Churchill the legatee; her claim is upon the estate which was vested in Samuel Churchill's trustees after the execution of the release, or upon the equity of redemption which remained with them after the mortgage to Lord Carrington, and although it appears to me, that the execution of the release was fraudulent as against the persons entitled under the settlement, yet the equity to have a charge upon the estate could not be made available, without first establishing an equity to set aside the release, and it was seen, that the trustees of Samuel Churchill, who had actually contracted to give the security to Mrs. Greenwood, could not have resisted her demand to have the money raised out of the equity of redemption, though they might have resisted the claim of the trustees of the settlement, calling upon them to raise the legacy which had actually, however improperly, been released. Whilst that release remained in force, Benjamin Churchill the legatee, who had himself released, could not, for his own assignees, set up the claim to be paid in priority to a *bona fide* claimant on the equity of redemption.

The right to the legacy was to be made out through him. He had released the legacy, and he and his co-trustees had entered into a contract with Mrs. Green-[323]-wood to give her the benefit of a charge, and she having a judgment, was, on the faith of that contract and of the estate supposed to be invested in Benjamin Churchill and James James, induced to enter satisfaction on the judgment, in consideration of the charge which she received; and it does not appear to me that the trustees of the settlement, who were to claim through the assignment of Benjamin, could, whilst the release of Benjamin remained unimpeached, establish any priority before Mrs. Greenwood. The trustees, under the deeds of July 1826, had the legal estate till they executed the mortgage to Lord Carrington; after that, they had the equity of redemption. They then engaged to hold the estate as a security for Mrs. Greenwood, and in that way, it appears to me, they gave her a preference.

I think also that the argument founded on the words, "subject to prior incumbrances," cannot prevail. The settlement was not known to Mrs. Greenwood. The release of the legacy by the legatee had actually been executed, and was, or might have been known. It is, I think, clear, that the trustees of the deeds of July 1826 did not intend to include the unpaid part of the legacy amongst the "prior incumbrances," and I think that the words do not deprive Mrs. Greenwood of her right.

Overrule the exception.

[324] SADLER v. LEE. April 28, 29, May 8, 1843.

[S. C. 12 L. J. Ch. 407; 7 Jur. 476. See *Davenport v. Stafford*, 1851, 14 Beav. 392; *St. Aubyn v. Smart*, 1867, L. R. 5 Eq. 187; L. R. 3 Ch. 646; *Moore v. Knight* [1891], 1 Ch. 554. Partnership Act, 1890 (53 & 54 Vict. c. 39) s. 11.]

A., B., and C. executed to a banking firm, consisting of E., F., and G., a power of attorney, empowering them "jointly and severally" to receive the dividends and to sell out the stock itself. The power was sent by the bankers to their broker, who deposited it with the Bank of England. F. alone clandestinely sold out the stock, but the firm had credit for the proceeds. The sale was concealed, and the amount of dividends for some time accounted for. Held, that E. was liable for the sale, though it had taken place after the death of C. and G.; and that he would have been equally liable, though the proceeds had not been placed to the credit of the firm.

Upon a question whether one partner had notice of the irregular course of dealing of his co-partner, to the prejudice of their customer, the Court was of opinion, that he ought to be deemed to have known the facts, it appearing from the evidence,

that if he had used ordinary diligence and attention in the management of the business, he might and must have discovered all the material facts: that the means of knowledge were within his power: that he would, with very little trouble, have found confusion and irregularity in the accounts, a proper investigation of the sources of which would have led to discovery of all that had been done. Held, also, that under such circumstances the Court, for the protection of those who deal with partnerships, must impute the knowledge which the partners, acting for their interests and in discharge of their plain duty, might and ought to have obtained. Difficulty in holding a partner who ostensibly takes an active part in the conduct of the business free from responsibility, on the ground of insanity, in respect of the acts of the firm.

Confirmed and incurable insanity is a ground for dissolving a partnership, but a mere diminution of capacity in attending to it is insufficient for that purpose.

Partners of trustees wrongfully sold out stock and applied it to their own purposes. Held, that the measure of their liability was the amount paid in replacing the stock.

In the beginning of the year 1825 the Plaintiffs and Mr. Lucas, who had died, being entitled to the sum of £11,813, 0s. 2d. 3½ per cent. annuities, then residing in their names as trustees, were desirous that the dividends should be paid through the agency of Messrs. Sparks & French, who then carried on the business of bankers, in partnership together, at Guildford. The firm of Sparks & French consisted of Richard Sparks, William Sparks, and John French, and on the 1st of January 1825 the Plaintiffs and Lucas executed a power of attorney, whereby they empowered Richard Sparks, William Sparks, and John French, jointly and severally, not only to receive the dividends of the stock, but also to sell the capital. Sparks & French, by their [325] London agents and correspondents, according to the power, received the dividends, and although French died in 1828, and Anthony French was taken into partnership with Richard Sparks and William Sparks, and the firm thereupon became Sparks & Lee. Although Richard Lucas died in 1830, the Plaintiffs the surviving trustees, continued to act under the power of attorney, and the persons named in the power and the agents of the firm, continued to receive the dividends, and apply them according to the directions of the trustees. It did not appear that there was any irregularity or misconduct till the month of November in the year 1832.

The power of attorney itself was, on the 1st of February 1825, sent by the firm Sparks & French to Mr. Peppercorn, their broker in London, and was by him deposited in the proper office of the Bank of England, where it remained. On the 1st of November 1832 Mr. Peppercorn, by the direction of William Sparks, sold, for the sum of £2237, 7s. 6d., which he paid, with other sums, into the bank of Messrs. Eadailes & Co., who were the correspondents in London of Sparks & Lee, to the credit of that firm. Again, on the 28th of December 1832, Mr. Peppercorn, by the direction of William Sparks, sold the sum of £3406, 10s. 1d., further part of the trust stock, for the sum of £3151, 0s. 4d., which was partly applied by Peppercorn to the use of Sparks & Lee, and as to the rest, was paid to Eadailes & Co. to the credit of Sparks & Lee. And again, on the 29th of October 1834, Mr. Peppercorn, by the direction of William Sparks, sold the sum of £5056, 17s. 10d., further part of the trust stock, for the [326] sum of £5000, which he paid to Eadailes & Co. to the credit of Sparks & Lee.

The several sums of stock thus sold, amounted in the whole to the sum of £963, 7s. 11d. and the sum of £10,388, 7s. 10d. cash was the aggregate of the proceeds.

The several sales were, it was said, personally directed by William Sparks alone, and they were effected under the power which was confided to the firm of Sparks & French, the business of which was assumed and continued by the firm of Sparks & Lee. They were effected by the broker employed by that firm, and the proceeds were by him, after deducting half of the usual commission, paid to the credit of the

account subsisting between Sparks & Lee and their London correspondents. The firm had credit for the proceeds in that account, and the entries in the accounts of the London correspondents indicated that the several sums thus placed to the credit of the firm were received "per Mr. Sparks."

After the several sales as well as before, sums, equal to the full amount of the dividends of the whole of the trust stock, £11,813, 0s. 2d. 3½ per cent. annuities were dealt with, according to the directions or authority given to the firm of Sparks & Lee, by the Plaintiffs or their solicitor, and thus the Plaintiffs and the persons interested in the stock were induced by the firm of Sparks & Lee to believe, that the stock continued safe. Nothing occurred to afford to the Plaintiffs the least intimation that any part of the stock had been sold.

In the month of June 1838 Richard Sparks died, having disposed of his real and personal estates by will and codicils. William Sparks, who was residuary legatee [327] and executor of Richard, proved his will, and after the death of Richard Sparks, the banking business was carried on by William Sparks and Lee. William Sparks died on the 24th of October 1840, and soon after his death it was discovered that the stock had been sold.

This bill was filed on the 16th of November 1840, and it prayed, in substance, a declaration that the real and personal estates of Richard Sparks and William Sparks were liable, in equity, at the respective times of their deaths, to replace the sum of £10,963, 7s. 11d. 3½ per cent. Reduced annuities, or at the option of the Plaintiffs, make good to them the amount of the proceeds of the sales, and the amount of much of the dividends as had not been accounted for. The bill alleged Lee to be insolvent, and he had since become a bankrupt.

The persons who claimed under the will of Richard Sparks were the principal Defendants, and it was alleged by them, in opposition to the Plaintiffs' claim, that as the power was joint and several, the partners were not collectively answerable for the use which might be made of it by any one of them. Each being enabled to exercise upon the power, in the absence of collusion, no other was answerable for what he did. Secondly, that if they were originally answerable in the character of partners, they ceased to be so on the death of French, and that afterwards, the surviving partner, Richard and William Sparks ceased to be answerable for each other. Thirdly, that Richard Sparks did not know, and had not the means of knowing, that the stock was sold, or that the money, now appearing to have arisen from the sale of the stock, was paid to the credit of the firm, and that if he had been informed that William Sparks had paid any such sums of money into Eadailes & Co., he did not [328] know, and had no means of knowing, that the money was not the separate property of William Sparks.

Mr. Pemberton Leigh and Mr. Freeling, for the Plaintiffs.

Mr. Turner, Mr. Tinney, Mr. Teed, Mr. Goodeve, Mr. Shebbeare and Mr. Collyer, for the Defendants.

The following cases were cited: *Stone v. Marsh* (6 B. & C. 551); *Marsh v. Keating* (8 Bli. 651; and 2 Cl. & Fin. 250); *Ex parte Apsey* (3 Bro. C. C. 265); *Ex parte Hume* (Buck. 386); *Beavan v. Lewis* (1 Sim. 376); *Smith v. Craven* (1 Cr. & Jer. 56); *Hume v. Bolland* (1 Cr. & M. 130); *Devaynes v. Noble* (*Clayton's case*, 1 Mer. 572; 1 Cr. & M. 495); *Gray v. Chiswell* (9 Ves. 118); *Wilkinson v. Henderson* (1 Myl. & K. 56); *Pulliamy v. Noble* (3 Mer. 593).

May 8. THE MASTER OF THE ROLLS [Lord Langdale]. The facts of this case are many of them very similar to those which occurred in *Marsh v. Keating* (8 Bli. 651; and 2 Cl. & Fin. 250); the material difference being, that in this case, William Sparks caused the stock to be sold under a legal and valid power of attorney, whereas in the case of *Marsh v. Keating*, Fauntleroy caused the stock to be sold under a power of attorney which was forged. It was argued that there was another material difference, inasmuch as, in this case, the trustees and the Plaintiffs were the regular customers of Sparks & Lee, whereas in *Marsh v. Keating*, Mrs. Keating was the regular customer of Marsh & Co. I do not know that any such supposed difference would be material, but I am of opinion, that [329] with regard to the stock and the receipt and application of the dividends payable thereon, Sparks & Lee must be deemed to have been the bankers of the trustees. There can, I think, be no doubt, but that the trustees constituted Sparks & French their attorneys and agents.

this matter, because it was in the way of their business as bankers to transact such business, and that it was for the same reason that the Plaintiffs continued to permit Sparks & Lee to act for them; I think also that the relation which subsisted between the firm and the Plaintiffs, was precisely the relation subsisting between bankers and their customers who have given to the bankers powers of attorney to receive dividends and sell stock.

Now in *Marsh v. Keating*, the Judges state the facts, as appearing by the special verdict, to be, that the broker paid the money, the produce of the stock deducting one half of the usual commission, by a cheque payable to Marsh & Co., into the hands of Martin & Co., the city agents to the account of Marsh & Co., and they observe, that at the precise time of such payment, there can be no doubt that it was as much money under the control of Marsh & Co. as any other money paid to Martin & Co. by any customer under ordinary circumstances. The house of Marsh & Co. might have drawn the whole of the balance into their own hands. If the same money had been paid to Martin & Co., as the produce of the Plaintiffs' stock, under a genuine power of attorney, it would unquestionably have been received by all the Defendants to the use of the Plaintiffs, and would not less be money received by the partners of the firm, because it was entered in the account as "cash per Fauntleroy." It appeared, in *Marsh v. Keating*, that Fauntleroy had deceived his partners, but the Judges held that this fraud afforded no answer [330] to the Plaintiffs' claim after the money once came into their power.

But in the present case the distinguishing and important facts are, that the power of attorney was genuine, and was intrusted to the joint care of three partners. It enabled each to act severally after it was removed from their joint custody, and placed in the hands of their joint agent without special directions, or after it was deposited in the proper office, without which, the dividends, the receipt of which was the object of the trustees, could not have been received; but it was optional with the bankers, collectively, whether they would accept the power and assume the responsibility. They did assume it, as it appears to me, in the ordinary course of their business; having done so, and having sent it to their broker, to be acted upon in the way most suitable to their own convenience, I am of opinion, that they all became answerable for the several acts of each other under the power, and I think that all the partners would have been answerable for the sale by the direction of William Sparks, even if the money had not been paid to the account of the firm with the London bankers.

Under these circumstances, it is less important to consider, whether Richard Sparks ought to be deemed to have known the facts which are now established, but I am of opinion, upon the evidence produced, that Richard Sparks, if he had used ordinary diligence and attention in the management of the business, might and must have discovered all the facts which are material to this case; the means of knowledge appear to me to have been in his power; he would, with very little trouble, have found confusion and irregularity in the accounts, and a proper investigation of the sources of such confusion and irregularity would have led to the discovery of all [331] that had been done. In such a case as this, and under such circumstances, Courts of Justice, for the protection of those who deal with partnerships, must impute the knowledge which the partners, acting for their interests and in discharge of their plain duty, might and ought to have obtained.

It is said, indeed, that Richard Sparks had become imbecile, and that although he regularly attended at the bank, and took a small share in the management of the business, was yet incapable of investigating or understanding the state of the affairs, especially as William Sparks used constant endeavours to conceal the transactions from him. The evidence upon this subject is by no means satisfactory. If it were much stronger than it is, I own that I could not conclude from it, that a man, ostensibly taking an active part in the conduct of such a business, could be held free from responsibility in respect of the acts of the firm in which he was a partner. Confirmed and incurable insanity is a ground for dissolving a partnership, but I apprehend that, before a decree can be made that a partnership shall be dissolved on this ground, it must be shewn, not merely that the party alleged to be insane, is not, for the time, so capable as he may previously have been of attending to or conducting

the business, but that he is really insane. (See *Kirby v. Carr*, 3 Younge & Col. 184.) If not, the partnership cannot be dissolved on that ground, and his responsibility continues. But in this case, the evidence has failed to shew, that at the times when the sums of stock were sold, Richard Sparks was, in any respect, incapable of investigating or understanding the accounts, or of managing the business. And, on the whole, I am of opinion, that Richard Sparks and William Sparks were, at the [332] respective times of their deaths, indebted to the Plaintiffs in respect of their transactions.

The next question is, what is the amount of the debt, or how it is to be ascertained. The bill prays, that it may be declared that the real and personal estates of Richard and William Sparks are liable to replace the stocks sold out; or, at the option of the Plaintiffs, to make good the amount of the proceeds of the sales. (See *Watts v. Girdlestone*, 6 Beav. 188.) The Defendants representing the estates of Richard and William Sparks say, that if they are subject to any liability, it can only be to the extent of the monies actually received, for that the bankers were agents only and not trustees, and cannot be answerable as such, especially in the absence of the *cestui que trust*. To which it is replied, that though the bankers were not trustees, the Plaintiffs are entitled to damages, and that the value of the stock at the date of the decree is the right measure of the damage. I think, that there is nothing in this case, or in the form of the pleadings, to prevent the Plaintiffs from demanding against the Defendants a full pecuniary compensation for the loss they have sustained by the improper sales of stock, but it does not appear to me that they are entitled to have the stock specifically replaced. The bill alleges that the Plaintiffs, being trustees for other persons, are bound to make good, and intend to make good, the loss which would otherwise be sustained by the *cestui que trust*, and that the *cestui que trust* have elected to treat the Plaintiffs as their debtors, and not to make any claim against the assets of the firm, or the estates of the Sparks'. I think that the loss sustained by the Plaintiffs is to be measured by the amount of money which they have properly paid in replacing the stock, [333] or otherwise satisfying the just claims of the *cestui que trust*. The Plaintiffs state that they have replaced the stock, but I do not understand that there is any proof of it.

DECREE.—Inquire what sums of money have been properly laid out and expended by the Plaintiffs in replacing the sum of £10,963, 7s. 11d. 3½ per cent. annuities; and declare that the estates of Richard Sparks and William Sparks are liable to make good to the Plaintiffs the full amount of such several sums of money, together with the amount of so much as has not been accounted for, of the dividends on such annuities, which ought to have been received up to the time when the same were replaced.

[333] BAKER v. THURNALL. May 11, 27, 1843.

Application to the Court to examine, on behalf of the Plaintiff, a Defendant, to whom answer a replication had been filed, refused.

Mr. Shapter, on behalf of the Plaintiffs, moved, that they might be at liberty to examine the Defendant Barker as a witness, saving all just exceptions, and without withdrawing the replication filed to his answer. He urged, that although an order of course for such a purpose was not regular, still that such an order may be made on special application to the Court.

THE MASTER OF THE ROLLS [Lord Langdale]. The general rule is, that you cannot examine as a witness a Defendant to whose answer you have filed a replication. By filing a replication you admit that he has an interest which you are contesting in the cause. You had better see if there are any authorities on the subject.

[334] Mr. Shapter now referred to the case of *Crookhall v. Smith* (2 Fowler Practice, 101. See *Holmes v. The Corporation of Arundel*, 4 Beavan, 155. *Ross v. Clarke*, 1 Y. & C. (C. C.) 538), where a Defendant, as executor, and not in his own right, was ordered to be examined as a witness to prove the execution of deeds, &c. his answer being replied to.

THE MASTER OF THE ROLLS [Lord Langdale]. That case only applies to the proof of documents. I have understood the rule to be universal, that if you desire to examine a Defendant you must, as to him, withdraw the replication. I cannot introduce a new rule. (NOTE.—By the 6 & 7 Vict. c. 85, a Defendant may now be examined on behalf of the Plaintiff or Co-defendant.)

[334] EDMONDS v. NICOLL. May 11, 1843.

Liberty for the Plaintiff to enter an appearance for the Defendant will not, after a delay of two months, be granted *ex parte*. The practice in such a case is not to make an order *nisi*, but to require notice of the application to be given, or that there should be fresh service of the *subpoena*.

Mr. Shebbeare, on the part of the Plaintiff, moved *ex parte*, under the 8th Order August 1841 (Ord. Can. 165), for liberty to enter an appearance for the Defendant. There had been two months' delay in making the application, and this having been objected by the Court, he asked that the order might be in the form of that made by Sir James K. Bruce in *Bointon v. Parkinson* (19th April 1843), viz., "that the Plaintiff should be at liberty to enter an appearance for the Defendant at the expiration of [335] ten days, unless the Defendant entered an appearance within that time, and the Plaintiff should undertake to serve the Defendant with notice of this order within eight days."

THE MASTER OF THE ROLLS [Lord Langdale]. I cannot make an order to enter an appearance *ex parte* when the Plaintiff has so long delayed to make his application for it. The practice in such a case has been, not to make an order *nisi*, but to require that notice should be given to the other side or that there should be fresh service of *subpoena*. Having always adopted that course, I think it must be followed in the present instance. (See *Radford v. Roberts*, 2 Hare 96.)

[335] ATTORNEY-GENERAL v. RAY. May 11, 1843.

In a civil proceeding at law, the office copies of the depositions in Chancery being good evidence, the originals will not be ordered to be produced.

Mr. Maule applied that the original depositions taken in this cause might be produced at the trial of a civil action at law, but

THE MASTER OF THE ROLLS [Lord Langdale], after inquiry, refused the application, on the ground that the production and proof of the office copies were sufficient. See *Highfield v. Peake*, Moody & Mal. 109. *Hennell v. Lyon*, 1 B. & Ald. 182, and *Attorney-General v. Ray*, 2 Hare, 518, and 3 Hare, 335.)

[336] ASHBY v. JACKSON. May 31, 1843.

A common injunction to stay trial will not be extended, if it appears from the pleadings, contrary to the usual affidavit, that the discovery will not assist the Defendant at law in his defence to the action.

On the 19th of April 1843 an action at law was commenced by the Defendant against the Plaintiff, who, on the 10th of May, filed this bill, praying an injunction. The common injunction was obtained on the 26th of May, and on the 25th of May notice of trial for the second sitting in term (9th of June) was given.

Mr. Pemberton Leigh now moved to extend the common injunction to stay trial on the usual affidavit.

Mr. Greene, *contra*, objected, that after the delay which had taken place, the Plaintiff was not entitled to extend the injunction on the eve of trial, and that from

the facts it appeared that the discovery would be of no avail to the Plaintiff in the action at law. *Thorpe v. Hughes* (3 Myl. & Cr. 742).

THE MASTER OF THE ROLLS [Lord Langdale]. I quite agree with the doctrine of the case cited, and if it appeared to me that the nature of this action was such that the discovery could not be of any use to the Plaintiff in his defence to the action at law, I should certainly refuse this motion, but that does not in any way appear nor is the delay such as to disentitle the Plaintiff.

Injunction extended.

[337] *In re MARTIN.* May 30, 31, 1843.

Solicitor struck off the rolls for fraudulently abusing the confidence of his client.

It is the duty of the Court to protect solicitors in the fair discharge of their difficult and delicate duties, but when a solicitor is found to have availed himself of his honourable and confidential position, for the purpose of taking advantage of and defrauding his clients, it is not less the duty of the Court to withdraw from him those privileges, and that certificate of character, which are afforded by his being permitted to remain on the roll of solicitors.

This was a petition presented by Miss West, to have the name of the Respondent a solicitor of the Court, struck off the rolls under the circumstances stated in the Master of the Rolls' judgment.

Mr. Pemberton Leigh and Mr. Shebbeare, in support of the petition.

Mr. Turner and Mr. Collins, *contra*, amongst other arguments, urged that the application ought not to be granted in consequence of the delay which had taken place. *In the Matter of ———* (2 Barn. & Ad. 766). That the matter had been brought forward by the Petitioner for the private purpose of compelling payment of the debt, and that it appeared that she would willingly have compromised the matter if the Respondent had paid the amount.

Mr. Shebbeare, in reply.

THE MASTER OF THE ROLLS postponed giving his judgment, observing that he did not think that the reasons adduced for not entertaining the petition ought to prevail. That there was no such delay as ought to prevent his interposing, and that it was no reason why the Court, in a proper case, should refuse to relieve the public because the party prosecuting the complaint had been negotiating for a compromise.

[338] May 31. THE MASTER OF THE ROLLS [Lord Langdale]. The Respondent was the solicitor of Miss West in a cause of *West v. Funge*, in which a decree had been obtained. She seems to have placed great confidence in him. He says that great intimacy arose between him and Miss West, and he states his belief, that if she had possessed £5000, and he had required it, she would have lent it to him.

In November 1840 he requested her to assist him in obtaining £1000, which he wanted, as he says, for the purpose, amongst other things, of lending a portion of it to Sir John Scott Lillie on security. She had then no money to lend, and attempts having been in vain made, to obtain it from one or two other sources, he suggested that she might compromise the suit, and thereby obtain money, out of which she might advance what he wanted. To this she consented, and it was agreed that the suit should be compromised; under the agreement she became entitled to receive £1700 from Funge and Bland, two of the Defendants, and also the fund in Court which consisted of £1276, 12s. 3 per cent. annuities, and £76, 12s. cash. To avoid delay in procuring the money before the agreement to compromise could be carried into effect, Miss West was prevailed upon to consent to an arrangement, by which Mr. Martin was to receive £1000 from the Metropolitan Bank on her credit as security; and accordingly the bank advanced, nominally to her, but really to Martin, the sum of £1000 for two months, and she executed a deed, dated the 12th of December 1840, whereby she assigned to Courtenay and Abbott, two of the directors of the bank, the funds to which she was to become entitled on the compromise of the suit, on trust to receive the same, and thereout pay the £1000 and interest, and [339]

of the surplus to her. At the same time, Miss West signed a bill, drawn on Martin, and accepted by him, for £1000, payable to the bank in two months.

When the money was obtained, Miss West was induced to receive from Martin £1000, a part of it, for her own use.

Miss West thus subjected herself and her property to the payment of £1000, of which £950 was placed at the disposal of Mr. Martin, her solicitor, and Mr. Martin gave her a memorandum thus expressed:—"I have received £950 value from Miss West to place out, and I hereby undertake that she shall receive at least 5 per cent. for the same, and incur no risk of loss thereof.—December 12th, 1840."

The sum mentioned in this memorandum is the sum which he now alleges was a sum lent to him to employ in his business.

But however great her confidence in him may have been, it is plain that she misdirected security, and did not choose that he should have her money or money placed on her security, without his acknowledgment in writing that it was to be paid out, and it is clear that the loan from the Metropolitan Bank was no more than a temporary arrangement, until her own money could be obtained. Mr. Martin says, and recollects it was stated, that when the suit was settled, the loan made by the bank would be discharged.

The Metropolitan Bank, having obtained the assignment, put a stop order upon the fund in Court, and very soon afterwards, viz., by two payments, one of £700 on the 22d of December 1840, and the other of £1000 on [340] the 20th of January 1841, the £1700, which Miss West was entitled to receive from Funge and Bland on the compromise of the suit, was paid to Mr. Martin, who ought to have taken the earliest opportunity of paying off the money borrowed from the bank. The two months, indeed, for which the money was lent, had not then elapsed; but it is plain that Mr. Martin had no intention of applying the money in making the payment, for on the same 20th of January on which he received the £1000 from Funge and Bland, he presented a petition in the cause, in the name of Miss West, and thereby prayed that the stock in the cause which belonged to her might be sold, and that the debt due to the bankers might be paid out of the proceeds, and it was soon afterwards ordered accordingly, and the bankers were so paid.

Under these circumstances, Mr. Martin had obtained from the bankers at Miss West's expense the £950, for which he had given the memorandum of the 12th of December 1840, and he had also obtained the £1700 from Funge and Bland, for which he had given no memorandum.

Miss West states, that Mr. Martin informed her that he had received the £1750 from Funge and Bland, and applied £1000, part of it, in payment of the bankers, and that the remainder was at his banker's; and she says further, that, until the 3d of March 1841, she did not know that the stock had been sold. That she was very ignorant about her money appears not only by her own affidavit, but by the letters of Mr. Martin, the purport of which he accounts for by saying, that they were written in a hurry: and after carefully reading the affidavit of Mr. Martin and Mr. Funge, I see no reason to doubt that the other statements which I have made are substantially true. After the 3d of March, when she was informed of the sale of the stock, she received the money which remained after payment of the bankers—she used her best endeavours to obtain the money still due to her from Mr. Martin; he paid her in the whole £1500, and she obtained an order requiring him to transfer so much of the stock which he had caused to be sold as produced the £1010 to the bankers. He was afterwards arrested at Deal upon a writ of *ne exeat* issued by the order of the Lord Chancellor; and seeking to obtain the benefit of the Insolvent Debtors Act, he was ordered to be imprisoned for a period of ten months, which expired in April last.

The Respondent has no doubt suffered severely for the conduct he has pursued, and now asked that he may be struck off the Rolls, and after very anxious consideration of the case, I feel myself compelled to make the order.

Except in making the repayment of parts of the sums which he received, it appears that every part of the conduct of Mr. Martin in the matters in question was improper, and I think, on the examination of the matter and of every affidavit, that he fraudulently abused the confidence placed in him by his client, and

endeavoured to effectuate and continue the fraud, by misrepresentations, in a manner and under circumstances which make it my imperative duty to declare, so far as depends upon me, that he is not to be permitted to act as a solicitor, and to continue in a situation which may enable him to conduct himself towards other clients in the same manner.

It is undoubtedly the duty of the Court to protect solicitors in the fair and honest discharge of their difficult and delicate duties; but when a solicitor is found to have availed himself of his honourable and confidential position, for the purpose of taking advantage of and defrauding his clients, it is not less the duty of the Court to withdraw from him those privileges and that certificate of character which are afforded by his being permitted to remain on the roll of solicitors.

Let the order be made as prayed.

[342] FLINT v. HUGHES. June 7, 1843.

[S. C. 7 Jur. 523.]

Bequest of residue to A. for life, "and whatever she can transfer to go to her daughters," B. and C. Held, that the gift to B. and C. was void for uncertainty.

The testator, by his will dated in 1842, after giving an annuity, proceeded in the following terms:—

"After this, I bequeath everything I may die possessed of to my dearly-beloved daughter Frances Elizabeth, married to the Rev. Robert Hodgson Fowler of Southwell, Notts, for her own use during her natural life, and whatever she can transfer to go to her daughters, Frances, wife of the Rev. Charles Ramsay Flint, and to Mr. Fowler, spinster." He named Frances Elizabeth Fowler, Charles Ramsay Flint, and Richard Hughes, executors.

This bill was filed by Mr. and Mrs. Flint and Mary Fowler against Mr. and Mrs. Hodgson Fowler and Mr. Hughes, praying the establishment of the will, and that the trusts might be carried into execution.

To this bill the Defendants Mr. and Mrs. Fowler put in a general demurrer.

[343] Mr. Kindersley and Mr. Malins, in support of the demurrer, submitted that the gift over was void for uncertainty, it being impossible to say what the testator intended by the expression "whatever she can transfer." That the Plaintiffs therefore had no interest in the property and could not maintain this suit.

Mr. Pemberton Leigh and Mr. Bacon, in support of the bill, argued that it was a valid gift of the whole property to Mrs. Fowler for life, with remainder to her two daughters.

Pope v. Pope (10 Sim. 1) was referred to.

THE MASTER OF THE ROLLS [Lord Langdale] said that the objects of the testator's bounty sufficiently appeared, but it was impossible to say what was the subject intended by the expressions "whatever she can transfer," or whether it was to pass to the daughters by a transfer from the mother, or by the operation of the will. He thought therefore that the gift to the daughters was void for uncertainty, and allowed the demurrer.

[344] DE LA GARDE v. LEMPRIERE. June 5, July 3, 1843.

[S. C. 12 L. J. Ch. 471.]

The wife's equity to a settlement does not attach upon filing a bill; if, therefore, the wife dies without making any claim to a settlement out of her legacy, her children after her death, have no right to one.

John Lempriere, by his will dated the 19th of May 1821, gave to his daughter Louisa Moore £2500. A bill for the administration of the estate was after-

died, to which John Bury Moore and Louisa his wife (the legatee) were made Defendants, and in 1836 a decree was made for taking the accounts and for making certain inquiries.

In 1837 Louisa Moore died.

The Master made his report in 1838, by which he found, amongst other things, that the testator's daughter Louisa married the Petitioner in the lifetime of her father, and died at the age of forty-one in March 1837, leaving five children.

By the order on further directions in 1839 it was declared, that the pecuniary legacies to the daughters were absolute legacies upon their attaining the age of twenty-four years, and were not subject to a direction for a settlement which was contained in the will; but the children claiming a settlement in right of their mother Louisa, it was directed that the amount of her legacy, when ascertained, should be carried to the account of "Louisa Moore and her children," subject to further order.

Several further proceedings being afterwards had in the cause, the amount due on the legacy to Louisa Moore was found to be the sum of £1941, 12s. 9d.; and which, according to the order of 1839, had been carried [345] to the account of Louisa Moore and her children. Mr. Moore now presented a petition for payment of him of the legacy, and the question now was, whether Mr. Moore was entitled to it as the representative of his deceased wife, or whether the children, in right of their deceased mother, had any and what right to a settlement.

Mr. Flather, in support of the petition.

Mr. Whitmarsh, *contra*, for the children.

Murray v. Lord Elbank (10 Ves. 84, 92), *Lloyd v. Williams* (1 Mad. 450), *Steinmetz v. Halthin* (1 Gl. & Jam. 64), *Groves v. Clarke* (1 Keen, 132) were cited.

July 3. THE MASTER OF THE ROLLS [Lord Langdale]. I conceive it to be settled, that if there be a decree for a settlement on the wife, the children are entitled to the benefit of it, although the wife may have died before any proposal for a settlement was carried into the Master's office.

In this case, the wife filed no bill claiming a settlement, and she died before any order for a settlement was made. In *Scriven v. Tapley* (Amb. 509; 2 Eden, 337), the child after the death of her mother filed her bill for a settlement. It was decreed to her by Sir Thomas Clarke at the Rolls, but as to that part the decree was reversed by Lord Northampton.

And in the case of *Lloyd v. Williams*, Sir Thomas Plumer, after a careful examination of all the authorities, [346] said (1 Mad. 464), that no case had trenchanted upon *Scriven v. Tapley*, and the conclusion to which he came was, "that the right of the child can arise only out of contract or under a decree."

This case would therefore be very clear, if it were not for the case of *Steinmetz v. Halthin* (1 Glyn. & J. 64), which was decided by Sir John Leach when he was Vice-Chancellor; who, after admitting that the equity was personal to the wife, and that the Court acknowledged no original right in the children, and that the children could claim only such provision as the wife thought fit to secure for herself, nevertheless was of opinion, that when a suit was instituted for the administration, out of which the legacy was to be paid, and the wife was a party Defendant to such suit, the equity of the wife attached upon the property on the filing of the bill, and that the equity having attached upon the property, and the wife having died without waiving it, the children became entitled to the benefit of it.

If this case had been followed by others, I should have considered myself bound by it; but standing alone, and being as it appears to me, contrary to the previously existing rules on this subject, I do not consider myself to be at liberty to act upon it, without considering the principle on which it is founded.

In all cases, the equity of the wife is personal, and it arises upon the vesting of the legacy in her: it may be defeated by a voluntary payment of the executors to her husband, who has a legal right to receive it, and give a discharge for it. If the payment is to be made through the medium of the Court, her equity will be [347] enforced, if she desires it, but not otherwise; she may abandon it, in which case her children can claim nothing, and if she claims it for herself, the Court requires the benefit to be extended to her children: her equity and the equity of the children are

treated as one equity, to be enforced or not at her option. If the equity were to be considered as attached to the property on the filing of the bill, it must, I apprehend, be considered for the benefit of her children at the same time, but if so, she could not afterwards waive it for herself, because her equity and theirs are one; and as it is admitted that she can waive it after the institution of the suit, it seems to me to follow that it is not an equity, which, upon the filing of the bill, attaches upon property for the benefit of the children.

It is true, that after the filing of the bill, the discretion which the trustee or executor had to pay the wife's legacy to the husband is greatly altered. The filing of the bill has, it has been said, made the Court the trustee, and if the wife be living the Court will not pay the wife's legacy to the husband if she desires a settlement, unless she waives it; but when death has made any option on her part impossible when nothing has occurred from which it can be concluded that she has made an option, there seems to be no reason why the legal right of the husband should prevail, and I am therefore of opinion, notwithstanding the case of *Steinmetz v. Hall*, that in this case the wife's equity did not attach to the property for the benefit of the children on the institution of the suit, or before her death, but that upon her death before decree, and before any arrangement for a settlement, her legal personal representative became entitled to the legacy.

[345] TOGHILL v. GRANT. *In re* BOORD. June 5, July 3, 1843.

Where taxation is directed after action brought, this Court does not give the client the costs of taxation, though more than one-sixth be taxed off.

On the 18th of September 1839 Mr. Morris, who had been the agent of Mr. Board, a solicitor, delivered three bills of costs.

On the 12th of November 1839 Mr. Morris commenced an action against Mr. Board to recover the amount of those bills.

And on the 13th of January 1840, two months after the commencement of the action, and nearly four months after the delivery of the bills, the Petitioner obtained an order for the taxation of the bills. (2 Beavan, 261.)

On taxation, more than one-sixth of the amount of the three bills was taken off, and Mr. Board now presented a petition to compel Mr. Morris to pay the costs of the orders of reference and of the taxation.

The matter had been referred by the parties to Mr. Mills, of the Six Clerks' Office, who directed the costs to be paid by Mr. Morris, but it was alleged that his attention had not been called to the authorities on the subject.

Mr. Beavan, in support of the petition.

The Court, by analogy to the rule which the statute lays down, throws upon the solicitor the costs of the [349] taxation, where his bill is reduced by more than one-sixth of the amount; *Barton v. Pyne* (1 Hare, 496).

Mr. Corrie, *contra*. At law, an agent's bill cannot be taxed at all. When the order for taxation is obtained after action brought, the client is not entitled to the costs of the taxation, even if more than one-sixth be taken off his bill. This is the rule of Courts of law, *Jay v. Coaks* (8 Barn. & Cr. 635), and of this Court; *Smith's Practice* (vol. i. p. 706 (2d ed.)).

Mr. Beavan, in reply. The rule stated has been adopted by the Courts of law only, and has never been followed in this Court. Mr. Beames (*Beames's Costs* (2d ed.) 201) refers to the rule as applicable only to Courts of law: he says the rule may be usefully and justly followed in equity, this assumes that it has never yet been adopted there. The foundation for what is stated in Mr. Smith's book is merely the common law decision. It seems to have been the opinion of Mr. Mills, an experienced sworn clerk, that the Respondent is liable to pay the costs.

Hatherway v. Hatherway (2 Mad. 329) was also referred to.

July 3. THE MASTER OF THE ROLLS [Lord Langdale]. It was objected that the

reference was not obtained till after the action had been brought by the Respondent, and that according to the practice of the Courts of law, the costs of taxation are not given, although more than one-sixth may be taken off the bill; and it being alleged [350] that the practice in this Court was different, I thought it right to cause inquiry to be made, and it has been certified to me, that where an action to recover a bill of costs is brought before the order to tax the bill is obtained, it is not the practice in this Court to give the client the costs of taxation, although more than one-sixth may have been taken off the bill.

And this being so I must decline to make any order upon this petition.

NOTE.—The law has since undergone an alteration by the passing of the 6 & 7 Ed. c. 73, under the thirty-seventh section of which it has been held, that under the circumstances stated in the text, the Attorney is liable to the costs. *Ex parte Wollett*, Chequer, 23d Jan. 1844.

[350] JORDAN v. LOWE. June 23, 1843.

[See *Ex parte Wynch*, 1854, 5 De G. M. & G. 211; 43 E. R. 850 (with note).]

wise of leaseholds on trust for A. for life, and afterwards to his issue male severally and respectively, according to their seniorities, and in default to his heirs, according to their seniorities, and in default over. Held, that A. took an absolute interest.

The testator, being possessed of a leasehold estate renewable every seven years, devised it to trustees, upon trusts which he declared as follows:—"I direct my said trustees to remain and continue seized and possessed thereof, and to pay the rents and profits thereof to or to the use of, or to permit and suffer my cousin Robert Jordan, of my uncle Jonathan, to hold and enjoy, or to receive and take the rents, issues, and profits thereof, to his own use and benefit, during the term of his natural life; and from and immediately after the decease of the said Robert Jordan, then I direct said trustees to pay the rents and profits thereof to his issue male lawfully gotten, severally and respectively according to their respective seniorities; and for want of such issue male as aforesaid, I devise the same to the [351] use of the said and all other the daughters and daughter of my said uncle Jonathan, according to their respective seniorities; and in default of such issue of my said uncle Jonathan, I devise the same to the eldest daughter of my said cousin Robert for all my life and interest therein. And I direct the said leasehold estate shall be, from time to time, renewed by and in the names and name of my said trustees."

The question was what interest Robert Jordan took in this leasehold.

Mr. Malins, for Robert Jordan, the Plaintiff, contended he took the leasehold absolutely.

Mr. Bird, for Thomas Jordan, the eldest son of the Plaintiff, and

Mr. Borton, for the younger children, contended that the Plaintiff took a life interest only.

Mr. Heathfield, for the trustees of the will.

Mr. Malins, in reply.

The following authorities were relied on:—*Jones v. Morgan* (1 B. C. C. 206. commented on in *Fearne's Cont. Rem.* 134), *Knight v. Ellis* (2 B. C. C. 570; and see *Gray-General v. Bright*, 2 Keen, 57; 2 Jarman on Wills, 496), *Lyon v. Mitchell* (Ibid. 467), *Stoner v. Curwen* (5 Sim. 264).

THE MASTER OF THE ROLLS was of opinion that the Plaintiff took a *quasi* estate, and said he must make a decree in favour of the Plaintiff, according to the prayer of the bill.

[352] HUGHES v. GARNONS. June 8, 22, 1843.

A correspondence took place between a client and his solicitor during the progress of a suit. A compromise was effected, but afterwards a second suit was instituted to set it aside, and to prosecute the original suit. Held, that the correspondence was privileged in the second suit.

The object of this bill was to set aside a compromise which had been entered into in a suit of *Garnons v. Hughes*, and to enable the Plaintiff to proceed on the decree which had been made in the original suit.

One of the Defendants, by his answer, admitted that he had in his possession divers letters, and copies of letters which passed between Henry Rumsey Williams deceased (a solicitor), and Mr. Smedley, his agent, and others, during the progress of the said suits, and with reference thereto, but he said, "that all the said letters and copies of letters were confidential communications between Henry Rumsey Williams deceased and Richard Garnons, the solicitor and client respectively in the said suit, and with reference thereto."

Mr. Pemberton Leigh and Mr. Renshaw, for the Plaintiffs, moved for the production of these, amongst other documents admitted to be in the Defendant's possession. They referred to *Addis v. Campbell*. (Not reported on this point.)

Mr. Cockerill, *contra*. The correspondence took place between the solicitor and his client in the other suit, which it is the object of the present suit to prosecute, notwithstanding the compromise. The documents are therefore privileged, and ought not to be produced; *Bolton v. The Corporation of Liverpool* (1 Myl. & K. 88).

[353] THE MASTER OF THE ROLLS [Lord Langdale]. I think the Plaintiff must be content with the production of the other documents. These cannot be ordered to be produced.

[353] ADNAM v. COLE. June 26, 1843.

Gift of residue to pay income to widow for life, subject to the payment thereof of an annuity of £10 to A. for his life. After the decease of his widow, a disposition was made of the property, and amongst other gifts there was one of the dividends of £1000 stock to A. for life. Held, that the annuity to A. ceased upon the death of the widow, and that A. then took the dividends on the £1000 in substitution.

Bequest of chattels real to trustees to erect such monument as they should think fit, and build an organ gallery. The first object was valid, the second invalid under the Statute of Mortmain. Held, that the trustees were wrong in applying the whole to the first object, and an inquiry was directed to apportion the gift.

The testator being seised of a freehold cottage at Long Parish, and being possessed of a leasehold at Vale Place, devised and bequeathed the residue of his real and personal estate to his executors, upon trusts which were expressed as follows:—"Upon trust to pay and apply the rents, use, enjoyments, and profits thereof to my wife Frances Adnam, for and during the term of her natural life, subject nevertheless to the payment thereof to Charles Adnam of £10 a year during his life, and after his decease, £10 a year to Elizabeth, his wife, if she survive him, during her life;" and from and after the decease of my said wife, upon trust to sell my messuage, &c., at Vale Place aforesaid, "as soon as conveniently may be after the decease of my said wife, and the monies arising therefrom to sink into and become part of the residue of my personal estate; and from and after the decease of my said wife, I give my cottage and garden at Long Parish aforesaid, with the appurtenances thereunto belonging, unto the said John Thompson, his heirs, &c., subject and charged with the yearly payment thereof of £3 to be applied as hereinafter mentioned; and upon further trust, after the decease of [354] my said wife, to pay and apply the interest and dividends of £1000 stock in the 3 per cent. Reduced Bank annuities unto the said Charles Adnam during his natural life, and from and after his decease, to pay the like interest and dividends to his wife, the said Elizabeth Adnam, if she shall survive him; and from and after

the decease of the survivor of them, upon trust to pay and divide the said principal sum of £1000 stock, unto and amongst all and every of the children of the said Charles Adnam and Elizabeth his wife equally." He then bequeathed certain legacies after the decease of his wife, and proceeded as follows:—"And as to all the residue of the said trust monies, it is my will and desire, and I do hereby direct my said trustees, &c., to lay out the same for the purpose of erecting such a monument to my memory, as my trustees shall think fit, and for building a neat, substantial Gothic organ gallery, over the north door, within the parish church of Long Parish aforesaid, and for purchasing and putting up an organ within the said gallery, which gallery and organ are to be erected and placed, with the consent of the vicar and churchwardens, under the directions of my said trustees or trustee for the time being."

There were two questions, the first, whether the annuity of £10 a year to Charles Adnam ceased upon the death of the testator's wife; and the second question related to the monument and organ gallery, with regard to which the bill alleged that the gift was void, and with respect to which the following circumstances took place.

The Defendants, the executors, said, "they were advised by counsel, that the executors of the testator were authorised, by the will, to apply and expend such part of the testator's residuary personal estate as they, in their discretion, might deem fit, or even the whole [355] thereof, if they should think fit, in the erection of a monument to the testator's memory.

"That they, acting upon such advice, had applied a sum exceeding, as they believe, the whole amount of such residue, in erecting such monument, and in and about the expenses connected therewith."

"That the monument they had so erected to the memory of the testator, and which was called Adnam's Chapel, had cost in the actual erection thereof the sum of £294, 19s. 3d. or thereabouts."

"That they had not applied any part of such residue, and that there, in fact, remained no part applicable to the building or erection of an organ gallery, or of putting up an organ therein."

Mr. Pemberton Leigh insisted, first, that the £10 a year was payable to Charles Adnam and wife for life, even after the death of the widow.

Secondly, that the trustees had not exercised a due discretion in laying out the whole residue in the monument, and he insisted that there ought to be an inquiry to ascertain what proportion ought to have been laid out on the organ and organ gallery, which amount, so far as it was connected with realty, would belong to the representatives of the testator, in consequence of the gift of realty for such a purpose contravening the Statute of Mortmain.

Mr. Lloyd, *contra*. The annuity ceased on the death of the widow, because it was given out of a subject which was only to endure during that period. This construction is corroborated by the subsequent parts of the [356] will, which disposes, in another way, of the whole subject out of which an annuity of £10 was to be paid, and gives to the annuitants the dividends on £1000 as a substitute.

The gift of realty for the purpose of erecting a monument is not within the Statute of Mortmain (9 George 2, c. 36); *Mellick v. The President, &c., of the Asylum* (Jacob, 180). The trustees were empowered to erect such a monument "as they should think fit." They therefore had a discretion, and were justified in laying out any part of the residue they thought fit in erecting a monument. In *Cooke v. Farrand* (7 Taunt. 122), the widow had the power to will any part or proportion of the residue, and it was held that she might dispose of the whole. In *Talbot v. Tipper* (Skinner, 427), a party had the power of leasing at such rent "as he should think fit:" it was held that he might make a lease without reserving any rent.

Mr. Pemberton Leigh, in reply. If this were a residuary gift to be divided between three persons as the executors thought fit, a distribution excluding one could not stand. We have a right to have a due and proper part apportioned to the second of two purposes, namely, the building the organ gallery, &c., and if there be any difficulty, the Master must settle the proportions.

As to the annuity, the gift to Charles Adnam is distinctly for his life. The payment is not to be made out of the life-estate of the widow, but out of the estate of the trustees. I admit, that if the gift had been to A. for life, she paying thereout

an annuity to B. for his life, it must have ceased on the death of A.; but here the [357] duration of the estate of the trustees is quite sufficient to pay the annuity during the life of the annuitant.

THE MASTER OF THE ROLLS [Lord Langdale]. This will is very inaccurately expressed. The testator directs the whole income to be paid to his wife for life subject to the payment of an annuity of £10 to Adnam during his life, and after his decease £10 a year to his wife for life; after the death of the widow, there was to be a sale of part of the property, and there is a disposition of the residue and amongst other gifts, there was one of the dividends of £1000 stock to Adnam for life, and afterwards to his wife. I think, taking the whole together, that the dividends on the stock were given by way of substitution for the annuity of £10 a year, and that the annuity has ceased.

As to the other point, there can be no reasonable doubt: the testator had two objects in view, viz., the monument and the organ gallery; both were to be considered with reference to the amount of the residue. He intrusted, to a certain extent, a discretion with the trustees: they were to erect such a monument as they thought fit, but they were not to expend on one object whatever they thought fit without regard to the other object. The testator could not have meant that.

The rules of law do not permit chattels real to be applied to one of those purposes. I must so declare, and refer it to the Master to ascertain in what proportion the residue ought to be divided between these two objects.

[358] TARBUCK v. GREENALL. July 1, 1843.

Certain persons were properly made parties to a suit, previous to the orders of August 1841, which made them no longer necessary parties. Held, that they may properly be dismissed at the subsequent hearing.

This bill was filed previously to the General Orders of August 1841 coming into operation. By the 30th of these orders (Ord. Can. 173) it is directed, "that in suits concerning real estate which is vested in trustees by devise, and such trustees are competent to sell and give discharges for the proceeds of the sale and for rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate or the proceeds or the rents and profits, in the same manner and to the same extent, as the executors or administrators, in suits concerning personal estate, represent the persons beneficially interested in such personal estate and in such cases, it shall not be necessary to make the persons beneficially interested in such real estate or rents and profits parties to the suit; but the Court may, upon consideration of the matter on the hearing, if it shall so think fit, order such persons to be made parties."

The case came within this order, but the bill having been filed before it came into operation, the parties beneficially interested had been made parties to the suit and were numerous.

The cause now came on for hearing, when the usual accounts were directed, in addition.

Mr. Pemberton and Mr. Chapman, for the Plaintiff, proposed, that as, under General Order referred to, [359] the trustees sufficiently represented the estate, parties beneficially interested should be dismissed from the suit and their costs provided for.

Mr. Turner submitted, whether the order applied to such a case as the present and whether it could have been intended by the Court to alter the rights of parties and the frame of a record, in a suit instituted previous to the orders coming into operation. He suggested that a difficulty might occur on the part of the purchaser of the estate under the decree.

Mr. Kindersley, Mr. Dixon, Mr. Bigg, Mr. Faber, Mr. Piggott, and Mr. Jervis, for other parties.

THE MASTER OF THE ROLLS [Lord Langdale] said, that the orders applied to

existing cases (51st Order. See Ord. Can. 178), and, therefore, that parties whose presence had become unnecessary might be dismissed at any time, upon making a proper provision for their costs.

[360] BENNETT v. MERRIMAN. July 22, 1843.

[See *Martin v. Holgate*, 1866, L. R. 1 H. L. 185.]

quest to widow for life, and afterwards to transfer to testator's children *then* living, with a gift to the issue of such children if dead, the issue to take only the share their father would have been entitled to. Held, that the issue took by substitution, and that to entitle them they must survive the tenant for life. Compromise under the Court, held not to exclude a point of construction not then under consideration.

The testator gave his real and personal estate to trustees, on trust to convert and sell, and pay the interest to his wife for life. He then proceeded in the following words, "and from and after the decease of my said dear wife, then upon trust, to pay, sell, assign, transfer, and assure unto each and every of my said daughters who shall at the time remain unmarried, the full sum of £1000 sterling, to and for her and their sole and separate use and benefit, and the residue of the said principal monies, dividends, and interest, unto and amongst all and every my said children (including my said son William), *who shall then be living*, or if dead leaving(1) lawful issue, in equal shares and proportions if more than one, and if but one, then to such only child; the share of my said son to be paid or assigned and transferred to him, when he shall attain his said age of twenty-one years, and the share or shares of my said daughters, when she or they shall respectively attain that age or be married; the issue of any of my said children to take only the share their father or mother would have been entitled to, and if such issue should consist of more than one child, to take the share of their father or mother in equal proportions, and if but one, then such one child to take the whole of their father's or mother's share.

"Provided always, that if any of my said children or child shall die without leaving issue, before he, she, or [361] they shall respectively have attained his, her, or their said ages of twenty-one years, or without having been married, then the share or shares of him, her, or them so dying shall, from time to time, go, accrue, and belong to the survivors or survivor of them, and be paid or assigned and transferred to him, her, or them, if more than one, equally, at such times and in the same manner as is hereinbefore declared touching their original share or shares."

The testator died in 1811. Kezia, one of his daughters, married in 1820, and died in 1822, leaving one child, Kezia May Bennett, who died an infant in 1841, without having been married.

The testator's widow died in 1842.

The first question which arose on this petition, was whether the legal personal representative of Kezia May Bennett was entitled to a share in the testator's residuary estate.

Another question arose under the following circumstances:—Suits having, in 1818, been instituted for the administration of the testator's estate, praying accounts, &c., that the rights and interests of all parties in the estate and effects of the estates might be ascertained by the Court, the usual decree for accounts was in 1820 made, but it was not prosecuted, for in 1826 it was referred to the Master to consider and report to the Court, whether, under the circumstances of the case, it would be for the benefit of the parties beneficially interested in the estate of the testator, that the said estate should be compromised, upon the terms and conditions therein mentioned.

[362] The Master, by his report, dated the 24th of March 1827, after setting forth the state of the assets, and certain irregular dealings therewith, certified, that he was

(1) On production of the original will it was doubtful whether this word was "leaving" or "leaving."

of opinion, that it would be for the benefit of the parties, that the before-mentioned suits should be compromised upon the terms following, that is to say:—the Petitioners (the children of one of the testator's daughters), "being considered to be entitled to one-third part of the estate of the said testator William May, in the stead of their late mother Ann Elizabeth Merriman deceased; the said Kezia May Bennett, as being considered to be entitled to one-third part thereof, in the stead of her late mother the said Kezia Bennett deceased; and the Petitioner Caroline Davis and the trustees of the settlement on her marriage with William Davis, as being considered to be entitled to one-third part thereof, that the suits should not be further prosecuted as to the accounts and inquiries directed by the decrees." That certain sums of stock and cash in the report mentioned should be considered as forming the residue of the testator's estate; that the same, subject to certain costs, should be considered as belonging to, and be divided between and amongst the several parties thereinbefore mentioned in equal third parts, and should, upon the death of the testator's widow, be carried over to their several separate accounts; and that the interest and dividends should be paid to her for life.

The report was confirmed, and the funds were carried over with directions to pay the dividends to the widow for life, "and upon her death, any person or persons entitled to or interested in the residue of the said testator's estate, were to be at liberty to apply to the Court concerning the same as they should be advised."

[363] A petition was presented upon the death of Mrs. Bennett, for payment out of Court of the fund.

Mr. Pemberton Leigh and Mr. Shebbeare, in support of the petition. There are two questions, first, as to the construction of the will; and, secondly, as to the effect of the compromise. On the first point, we contend that the representative of Kezia May Bennett is not entitled to any portion of the fund, she not having survived the widow of the testator; first, because those only could take to whom transfer and payment was directed to be made; and, secondly, because the gift to the issue of the children was by way of substitution, and, therefore, the issue could only take in the same event in which their parents could take.

The children were to be ascertained at the time the gift was to take effect. There is this peculiarity also in the language of this will, which distinguishes it from the other cases. The gift is in the form of a direction to transfer to persons who are to be then in existence, and these words alone constitute the gift. (See *Jones v. Mackintosh*, 1 Russ. 223.)

The compromise does not affect this case, as the point was never referred to or brought before the consideration of the Master.

Mr. Kindersley and Mr. H. Williams, for the representative of Kezia May Bennett.

The compromise entered into between the parties, approved of by the Master, and confirmed by the Court, has determined all questions between them. [364] The order made thereon binds even the infants. The original and supplemental bills prayed that the rights and interests of all parties might be ascertained; if the suits had proceeded, their rights would have been determined, but they were disposed of by the compromise.

Secondly, by the terms of the will, the representative of K. M. Bennett is entitled to share in the fund.

The gift is to the children of the children, unaffected by any such condition as that of surviving the widow, the Court has no authority to introduce such a contingency. If there had been a direct gift, it could not be contended that it was not vested, and there being a mere direction to transfer makes no difference; it is a mere modification of the same sort of gift. The issue would mean the issue living at the death of the parent, and not of the tenant for life; and if the construction of the other side be adopted, the words "if dead, leaving lawful issue," must be rejected. The testator's daughter Kezia died, leaving issue, and the only condition was performed. The language which requires the legatee to be alive at the death of the tenant for life, applies only to the children of the testator.

Mr. P. Leigh, in reply. It was never referred to the Master to approve of a contingent gift being converted into an absolute interest.

Gray v. Garman (2 Hare, 268), *Pinbury v. Elkin* (1 P. Wms. 563), *Barnes v. Allen* (1 Bro. C. C. 181; and 3 Ves. 208, n.), *Stanley v. Wise* (1 Cox, 432), *Tytherleigh v. Tartin* (6 Sim. 329), [365] *Christopherson v. Naylor* (1 Mer. 320), *Butler v. Ommamey* (4 Russ. 70), *Waugh v. Waugh* (2 Myl. & K. 41), *Peel v. Catlow* (9 Sim. 372) were cited.

THE MASTER OF THE ROLLS [Lord Langdale]. In the first place, it does not appear to me, that the orders which were made for the purpose of compromising the former suit, do determine this question in any way whatever. The Court sanctioned a compromise, and Kezia May Bennett was to be considered entitled to one-third part of the estate in the stead of her late mother deceased. Was she to be entitled to it absolutely, by arrangement between the parties, and independently of the will, or as legatees under and according to the terms of the will?

If this question had been raised at the time, and upon consideration of the matter, and on looking at the Master's report, the Court had determined that she was absolutely entitled, the fund would, without doubt, have been placed to her account absolutely. If, on the other hand, the Court had determined that it was contingent upon her living at the death of the tenant for life, then it would have been carried to her contingent account. I therefore consider this question to be open.

I do not delay putting a construction on this will, for I think I could not acquire greater certainty by further consideration. There is, I think, great inaccuracy and uncertainty in the expressions. The testator, speaking of the residue which he had given to the trustees, says this, "upon trust to pay, assign, transfer," &c., "the residue unto and amongst all and every my said children who shall be then living," that [366] is simple enough; but then he proceeds "or if dead, 'leaving,' or 'having' lawful issue, in equal shares and proportions, if more than one, and if but one, then to such only child."

This clause, by itself, is ambiguous; but the next clause shews clearly that he meant the issue to take, for he says "the issue of any of my said children to take the share their father or mother would have been entitled to." So it is clear he intended the issue were to take under the former clause; he assumes that, as appears from that which follows immediately afterwards.

Then what issue were to take? Clearly the issue of any child of his own who might be dead at the time of the death of the tenant for life. And then comes the question, whether the issue of any daughter living at the time of her death, but who afterwards died in the lifetime of the tenant for life, could take. That is the question decided on the present occasion.

Now with regard to the general rule as to gifts in remainder, there is no doubt. The question is, whether the peculiar wording of this will does not lead to a different construction. I conceive that the expression in the first part, construed by the last, applies a gift to the children who should be living at the time of the death of the tenant for life, and to the issue of any child who may have previously died, such issue being living at the death of the tenant for life. I think so, because the words which follow shew that he clearly intended the issue to take by substitution, for "the issue of any of his said children are to take only the share their father or mother would have been entitled to."

[367] The gift also is to be by a transfer or payment, and not in any other way; the transfer or payment is "to be made to those children of the testator who might be then living," namely, at the time of the death of the widow. The issue of any daughter who might have previously died, is to take, by way of substitution, "the share the mother would have been entitled to."

The words "transfer and pay" constitute the gift both to the children living at the time of the testator's death, and to the issue. And I do not think it unworthy of consideration here, that if you construe it in any other way, you apply the same words in one case to the class of children living at the death of the tenant for life, and in the other case, to the issue not only who were then living, but who had previously died.

The case is attended with considerable doubt and difficulty; but, on the whole, it appears to me, upon the construction of the words of this will, that the gift was intended to be for the benefit of those persons only who were living at the death of

the tenant for life, and the whole issue of one of the children of the testator having died in the lifetime of the tenant for life, I think that the other children are entitled

[363] HEARN v. WAY. July 28, 29, 1843.

The Plaintiff upon a demurrer being filed wrote to say he submitted thereto, and would obtain an order to amend. More than two months afterwards, he obtained an order, as of course, to amend, it was discharged for irregularity. Practice as to filing, entering, setting down, and submitting to a demurrer.

On the 7th of March 1843 the Defendant filed a demurrer to the Plaintiff's bill and gave notice thereof to the Plaintiff's solicitors on the same day.

On the 11th of March the Plaintiff's solicitors wrote to the Defendant's solicitors stating that they were instructed to submit to the demurrer, and that an order to amend would be obtained forthwith.

The demurrer was neither entered by the Defendant, nor set down by the Plaintiff. The Plaintiff took proceedings to obtain administration to the parties, whose absence was the cause of the demurrer, which he effected on the 4th of May, and on the 12th of May he obtained an order of course to amend the bill, on payment of 20s. costs. The order was in the common form, and contained no statement of the special facts which had occurred in the suit.

It was now moved to discharge this order for irregularity, with costs.

Mr. Pemberton Leigh, for the motion.

Mr. Willcock, *contra*.

Bullock v. Edington (1 Sim. 481), *Nicholson v. Peile* (2 Beavan, 497), *Charles v. Richmond* (4 Beavan, 397), *Jordan v. Sawkins* (3 B. C. C. 372).

[369] July 29. THE MASTER OF THE ROLLS [Lord Langdale]. The Defendant having filed a demurrer, is to give notice to the Plaintiff of his having done so (Ord. Can. 216.)

And within eight days after the filing, he is to enter the demurrer with the registrar. Neglecting to do so, the demurrer will be overruled, or deemed to be abandoned. (Beames' Orders, 287; and see *Dalton v. Hayter*, 7 Beav. 250.)

After the demurrer has been entered, either party may set it down for argument. Upon the demurrer being filed, the 34th Order of August 1841 (Ord. Can. 17) declares, that it shall be held sufficient, unless the Plaintiff shall, within twelve days from the expiration of the time allowed to the Defendant for filing such demurrer, cause the same to be set down for argument.

Before the demurrer is set down, the Plaintiff may obtain an order, as of course, to amend the bill, on payment of 20s. costs. (*Warburton v. The Blackwall Ropewalk Company*, 2 Beavan, 255.)

If the demurrer has been set down, the Plaintiff submitting thereto, is not to amend without the payment of additional cost. (*Anon.* 9 Ves. 221; 32d Ord. April 1828; Ord. Can. 17.)

On the 12th of March before the notice was given, it was the duty of the Defendant to enter and set down the demurrer, and the Plaintiff was at liberty to amend on payment of 20s. costs.

[370] The Plaintiff did not then amend, and he put a stop to any further steps on the part of the Defendant, by giving notice that he submitted to the demurrer, and intended to amend.

I am of opinion, that the Plaintiff's notice relieved the Defendant from the necessity of entering the demurrer, and that after it, the Plaintiff would have had reason to complain, if the Defendant, instead of trusting to the notice, had proceeded to enter and set down the demurrer.

The Defendant had reason to complain that the Plaintiff did not amend his bill till more than two months after his notice.

And I am of opinion, that if the Plaintiff had stated on his petition for leave to amend, the time which had elapsed since the demurrer was filed, or that he had given

notice two months before, that he submitted to the demurrer and intended to amend, the order ought not to have been granted, as of course.

[371] STOCKEN v. DAWSON. May 5, 8, 1843.

[S. C. affirmed on appeal, 17 L. J. Ch. 282.]

A surviving partner being the executor of his deceased partner, is not entitled to an allowance for carrying on the business after his partner's decease, for the benefit of the estate; nor is an executor and legatee of such surviving partner.

This case came before the Court upon exceptions and for further directions.

The facts, so far as relates to the point intended to be reported, are sufficiently stated in the judgment of the Court.

Mr. Pemberton Leigh, Mr. Turner, Mr. Wood, Mr. Kindersley, Mr. Goodeve, Mr. Gordon, and Mr. Prendergast for the several parties.

Wedderburn v. Wedderburn (2 Keen, 722), and *Brown v. De Tastet* (Jacob, 284), were cited.

July 31. THE MASTER OF THE ROLLS [Lord Langdale]. In and before the month of May 1820 John Stocken and William Stocken carried on the business of brewers, in partnership together. John Stocken, being entitled to some real estate, and also to some personal estate, besides that which was employed in the brewery, died on the 31st day of May 1820, having made a will, dated the 6th of July 1818, whereby, after devising as therein mentioned to his son James Julius Stocken (the Plaintiff), and his daughter Maria Mattam (a Defendant), and reciting that he was jointly with his brother William Stocken possessed of or entitled to certain property, including the brewhouse, garden, cooper-[372]-age, maltlofts, and appurtenances then used and occupied by himself and his said brother, he devised his undivided moiety thereof to William Stocken, Thomas Carlton and Benjamin Dawson, in trust to receive the rents, and apply the same towards the support of his son and daughter during their minorities; and when the youngest of them come of age, he devised the same to them in equal shares. He directed that within a reasonable time after his death, his share in the brewery and the good-will thereof, and the stock and things used therein, should be valued and ascertained, and should be offered for sale to his brother William, on fair and reasonable terms. And that he, if he would consent to purchase the same, should be put in possession thereof, on his giving or giving security to the testator's executors for payment of the value, at such reasonable times as they should think proper; and that the monies arising therefrom, and from the joint debts due to the brewery partnership, when got in, should fall into the residue of his personal estate. And he directed, that if his brother William should take his moiety of the brewery, stock and appurtenances, he should have the option of purchasing any part of the testator's moiety of the copyhold premises in the will mentioned; but if his said brother should decline to take and purchase his moiety in the brewery, &c., he directed that it should continue and be carried on in the same manner in which it then was, for the better maintenance and support of his wife and children. And he gave the residue of his estate equally between his children on their attaining twenty-one years of age; and appointed William Stocken, Thomas Carlton and Benjamin Dawson, executors of his will, and trustees for the purposes thereof.

In the month of October 1820 the will and a codicil thereto were proved by William Stocken and Benjamin [373] Dawson. In the preceding months of June and August, a valuation of the brewery and part of the property connected therewith was made, with a view to the purchase thereof by William Stocken; and the rest of the property connected with the brewery being afterwards valued in February 1822, the whole was stated to amount to the sum of £6429, 17s., from which being deducted the debts of the concern and other sums, the testator's moiety of the remainder was stated to be £2413, 4s. 9½d.

The business was, after the death of John Stocken, carried on by William Stocken,

up to the time of his own death. He appears to have considered himself absolute owner of the business and property, under the leave to purchase given by the will and upon the valuations which had been made. He died on the 23d day of February 1824, having first made a will, dated the 1st of November 1823, whereby he gave to his son the Defendant Oliver Thomas Joseph Stocken, all his interest in the brewery and in the freehold, copyhold, and leasehold premises in which the business was carried on, and whereby he appointed Oliver Thomas Joseph Stocken, James King and Benjamin Dawson executors thereof.

The executors of William Stocken having proved his will, they, or Oliver Thomas Joseph Stocken with their assent, took possession of the brewery, and he, considering himself to be owner under his father's will, carried on the business thereof as though for his own benefit.

It was alleged on the part of the Plaintiff during his minority, that either no valuations as were stated to have been made by William Stocken had in fact been made, or that if made, the same were inaccurate and improper; and on the 13th January 1827 the bill was filed by the Plaintiff then an infant, by his next friend [374] against Benjamin Dawson, the surviving executor of John Stocken, and one of the executors of William Stocken, Oliver Thomas Joseph Stocken and James King the two other executors of William Stocken, and Peter Mattam, and Maria his wife who was one of the residuary legatees of John Stocken; and the bill, alleging that William Stocken had not become the owner of the brewery and property connected therewith, prayed the usual accounts of the personal and real estates of John Stocken, and also an account of the profits of the brewery which accrued from the death of John Stocken to the death of William, and what was due from Dawson the executors of William in respect thereof. The bill also prayed an account of debts, funeral and testamentary expenses and legacies of John Stocken, and that the clear residue of his estate might be ascertained, and the Plaintiff's interest therein secured for his benefit, and that the trade and business and the good-will thereof might be sold, and one moiety thereof secured for the Plaintiff, and for a receiver.

The cause came on to be heard in the month of November 1830, and by decree then made, after referring it to the Master to take the usual accounts of the real and personal estates of John Stocken, it was declared, that the interest of John Stocken in the brewery was not affected by the valuation and purchase in the pleadings mentioned. And it was referred to the Master to take an account of the profits of the brewery, which accrued due since the death of John Stocken up to the death of William Stocken, and of the profits accruing therefrom from the time of the death of William Stocken, come to the hands of Benjamin Dawson and William Stocken in his lifetime or either of them, or to the hands of Benjamin Dawson, Oliver Thomas Joseph Stocken and James King since the death of William Stocken, and [375] the Master, in taking the accounts, was to make unto the parties all allowances.

The cause was reheard before the Lords Commissioners on the 24th of August 1835, and an error was corrected, but in substance the decree was confirmed.

The Plaintiff's second exception complains of the allowance of two sums £100, 2s. 9d. and of £15, 15s. for payment made in respect of valuations of partnership property made in the months of April and June 1822; and as it appears to me that these valuations were made with a view to the purchase of the partnership stock by William Stocken, which purchase has been set aside, I think that the expense of the valuation should not be charged against the estate of John Stocken and consequently that the Plaintiff's second exception should be allowed.

The fourth exception must, I think, also be allowed, as it does not appear that the valuation therein mentioned and charged for was an expence properly incurred in carrying on the brewery business. If it had appeared, as was suggested, that the valuations mentioned in the second and fourth exceptions had been made in the direction of William Stocken in the proper discharge of his duty, as executor of John, the expence ought to have been allowed.

The eleventh and twelfth raise, and depend upon, the question whether William and Oliver were entitled to allowances for their trouble in carrying on the business. As to the allowances, John and William Stocken were partners in trade, carry-

a business in which they were equally interested, without articles. William Stocken [376] survived, and carried on the trade. The will of John Stocken enabled him to purchase John's share of the business, and he intended to do so, but the decree declares, that the interest of John is not affected by the valuation and purchase of William, so that we must see what was to be done in the absence of a purchase by William, and the will of John directs that if William declines to purchase, the business shall continue and be carried on in the same manner it then was, for the maintenance and support of the testator's wife and children. This case appears to me to fall directly under the authority of *Burden v. Burden* (1 Ves. & B. 407); and I am therefore of opinion, that William Stocken was not entitled to the allowance claimed for his trouble; and, I think that Oliver, who succeeded to the management of the business, as the legatee and an executor of William, can be in no better situation, and I therefore disallow these exceptions.

[376] SPALDING v. RUDING. March 24, 25, July 8, 1843.

12 L. J. Ch. 503, affirmed on appeal, 15 L. J. Ch. 374. See *Berndtson v. Strang*, 1867, L. R. 4 Eq. 486; *Piggott v. Piggott*, 1867, L. R. 4 Eq. 561; *Coventry v. Gladstone*, 1868, L. R. 6 Eq. 48; *Rodger v. Comptoir d'Escompte de Paris*, 1869, L. R. 4 P. C. 407; 5 Moo. P. C. (N. S.), 557; 16 E. R. 625; *Ex parte Golding, Davis & Company, Limited*, 1880, 13 Ch. D. 628; *Ex parte Falk*, 1880, 14 Ch. D. 457; and in House of Lords (sub. nom. *Kemp v. Falk*), 1882, 7 App. Cas. 573; *Sewell v. Burdick*, 1884, 10 App. Cas. 85.]

equity, a transfer of goods for valuable consideration by a consignee for a limited purpose, does not destroy the consignor's right of stoppage *in transitu*, ultra the particular lien of the transferee.

consigned goods of the value of £1800 to B., who transferred the bill of lading to C. to secure £1000. B. having become bankrupt, C., as B.'s factor, claimed, as against A.'s title to stop *in transitu*, a right to retain the whole in satisfaction of a general balance due to him from B. Held, first, that he was not entitled beyond the £1000; and, secondly, that A.'s remedy against C. for the surplus, was in equity.

The Plaintiffs were merchants residing at Stralsund; on the 17th of May 1841 their agent Mr. Schleicher, on their behalf, sold to James Williams Thomas a quantity of wheat, at 35s. per quarter free on board, the shipment to be made with to London, at the current rate of freight, and the amount to be [377] paid for on Thomas at three month's date, payable in London on handing invoice bill of lading.

The Plaintiffs accordingly, on the 1st of June 1841, shipped at Stralsund, by the "Ceres" 714 quarters of wheat; a bill of lading was signed by Zillmer the master of the ship in the usual form, and the Plaintiffs, having made out and signed invoice of the wheat, sent the same with the bill of lading to Thomas, and, at the same time, drew upon them three bills for the amount in the whole of £1264, 2s.; by letter requested Thomas to protect those bills.

Thomas received the bill of lading and invoice on the 8th of June 1841, and he thereupon requested Ruding to accept for him a bill of exchange for £1000, payable three months after date, which Ruding agreed to do, on receiving from Thomas a memorandum or letter signed by Thomas to this effect:—

"London, 9th June 1841.—Messrs. J. C. Ruding & Son.—Gentlemen,—In consideration of your having this day accepted my draft on you at three months' date for £1000 on a cargo of wheat (viz., 3825 scheffels), from Stralsund per the "Ceres," a ship of Zillmer, of which I have handed you the policy of insurance for £1600 and a bill of lading, I authorise you to dispose of the same on my account, subject to your usual commission and charges, before such bill becomes due; or, I undertake to provide you with cash to the amount of your advance, should I wish you to hold it good at that time.

JAMES W. THOMAS."

On the 1st of July 1841, the ship "Ceres" with the wheat on board, arrived in the port of London. About [378] this time, Mr. Thomas stopped payment. On the 2d of July Schleicher, the agent of the Plaintiffs, gave a verbal notice, and on the 3d of July a written notice to Zillmer the master of the "Ceres," not to part with the wheat, without the orders of the Plaintiffs. On the 5th of July a fiat of bankruptcy was issued against Thomas, and on the same day Schleicher again gave notice to the master not to part with the wheat, but being then informed that the bill of lading had been indorsed and delivered to Ruding as a security for monies lent, he permitted the wheat to be delivered to Ruding, but on the same day gave him notice, that the Plaintiffs claimed to be entitled to the wheat and the proceeds thereof, and did so by removing the stop placed upon the delivery to Ruding, abandon their claim, and that in case Ruding should be entitled by law to any part of such proceeds, the Plaintiffs claimed the balance which should remain, after satisfying such claim, if any as Ruding might by law have.

Ruding claimed to be entitled to apply the proceeds of the wheat, not only to payment of the £1000 bill which he had accepted, and the freight and other charges of the shipment, but also in satisfaction of the balance of a general account which was alleged to be subsisting between himself and Thomas. Under these circumstances the Plaintiffs offered to pay him £1200 in satisfaction of his acceptance, and the charges on the wheat, and requested to have the wheat thereupon delivered to them. This was on the 23d of July. Mr. Ruding refused to accept the money offered to him, or to deliver up the wheat, and he afterwards, on the 21st of August 1841, sold it for £1822, which he retained to his own use. Having subsequently, in December 1841, declined to acknowledge that the Plaintiffs had any claim whatever, this bill was filed on the 31st of December 1841.

[379] The bill prayed, that an account might be taken of the monies which had come to the hands of the Defendant Ruding, in respect of the wheat, and also of the monies due to the same Defendant on the security of the bill of lading. That the Defendant might be allowed such last-mentioned monies, and might pay to the Plaintiffs the balance of the monies arising from the wheat.

Mr. Pemberton Leigh and Mr. Wood, for the Plaintiffs.

Mr. G. Turner and Mr. Fisher, for the Defendant Ruding.

Mr. Bichner, for the assignees of Thomas.

In re Westzinthus (5 B. & Ad. 817), *Cox v. Prentice* (3 M. & Sel. 344), *Lickbarrow v. Mason* (4 B. P. C. 57; 2 Term R. 63; and 6 East, 20, note (a.)), *Patten v. Thompson* (5 M. & Sel. 350), *Jones v. Jones* (8 Mee. & W. 431), *Ex parte Deane* (1 Atk. 22), *Young v. The Bank of Bengal* (1 Moore, Pr. C. Cases, 150), *Ex parte Ockendon* (1 M. 235), *Dixon v. Yates* (5 B. & Ad. 313), *Oppenheim v. Russell* (3 B. & P. 42), *Sant v. Prescott* (1 Atk. 245), *Wiseman v. Vandepuut* (2 Vern. 203), *Houghton v. Matthews* (3 B. & P. 485), *Goodhart v. Lowe* (2 J. & W. 349), *Ex parte Gwynne* (12 Ves. 379), *Hodges v. Loy* (7 T. R. 440), *Weldon v. Gould* (3 Esp. 268), *Hewason v. Guthrie* (3 Scott, 30), *Phillips v. Huth* (6 Mee. & W. 572), *Drinkwater v. Goodwin* (Cowper, 251), *Walker v. Birch* (6 Term Rep. 258), *Worrall v. Johnson* (2 Jac. & W. 214), were cited.

[380] July 8. THE MASTER OF THE ROLLS [Lord Langdale]. I apprehend it to be clear, that the indorsement and delivery of the bill of lading by Thomas the consignee to Ruding, for valuable consideration, gave to Ruding the legal right to the delivery and possession of the goods. That right is not disputed by this bill, but the Plaintiffs insist, that under the contract subsisting between Thomas and Ruding, the right to the possession of the goods was vested in Ruding, only as a security for the repayment to him of his advance and charges, and that subject to that security, the Plaintiffs, in the consideration of a Court of Equity, retained their right to a stoppage *in transitu* against the assignee or indorsee of the bill of lading; it appears that in the case of *Westzinthus* (5 B. & Adol. 817) the Court of Queen's Bench held, that in such a case, a Court of Equity would hold such a transfer to be a pledge or mortgage only, and that the attempt to stop *in transitu* gave a right to the goods, in equity, subject only to the lien for the advance.

The propriety of that opinion was questioned, but, as it appears to me, without sufficient reason. As against Thomas, I think that the Plaintiffs had a right to stop the goods *in transitu*; and, although the legal right to the goods was transferred with

the bill of lading, yet I think, that in equity, the transfer took effect only to the extent of the consideration paid by the transferee, leaving in the Plaintiffs an equitable interest in the surplus value.

In the argument for the Defendants it was urged, that they, in the character of factors for Thomas, had an interest of their own to retain the surplus value in [381] satisfaction of a balance due to them from Thomas; and, secondly, that any interest of the Plaintiffs, though of an equitable nature, might be made available in an action to be brought by them against the Defendants in this cause; but the goods came to the hands of Ruding under a special contract, interfering with any general right which he might have as factor; and, even if the Defendants were entitled to be considered as factors of Thomas, having a balance due to them, it does not appear to me, that, as against the Plaintiffs the owners and shippers of the goods entitled to them *in transitu*, they could, by virtue of the bill of lading, have a right to retain more than the consideration they paid for the advantage which the bill of lading gave them; and as to the action, the legal right to the goods being clearly in the Defendants, it does not appear to me that the Plaintiffs could have obtained, at law, that relief which I think them entitled to here.

I am therefore of opinion that the Plaintiffs are entitled to the decree which is made by the bill, and that an account must be taken of the monies received by the Defendants in respect of the wheat in question, and of the monies due to the Defendants on the security of the bill of lading, and that the balance may be ascertained and paid to the Plaintiffs by the Defendants.

[382] THE ATTORNEY-GENERAL v. THE DRAPERS' COMPANY. (HOWELL'S CHARITY.) May 3, 1843.

[S. C. 12 L. J. Ch. 421; 8 Jur. 1060.]

A bequest was made to a corporation, in terms which devoted the whole improved income to a charity. In 1559, the corporation, by their answer in a suit, offered to apply the whole income to the charity. The decree directed the distribution of the whole existing income, and provided that in case of an increase, the objects should receive an increase limited to £16, but it made no disposition of any surplus. Held, that under this decree the corporation was not, by implication, entitled to such surplus.

Generally, a charitable gift must be accepted according to the declared intention of the giver; but a corporation not being bound to accept an accession to its foundation, may consent to receive it with qualifications, which may be collected either from documents, or constant usage adopted at the time and persevered in afterwards.

Charity informations, the account is sometimes carried back to the date of the report of the Charity Commissioners, sometimes it is directed from the filing the information, and sometimes from the decree, according to the circumstances of each case.

This was an information filed by the Attorney-General, on the certificate of the Charity Commission, under the following circumstances:—

The testator, Thomas Howell, being resident at Seville, made his will in 1540, whereby he bequeathed in the words following:—"Item, I comaunde myne exors, that I leve in Syvall that incontinnt after my deathe, doo send to the City of London 12,000 duckats of golde by billes of Cambio, for to delyver to the house called the Drapers' Hall, to delyver theyme to the wardaynes therof, and the wardaynes as sone as they have received the same 12,000 duckats, to bye thereunto 400 duckats of rent yarely for ever more, in possession for ever more. And it is my will that the saide 400 duckats be disposed vnto foure maidens, being orphans, out of my kynne and of bludde, to theire marriage, if they can be founde, every one theyme to have 100 duckats; and if they cannot be founde of my lynnage, then to be given to other foure maydens, though that they be not of my lynnage, so that

they be orphans honest and of good fame, and every of theyme 100 duckats, and every yere, for to marry foure maydens [383] for ever. And if the saide 12,000 duckats will bye more lande, then the saide 12,000 duckats to be spent to the marriage of maydens, being orphans, increasing the foure maydens aforesaide, as shall come by the discretion aforesaide of the master and wardaynes of the saide house of Drapers' Hall, and that this *memoria* to remayne in writing, in the booke of memoryes in the saide howse, in suche manner as it shall at no tyme be undon for ever."

The sum of 8720 ducats only was transmitted to the Drapers' Company.

In 1543 the Drapers' Company purchased from Henry VIII. some property in the City of London, which had been forfeited by the attainder of Cromwell, Earl of Essex, which was conveyed to them; and the company covenanted with the king to distribute the clear rents "to and for the marriage of poor maidens, being orphans."

About 1559 a suit was instituted in this Court (*Cryssly v. Chester*) by certain female orphans, alleged kinwomen of the testator, stating that the Defendants had purchased lands of the yearly rent of £105, but had disposed of the residue of the said bequest to their own benefit, and claiming the benefit of the said charity. The Drapers' Company, by their answer in that suit, admitted that the rent of the premises purchased with the charity funds amounted to £105 a year, but said that £30 a year was expended in the reparations; and they stated "that they always intended, and still did intend, God willing, as near as they could, to perform the said will and testament of the said Thomas Hoell, with as much of the rents of the premises as should come clearly to their [384] hands, over and above all charges, if they were ascertained, or hereafter should be ascertained, what maidens or orphans of his kin or lineage ought of right to have the same legacies according unto his will, which thereunto they could not perfectly attain to know."

By the decree in that suit, it was ordered that £84 a year should be paid "out of the rents and revenues" by the company amongst four orphans, £21 to each; and it was provided that if the premises should be decayed by casualty by fire, so that the £84 could not be levied, the company should be charged with an apportioned part only; and it was further provided, that if the property should be improved, above £84 payable to the orphans and £21 allowed to the company for their ordinary and extraordinary charges, that then the same improvement, over and above the sum of £84 and £21, should be equally divided and paid, yearly, to the said four orphans, portion and portion alike, in form thereinbefore recited; forseeing always, that the same improvement yearly to be divided to the said four orphans *did not exceed the value of £16 by the year*. And it was provided, that if the company should receive the remaining 3280 ducats, or such portion as would purchase an increase of lands, &c., to the yearly value of £16, then the company should pay the four orphans so much as the increased rent should amount to, "forseeing that in the whole the said orphans should not be paid above the yearly sum of £100."

The property now consisted of the hall of the Drapers' Company, and other premises producing more than £2000 a year. The company paid £84 a year to the maiden orphans, and carried the residue to the account of the company's income, but they expended a considerable part of their general income in charitable purposes.

[385] The information insisted, that the company were bound to apply the whole income towards the purposes of the charity.

The company, by their answer, relied on the former decree, and submitted, whether they were entitled to appropriate the surplus income to their own use; however, they said, that it had always been considered by the company, that, fulfilling the requisitions of the former decree, which they were willing to do, they were entitled to the property, and were freed from all further demands.

THE SOLICITOR-GENERAL, Mr. Pemberton Leigh, and Mr. Blunt, in support of the information, contended that, under the terms of the will, no benefit was given to the Defendants. That, both by their covenant with King Henry the Eighth, and their answer in the former suit, they were bound to apply the whole income to the charitable objects. That the decree did not give to them any interest in the surplus, and that if it did, still that the decree was not binding on the Attorney-General, he not having been a party to the suit.

Sir Thomas Wilde, Mr. Kindersley, and Mr. Lloyd, *contra*, insisted, that under the

decree the benefits to be taken by the objects of the charity were expressly limited to £100 a year, and that, by implication, the company was to receive the surplus. That every presumption ought, at this distance of time, to be made in favour of the Defendants who, were shewn, by constant usage, to be entitled to the surplus; and that, as the gift was to a class of relatives of the testator, it was not necessary that the Attorney-General should be made a party to the former suit.

[386] *The Attorney-General v. The Coopers' Company* (3 Beavan, 29) was cited.

THE MASTER OF THE ROLLS [Lord Langdale]. It appears perfectly clear, from the terms of the will, that the testator intended that the whole of the rent of the purchased property should be applied to the purpose indicated by him; and subsequently, on the occasion of the purchase, when the company obtained the grant from the Crown, they expressly covenanted, that the whole rents should be so applied.

In the answer of the Defendants in the former suit, there is a passage which is of the utmost importance in this case, not only as shewing their view of the uses to which they were bound to apply the gift they had accepted, but also for the purpose of ascertaining the questions raised in that case, and what was then decided by the Court. It is also of some importance, as shewing in what way the gift was accepted, because there have been instances, in which the Court has held, that, from contemporaneous transactions, you may infer the nature and extent of the trust assumed by the persons who accepted a gift. No doubt, generally speaking, a gift must be accepted according to the intention of the giver as declared at the time, but where the object is to make a corporation undertake the management of a trust, then, as was stated by Lord Eldon in *The Catherine Hall case* (Jacob, 381; and see *The Attorney-General v. Caius College*, 2 Keen, 150), the college, being under no obligation whatever to accept an accession to its foundation, may only consent to receive an increase subject to certain qualifications, which the Court may collect from the transactions that took place at the time, as evidenced by documents, or as [387] proved by a constant usage adopted at the time, and persevered in downwards. This is not a case precisely of that sort, but here we have the Defendant's declaring, by their answer, "that they always intended, and still do intend, God willing, as near as they could, to perform the will and testament of Thomas Howell, with as much of the rents of the premises as shall come clearly to their hands."

It is to be observed, that at this time, the rents, being £105, were unequal to answer the full purpose of the founder. The decree approves of a scheme by which the whole was disposed of. It gives £21 for the reparation and maintaining the property, and £84 for the portions to be given to the poor maidens; and, it is to be observed, that nothing whatever is reserved to the company. If the company were to have been supposed by the Court to be entitled to a beneficial interest in the rent, surely it would not have been very just to abandon and neglect such interest altogether.

No such declaration was however made, nor could it have been made, because the company had stated in their answer that they were willing to apply towards the charity all that clearly came to their hands. This decree being made with reference to the rents then received and exhausting the whole, it certainly might be expected, that some provision would have been made in the case of any increase or decrease of the rents, especially as the sums to be applied by the company were to be paid out of the rents. Accordingly provision is made for the event of a decrease by destruction by fire. It is true that no direction is contained for a decrease by any other event; but is it to be collected, that in every other event, the decrease was to be made good by the com-[388]pany out of their own funds? when they were directed to apply these sums "out of the rents."

On the other hand, there might be an increase, either by the improvement of the rents of the estates already purchased, or by new purchases to be made with that part of the money which had not then been transmitted from Spain; in both these cases, a provision was made for an increase to the extent of £16, which, added to the £84, would make £100, or four sums of £25 for each maiden. Now, without having arithmetical demonstration of it, I feel strongly persuaded that it was intended to increase the sum to that intended by the testator himself to be the endowment of each poor maiden, and I do not entertain a reasonable doubt that this was what the

decree had in view. There is not one word as to any other further surplus that might probably arise; there was an offer by the Defendants to apply everything, and in that state of things the Court was silent, and did not proceed any further.

The question is, whether I am to collect from that decree that the Court declared, by implication (an express declaration is not found or contended for in any way), that because it had not disposed of the surplus beyond £16, the rest was to be applied for the benefit of the company. I confess I am totally unable to follow the reasoning by which that is attempted to be made out. If it had been intended, there ought to have been an express declaration, but there could not on those pleadings have been any such a declaration; because it would have been contrary to the offers of the company by their answer. The question never did arise or could arise upon the pleadings in that case, and I am of opinion, that the decree does not, by anticipation, decide the question which is brought before me to-day.

[389] I must, therefore, look at these documents, and see whether (according to the rules of construction which have been adopted in this Court, where funds are given to a charity with a direction to apply them all to the purposes of the charity, in a manner to exclude all notion of a beneficial interest being vested in the trustees), the trustees have a right to apply all the funds, beyond what was disposed of by the decree, to their own benefit; I am of opinion that I cannot do so, and that, on the contrary, I must make an opposite declaration.

As to the time from which the account against the Defendants should be taken, I must say that nothing can be more satisfactory in an investigation of this kind, than to find, that there is no possibility of any imputation of bad or corrupt conduct on the part of the Defendants. The present Defendants, beyond all question, have applied this fund just in the manner in which it has been applied by their predecessors; in all probability, they never looked at the original foundation at all, but instead of applying it to any beneficial purposes of their own, it is now shewn by the evidence and by their answer, and it is admitted by the Attorney-General, that they have applied the funds in a beneficial manner for the most useful charitable purposes.

It is, therefore, quite satisfactory to me to find, that the Attorney-General confines his claim for an account from the filing of the information, and the account, therefore, must be directed from that time alone, and I may say, that if it had been pressed further back, I think I must have come to the same conclusion; and that I could not, with any justice, have charged this company with applying to its own purposes any of those funds. Every case depends upon its own circumstances; there [390] are cases in which the account has been taken from the time when the information of the erroneous application was made known, namely, from the publication of the report of the Charity Commissioners. Other cases in which it has been directed from the time of filing the information, and others from the date of the decree. Those three periods of time have, according to the various circumstances of each case, been adopted; but I think that which is now proposed by the Attorney-General, is what is quite right to be done in this case.

With respect to the costs, the company have thought fit to have this question tried, in order that they might have the application of this money, according to their own view of what was right. (*The Attorney-General v. The Drapers' Company* (Kendrick's Charity), 4 Beav. p. 72; *The Attorney-General v. Christ's Hospital*, 4 Beav. p. 75.) If the costs are asked against the company by the Attorney-General, he must have them.

I think, therefore, there must be a declaration that all this income is applicable to the purposes of the testator's will. The account must be taken from the filing of the information, and the costs must be paid by the Defendants.

[391] DE WEEVER v. ROCHFORD. July 14, 1843.

Special order for allowance of maintenance to an infant resident with her father out of the jurisdiction.

A reference was made to the Master, to inquire if the father of the infant Plaintiff was of ability to maintain her, and if not, to approve of a proper allowance for that purpose.

The Master reported that the father was not of ability, and he submitted, that the income of the property in Court ought to be paid to the Plaintiff's father for her maintenance and education during her minority.

A petition was presented to confirm the Master's report, and for an order for payment to the father.

The infant Plaintiff and her father were both living in Demerara, out of the jurisdiction of the Court.

Mr. Freeling, in support of the petition.

THE MASTER OF THE ROLLS [Lord Langdale] said, he doubted whether it was the practice of the Court, where an infant and her father were living abroad, to direct payment of maintenance to the father, and he suggested that the order should be, that some person resident in this country should be appointed guardian to whom the money should be paid. He, however, directed the petition to stand over in order that the authorities might be looked into.

The case was mentioned again, when

[392] Mr. Freeling referred to a case of *Bliss v. Putnam* (Rolls, 19th November 1840), in which the infant and her mother, who was her guardian, were residing in Canada, and it was ordered, that upon production, from time to time, to the Accountant-General of this Court, of an affidavit of Mrs. Putnam, the mother, that she had duly applied in the maintenance and education of the infant Petitioners, all moneys received by her on that account, up to the time of making such affidavits, respectively, an allowance of £600 a year should be paid to the attorney for the father in England, during the respective minorities of the infant Petitioners, for their maintenance.

THE MASTER OF THE ROLLS [Lord Langdale] now ordered as follows:—That Mr. De Weever should appoint an attorney to receive the maintenance, and, upon the appointment of such attorney, the dividends of the funds in Court should be paid to the attorney, half-yearly, upon the production to the Accountant-General of an affidavit that he had duly applied, in the maintenance and education of the infant, all moneys received by him on that account, up to the time of making such affidavits respectively. (1)

(1) See *Jeffrys v. Vantesswardthwarth*, Barnard, 141; *Lethem v. Hall*, 7 Sim. 141; *Wren v. Hambury*, Jacob, 265, n.; *Logan v. Fairlee*, Jacob, 193; *Stephens v. James*, 1 Myl. & K. 627; *Biggs v. Terry*, 1 Myl. & Cr. 676; *Wynham v. Lord Ennismore*, Keen, 467, and the following two cases:—

In re Levinge, 4th July 1797.

The infant was entitled to real estates in England and Ireland, his father was dead. Infant's mother proposes that Richard Reynell, the maternal uncle of the infant, who was resident in Ireland, and had been appointed guardian of the infant's estate in Ireland by the Court of Chancery there, should be appointed guardian of the estate in England.

Order accordingly, Mr. Reynell entering into a recognizance with two sureties to account; and a commission directed to take the recognizances in Ireland.—Reg. Lib. 1796, B. fol. 618.

In re Daly, 22d May 1798.

Infant entitled to estates in England and Ireland, his father dead.

His mother resident in Ireland, had been appointed guardian of person and estate in Irish Chancery.

Order that she be appointed guardian of person and estate in England, entering into recognizances to account for what she received, and for a commission to take the recognizances in Ireland.—Reg. Lib. A. 1797, fol. 1029.

Same Case, 22d December 1802.

Similar order as to brother of the infant.—Reg. Lib. A. 1802, fol. 142.

[368] DAVIS v. BLUCK. July 14, August 1, 1843.

[S. C. 7 Jur. 805.]

Bill ordered, upon motion, to be taken off the file, on the ground that it was a supplemental bill in the nature of a bill of review, which ought not to have been filed without the leave of the Court.

A contract was entered into for the sale of the vendor's interest in a lease and premises at Doncaster, known as the Betting-Rooms, for the remainder of the lease granted by A. A bill for specific performance was filed by the purchaser, in which and in the decree the agreement was treated as comprising the premises held of A, and an account of the rents was directed. It turned out that the rooms and premises were partly under A. and partly under B., whereupon the vendor filed a second bill, praying a declaration that the whole was comprised in the agreement. Held, however, that the Plaintiff could not, upon a rehearing, obtain the relief asked by the second bill, nor could he, by such second bill, obtain the relief thereby prayed, whilst the decree stood in its present form; that to obtain the relief asked, the original cause must be reheard with the second, and, consequently, that the second bill was a supplemental bill in the nature of a bill of review, which ought not to be filed without leave of the Court.

In this case, the Plaintiffs, by their original bill, stated, that Charles Bluck alleged himself to be entitled to a moiety of and in certain premises situate in High Street, Doncaster, called the Subscription Betting-Rooms, consisting of the new betting-rooms and other buildings erected thereon, for the residue of a term of twenty-one years, commencing from the 25th of March 1828, under a lease granted to Anne King, whereby the entirety of the premises were demised to him and John Goodered [304] for twenty-one years. That the said Charles Bluck, alleging himself to be so entitled, signed an agreement in writing, dated the 30th day of October 1840, and which was in the following words, i.e. :—

"Newmarket, October 30th, 1840.—I, Charles Bluck, do agree to sell and assign, and we, James Hollick Davis, and James Adkins, do agree to buy of said Charles Bluck, his half-share of the lease and premises, situate in Doncaster in the county of York, known as the Subscription Betting-Rooms, for the remainder of a lease granted by Anne King to John Goodered and Charles Bluck, for the sum of £1200, to be paid by the aforesaid James Hollick Davis and James Adkins as follows: £300 to be paid on the assignment of the lease to the said James Hollick Davis and James Adkins, within twenty-one days from the date of this agreement, £500 to be further paid on or before the 30th of January 1841, and an additional sum of £400 on or before the 20th day of July 1841, making altogether the sum of £1200 of lawful money of Great Britain. Either party failing to perform said agreement, to forfeit the sum of £200 of lawful money of Great Britain. Provided the parties, James Hollick Davis and Charles Adkins, continue in quiet possession of the premises eight years from the date hereof, the said James Hollick Davis and James Adkins agree to the further sum of £100 to the said Charles Bluck.

"CHARLES BLUCK.
"JAMES HOLICK DAVIS.
"JAMES ADKINS."

Of this agreement the bill prayed a specific performance, and it was asked that the Defendant might produce to the Plaintiffs the *said lease*, and make to the Plaintiffs a proper assignment thereof.

[395] By the decree, dated the 7th of June 1842, it was ordered, that the agreement of the 30th of October 1840 should be specifically performed and carried into execution; the Defendant was to pay the costs of the suit to the Plaintiffs, and the Master was to "set an annual value, by way of rent, on the premises agreed to be sold to the Plaintiffs" by Charles Bluck.

It is now alleged, that during the proceedings in the Master's office to set an

annual value, by way of rent, on the premises agreed to be sold, the Defendant Thomas Henry Bluck (the legal personal representative of Charles Bluck who had died) pretended, that the agreement did not comprise all the Subscription Betting-rooms, but only such part of them as was comprised in the lease granted to Anne King.

It was now further stated, that the premises comprised in the lease granted to Anne King, were, by indenture dated the 4th of July 1828, assigned by her to Frederick and Charles Bluck who was the Plaintiffs' vendor; and it was alleged, that Frederick and Charles Bluck, being in the year 1830 desirous of enlarging the premises comprised under the lease to Anne King, obtained from Robert Liddell the lease of a stable outbuilding which adjoined a building of two stories comprised in Anne King's lease. The lease granted by Liddell was dated the 27th of September 1830.

It was further alleged, that after the date of Liddell's lease, buildings were made upon, and the premises were so dealt with, as to be known, together with the premises comprised in Anne King's lease, as "the Subscription Betting-Rooms." The Plaintiffs thereupon insisting that the agreement of the 30th of October 1840 ought to be deemed to comprise, not only [396] the premises comprised in Anne King's lease, but also the premises comprised in Liddell's lease, filed a bill, which they (on a present argument) desired to have considered as a supplemental bill; and they prayed for a declaration, that the premises comprised in the leases of the 4th of July 1828 (being Anne King's assignment of her lease), and the 27th of September 1830 (being Liddell's lease), were and are, as to one moiety thereof, comprised in the agreement of October 1840, and that the agreement might be specifically performed in conformity with that declaration.

It was now moved that the second bill might be taken off the file for irregularity. Mr. Kindersley, in support of the motion, contended, that the relief sought by the second bill was different from that obtained by the decree in the first. That it would be necessary to revive the first decree in order to obtain the relief prayed by the second suit; that the second bill was, therefore, in its nature, a bill of review, and ought not to have been filed without the leave of the Court.

That the proceeding was irregular; and that the proper course was to order the second bill to be taken off the file; *Hodson v. Ball* (11 Sim. 456; and 1 Phil. 177).

Mr. Pemberton Leigh and Mr. Sidebottom, *contra*. This is a supplemental bill in aid of the former decree, and not a bill of review. Lord Redesdale, in his Treatise, (page 61 (4th ed.), "Where the imperfection of a suit arises from a defect in the original bill, or in some of [397] the proceedings upon it, and not from any event subsequent to the institution of the suit, it may be added to by a supplemental bill only. Thus a supplemental bill may be filed to obtain a further discovery from a defendant, to put a new matter in issue, or to add parties, where the proceedings are such a state that the original bill cannot be amended for the purpose. And this may be done as well after as before a decree; and the bill may be either in aid of the decree, that it may be carried fully into execution, or that proper directions may be given upon some matter omitted in the original bill, or not put in issue by it, or by the defence made to it, or to bring formal parties before the Court, or it may be used as a ground to impeach the decree, which is the peculiar case of a supplemental bill in the nature of a bill of review, of which it will be necessary to treat more at large in another place." So in *Dorner v. Fortesque* (3 Atk. 133) it is said, "Supplemental bills are often brought even in aid of a decree of this Court, as in a decree to account for want of full directions before; and directions are given under the supplemental bill, that the new matter should be connected with the former decree."

Here, the property bought was "the Subscription Betting-Rooms and premises;" and therefore comprised the two parts as incorporated together. There was an inaccurate description of the tenure, but this was undoubtedly the property sold. The decree perhaps imperfectly describes the property; and this bill is to supply the defect, and to carry out the decree, according to the real intention of the Court at the hearing.

[398] There is no doubt of the principle, that you cannot file a bill to impeach a decree without leave of the Court; the Court considers its decree right, unless, on the matter being again brought to its attention, it entertains reason to doubt it.

Hodson v. Ball was quite a different case. The original bill was for a simple account, and was in the nature of an action of *assumpsit*; the second bill sought to charge the Defendants with the consequence of wilful default and in *forti*. Lord Lyndhurst there observed, "I apprehend that a supplemental bill in aid of a decree cannot vary the principle of the decree. Its province is to carry out the principle of the decree; to give full and complete effect to the decree, as it exists."

The character of this bill is a supplemental bill, seeking additional but not inconsistent relief, and therefore, the leave of the Court was not necessary.

THE MASTER OF THE ROLLS said, he would read over the pleadings to see whether the Plaintiffs were authorised in filing such a bill as the present without having previously obtained the leave of the Court.

August 1. THE MASTER OF THE ROLLS [Lord Langdale]. The Defendant has moved that this bill may be taken off the file for irregularity, and the question is, whether it is a supplemental bill in the nature of a bill of review or a supplemental bill filed, as it is said, in the aid of the decree. I am of opinion that this is a supplemental bill in the nature of a bill of review.

There can, I think, be no doubt, but that the title stated in the bill and the agreement therein set forth, as [399] literally interpreted, have reference only to the premises comprised in the lease therein stated to have been granted to Anne King, or to have been assigned by her to Goodered and Charles Bluck. The premises comprised in the agreement are stated to be premises comprised in the lease granted to Anne King, and no others are noticed.

The original bill and the decree treat the agreement as comprising the premises comprised in Anne King's lease, and the Plaintiffs could not, by having the cause reheard, obtain the relief which is asked for by the supplemental bill; and I am of opinion that they cannot, by the supplemental bill, obtain the relief thereby asked for whilst the decree in the original cause stands in its present form.

To obtain the relief which is asked, the original cause must be reheard, at the time when the supplemental cause is heard; and the whole matter being before the Court, the full relief to which the Plaintiffs may be entitled will be considered. I think that a supplemental bill thus brought to supply a defect in the pleadings and decree in the original cause, and the decree upon which it is to be obtained on a rehearing of the decree in the original cause, is a supplemental bill in the nature of a bill of review, which ought not to be filed without the leave of the Court.

I must therefore grant the motion with costs. (NOTE.—See also *Wilson v. Todd*, 1 Myl. & Cr. 42; and *Swan v. Swan*, 8 Price, 518.)

[400] KIRKMAN v. HONNOR. April 3, 1843.

Substituted service of an injunction ordered.

In August 1842 an injunction was granted, restraining the Defendant from receiving monies on some Portuguese *titulos*.

The Plaintiff being unable to serve the injunction, and the Defendant's solicitor in the cause refusing to accept service on the ground that he had no authority to do so,

Mr. Rogers moved, that service on the Defendant's solicitor might be deemed good service.

THE MASTER OF THE ROLLS [Lord Langdale] made the order. (NOTE.—See *Pr. Reg.* 232, *Hinde*, 595; *Pearce v. Crutchfield*, 14 Ves. 206; *Pulleney v. Shelton*, 5 Ves. 147.)

[401] SHERWOOD v. WALKER. March 30, April 7, 1843.

[S. C. 7 Jur. 293; affirmed on appeal, 13 L. J. Ch. 258; 8 Jur. 229.]

A suit was instituted by a son against his mother. A compromise was effected, whereby the mother agreed to settle a sum on the son and his family, and pay

£170 amongst such of the son's creditors "as should be willing to accept the same in full discharge of their respective debts, and should express their consent" before a given day. None of the creditors assented, and no payment was made to them. The son became insolvent. Held, that the mother was not liable to pay the £170 to the assignees.

John Walker was, under the will of his father, who died in 1814, entitled to the residuary estate. His mother Ann Walker and another were executors of the will. John Walker at the death of his father was an infant, but, having in 1830 attained twenty-one, he, in the same year, instituted a suit against the executors for an account and administration of his father's estate. A compromise of the suit was arranged, which was carried into effect by a deed executed in September 1831, made between Mrs. Walker of the first part, John Walker of the second part, and trustees of the third part; and thereby John Walker, in consideration of the covenants therein contained on the part of Mrs. Walker, assigned to her all his interest in any property to which he was entitled under his father's will; and Mrs. Walker thereby covenanted with her son that she would, within two months, pay £400 in discharge of [402] two of his debts, amounting together to £229, 10s., and pay the remainder of the £400 among such of his creditors "as should be willing to accept the same in full discharge of their respective debts, and should signify their consent to Mrs. Walker on or before the 1st of November next ensuing;" and Mrs. Walker thereby covenanted with the trustees that she would, on or before the 1st of December next, pay to them £800 on certain trusts for John Walker, and his wife and children.

At the time of the execution of this agreement, a list of debts then owing by John Walker was handed to his mother, which amounted to about £505 inclusive of the two debts which were to be paid in full.

Mrs. Walker paid the £800 and £229, 10s., and notice was given to the creditors that the £170, 10s. (the residue of the £400) would be divided among such of them as should accept the same in full discharge of their debts, and should signify their consent before the 1st of November, but none of them assented thereto, and Mrs. Walker therefore made no distribution of the £170, 10s.

John Walker was arrested in November 1831, and was discharged under the Insolvent Act in July 1832. His assignees filed this bill against Mrs. Walker to recover the £170, 10s. in her hands.

Mr. Pemberton Leigh and Mr. Smythe, for the Plaintiffs. John Walker was entitled to the whole of his father's estate, which he assigned to his mother in consideration of the £800 settled, and the £400 to be applied for his benefit. As the creditors did not consent to accept [403] the provision intended for them, there was a resulting trust in favour of John Walker, and not for his mother, who had received the full consideration for it. Where creditors are not parties to the arrangement, a trust for the payment of a person's debts is a trust for the person himself. *Walkers v. Coutts* (3 Mer. 707), *Garrard v. Lord Lauderdale* (3 Sim. 1; and 2 Russ. & Myl. 451). Here the particular mode of paying the fund has failed, it therefore belongs to the person for whose benefit it was to be applied, and has passed to his assignees under the insolvency.

Mr. George Turner and Mr. F. Bayley, *contra*. The question is this: is there or not a covenant in this deed for the payment, at all events, of this sum of money; if there is, the Plaintiffs' remedy is at law and not in equity. The sum of £170 was not to be paid at all events, but only in case the creditors consented to accept it in full discharge of their debts. The event has not happened on which payment was to be made, and, therefore, the Defendant is not liable either at law or in equity. This was a mere family arrangement between the mother and her son, to relieve the son from his pressing liabilities; but if this suit were to succeed, the sum in question will not only be applied in payment of other debts than those agreed upon by Mrs. Walker, and on different terms, but John Walker will be left still liable to those very debts, from which it was the object of his mother to relieve him.

They cited *Toovey v. Milne* (2 Barn. & Ald. 683).

[404] THE MASTER OF THE ROLLS [Lord Langdale]. The question arises on the

construction of the deed executed in September 1831, whereby an arrangement was come to between Ann Walker and John Walker her son, she being the legal personal representative of her late husband, and he being entitled to the personal estate.

It seems that a suit had been instituted for the administration of the personal estate, and that the parties came to a settlement of the questions between them upon the terms stated in the deed. It does not appear that any creditor signified his consent, or that there was any offer of any one of the creditors to accept any portion of the remaining sum in satisfaction of his debt. John Walker became insolvent, and this bill is filed by his assignees to recover the £170, the residue of the money, and the principal ground on which this claim is rested is, that there is a resulting trust in favour of John Walker.

I am of opinion that there is no such resulting trust. The intention was plainly to settle family disputes then existing, and to apply £400 in a specific and particular manner in payment of the son's creditors, viz., in payment among such of them as should be willing to accept the same in full discharge of their debts, and should signify their consent. They did not assent, and I therefore think that the £170, 10s. did not become payable in consequence of the events contemplated not having taken place.

Affirmed by the Lord Chancellor 24th February 1844.

[405] ALEXANDER v. ANDERDON. May 31, June 3, July 29, 1843.

The Court has no authority, upon a petition by a client against his solicitor, to give relief founded on a special agreement.

In this case the Defendant Richard Brough Anderdon presented an original and also a supplemental petition, the original petition praying a declaration that certain matters of business, in respect of which Mr. Henry Jackson, a solicitor, claimed to be entitled to charge him for costs, were unauthorized by the Petitioner, and that such parts of the bills of costs as related to such business were fraudulent and improper, and ought not to be charged, and that the rest of Mr. Jackson's bills might be taxed; and the supplemental petition praying that it might be referred to the Master to ascertain what was due to Mr. Jackson, generally, upon his bills of costs on the footing of an alleged agreement, and that it might be declared that a certain promissory note had been satisfied. Both the petitions prayed that Mr. Jackson might be restrained from proceeding at law in respect of the matters alleged.

Mr. Pemberton Leigh, Mr. Turner and Mr. Mylne, in support of the petition.

Mr. Kindersley and Mr. Bagshawe, *contra*.

July 29. THE MASTER OF THE ROLLS [Lord Langdale]. On the hearing of the petitions it appeared that, according to the allegations of the Petitioner, the relation subsisting between him and Mr. Jackson was not the ordinary relation subsisting between solicitor and client; and that the ground on which he claimed relief rested, [406] principally, on some special agreement, or on some special understanding, upon which he alleged Mr. Jackson had attended to his business.

I consider it to be settled that, upon a petition presented by the client against the solicitor, the Court has not authority to give relief founded on a special agreement, and, on that account, it appeared to me probable that the petitions could not be sustained, but as the dismissal of the petitions would leave it open to the Petitioner to file a bill for the same matter, upon which bill, if there was a good foundation for his claim, he might obtain relief, I was desirous to give the parties an opportunity of settling the matter in some way that might prevent a prolonged litigation.

As the opportunity has not been taken advantage of, it has become necessary to dispose of the petitions; and, after a careful consideration of the petitions and of the evidence, I am now of opinion that the petitions cannot be sustained, and must be dismissed.

Upon the evidence, I cannot say that the Petitioner may not, under some such

agreement or understanding, as he has alleged, be entitled to some relief, if applied in a proper form; but, on these petitions, I cannot say that there are merits upon which I could decide that Mr. Jackson is not entitled to issue execution on the judgments which he has obtained, and if I had come to that conclusion, I do not think that I have jurisdiction to restrain him. As the petitions charge fraud and misconduct, and the case is not supported by sufficient evidence, or shewn to be within the jurisdiction, I think that the petitions must be dismissed with costs. (NOTE.—See *In re Smith*, 4 Beav. 309.)

[407] NOWELL v. WHITAKER. June 23, 1843.

The Defendant obtained a reference under the Contempt Act, to enquire whether by poverty he was unable to answer. The Master reported in the negative. By an order of the Vice-Chancellor the bill was taken *pro confesso*, without prejudice to the Defendant applying within ten days to put in his answer. The Defendant, suppressing the previous circumstances, then obtained an order of course for leave to defend *in forma pauperis*. The order was discharged.

The Defendant having been brought to the Bar of the Court in contempt for want of answer, and his poverty being alleged as a reason for his default, a reference was made to the Master, under the Act (11 G. 4, and 1 W. 4, c. 36, s. 15, rule 6), to enquire whether, by reason of poverty, he was unable to employ a solicitor to put in his answer. The Master reported that he was not unable by poverty, &c.

The Plaintiff proceeded to take the bill *pro confesso*, and on the 8th of June the Vice-Chancellor made an order for taking the bill *pro confesso*, without prejudice to the Defendant applying to the Court, within ten days, for leave to put in his answer.

Two days after, the Defendant obtained, at the Rolls, an order of course to stand the suit *in forma pauperis*. The Defendant, on his application for the order, fully suppressed the circumstances which had previously taken place in the cause.

Mr. Elmsley now moved to discharge the order to defend *in forma pauperis*, on the ground that it had been obtained as of course, upon a suppression of material circumstances.

Mr. M'Christie, *contra*.

THE MASTER OF THE ROLLS [Lord Langdale] said, that if the Defendant, on his application, had stated the previous circumstances [406] as he ought, they would have received due consideration; but having obtained the order as of course, and upon a suppression of material facts, the motion must, on that ground, be granted, without prejudice to any other application.

[408] EGREMONT v. COWELL. May 5, 1843.

The cause came on in 1839, and was ordered to stand over for want of parties. A bill of revivor and supplement was afterwards filed, stating that A., the sole Plaintiff, had died in 1838, insisting that the order of 1839 was a nullity, and praying a revivor. A common *ex parte* order to revive was obtained on petition, placing the cause "in the same plight and condition as at the death of A." The Defendant moved to discharge the order on the ground that the order of 1839 must be discharged before the cause could be put in the same plight as at the alleged death of A. Held, however, that it was regular.

The original suit of *Vickers v. Cowell* having come on for hearing, on the 18th of July 1839, an objection was taken for want of parties, which was allowed. An order was then made, whereby the cause was ordered to stand over with liberty to the Plaintiff to amend by adding parties. (1 Beavan, 529.)

Instead of amending, a bill of revivor and supplement was filed by an administrator, stating that the Plaintiff Ann Vickers had died on the 15th of August 1838 (nearly

a year previous to the hearing), and insisting that as she was dead at the hearing of the cause in July 1839, the order then made was a nullity. It stated also supplemental matter, to shew that the persons who had been held to be necessary parties, were not so, under the circumstances; and it prayed that the suit might be revived and placed in the same plight as at the death of Ann Vickers the Plaintiff, and that the order of July 1839 might be set aside.

[409] The Defendant having appeared, the Plaintiff, after the expiration of eight days (Ord. Can. 46), and on the 5th of April 1843, obtained, as of course, an order to revive the suit, and place it "*in the same plight and condition as the same was in at the death of Ann Vickers.*"

The Defendant now moved to discharge the order.

Mr. Pemberton Leigh and Mr. Beavan, in support of the motion. The 10th Order of December 1833, by which, "If the Defendant shall not within eight days after appearance to a bill of revivor, shew cause by plea, answer, or demurrer filed, the Plaintiff shall be entitled, as of course, upon motion or petition, to the common order to revive," &c., does not apply to a case like the present, where the object of the bill is, not to continue the suit from the point at which it left off, but first to set aside the order of the 18th of July 1839, and then to place the cause in the state in which it was in August 1838, when it is alleged the Plaintiff died. Until the order of 1839 has been set aside, which can only be done at the hearing, the cause cannot be placed in the same plight as it was in 1838.

It appears from Hinde's Practice (page 48), that the common order to revive can only be obtained where the bill is *merely* for a revivor, and only upon reviving all orders made. It is there stated, "A cause cannot be revived in part, but the whole proceedings, bill, answer, and orders made in the cause must stand revived, for the revivor is but a continuation of the same suit, and it cannot be a continuation of the same, unless it proceeded where the other left off." "In a bill of revivor *merely*, the Defendant must appear, &c.; and in eight days after [410] appearance, either shew cause against the bill, or submit to answer, and in default the suit may be revived without answer, if none be required, upon motion as a matter of course." The orders of 1833 did not alter the former practice, for having extended the time for answering to eight weeks, and it being desirable not to extend the time for obtaining the common order to revive, the latter part of the 10th Order provided for it, but it does not extend the right of obtaining, *ex parte*, the common order to revive to cases not within the rules according to the old practice. The 10th Order, therefore, only applies to "a bill of revivor *merely*."

Costs were improperly occasioned by bringing the cause to a hearing after an abatement. By reviving *ex parte* the Plaintiff escapes his liability to pay them, for the Court would only have set aside the order in July 1839, upon payment by the Plaintiff of the costs of the other parties.

Mr. Koe and Mr. Shee, *contra*. The order is perfectly regular, for in all cases where the suit abates, whether the abatement requires merely a bill of revivor, or a bill of revivor and supplement, the suit must be revived by an order to revive, and it is not regular to wait till the hearing, and then to revive the suit by decree. (3 Daniell's Pr. 217.) Unless the Plaintiff had revived, he would have been unable to go on with the supplemental matter. [THE MASTER OF THE ROLLS. Does not the order to revive leave the equity of the bill open?] Yes; the Defendant may, at the hearing, shew that there is no title to revive. The only way to prevent the order to revive is by plea or demurrer.

Mr. Pemberton Leigh, in reply. It is not necessary to discuss what is the rule in ordinary cases: here the [411] case is very peculiar and special, and the supplemental part has not been occasioned by the abatement, but is alleged to have taken place since. The objection to this order is, that it is a partial revivor of the suit, it omits a portion of the proceedings which the Plaintiff thinks objectionable, and leaves the last order unrevived, which it treats as a nullity.

THE MASTER OF THE ROLLS [Lord Langdale]. The original cause having been brought on, was ordered to stand over with liberty to amend by adding parties; it now appears that nearly a year before the order was made, the Plaintiff had died, so that the bringing on of the cause at that time was an irregularity on the part of

be solicitor, who ought to have known whether his client was living or dead, and notice of which fact must be imputed to him.

A bill of revivor and supplement has been filed stating the abatement, which not only insists that the order previously made was a nullity and void, but prays a declaration to that effect, and that the cause may be revived.

The real difficulty is as to the costs of the previous proceedings; but as the plaintiff has stated them all by his bill, the Defendant will have the opportunity of demanding, by his answer, such costs as he may be entitled to.

I cannot say that the order to revive is irregular: it was obtained on matters showing a right to revive, and I think I cannot discharge it. (1)

[412] SIMPSON v. ASHWORTH. *April 28, May 1, 1848.*

[S. C. 7 Jur. 410.]

The words "lawful heirs," held, upon the context of a will, to mean "heirs of the body."

The testator, having several children, directed the purchase of an estate for one of his daughters, "for her use and her lawful heirs," to be returned "if she died without lawful heirs," to the other children that had heirs. Held, upon the context, that "lawful heirs" must be construed "heirs of the body:" that the daughter took an estate tail, and that the gift over was also an estate tail.

The testator gave his daughter a sum of money, and directed his executors, "as soon as convenient after his decease, to purchase an estate," and when she attained twenty-one, she was to receive the money if the land was not bought. There was a gift over. The estate was not purchased, and she invested the money in the funds. Held, on the daughter's death, that the money was impressed with the character of realty, and passed as such.

The testator, having a son and four daughters, devised one real estate to his son "and his lawful heirs or assigns for ever," subject to the payment of £10,450 to the testator's daughters.

He then devised a second freehold estate to his eldest daughter "and her lawful heirs," and £1500; and he devised, similarly, to two other daughters "and their lawful heirs," two other freeholds, together with a sum of money. As to these daughters he declared as follows:—"It is my will and mind, that the lands which I have bequeathed as above to my daughters Ellen, Isabel and Agnes, in case all or any of them die without lawful heirs, the same to return to my other children that have lawful heirs, share and share alike."

He then proceeded to provide for his youngest daughter in the words following:—"I give and bequeath unto my daughter Catherine, the sum of £4000, out of my personal estate, and I here direct my executors to pay her the interest of £2000 till she attains the age of twenty-one years. I likewise direct my executors, or the survivor of them, as soon as convenient after my decease, to purchase an estate not to exceed £2000 for her use and her lawful heirs, and come into possession, with the accumulations arising, at the age of [413] twenty-one years. This £4000 to be paid out of my personality at the end of twelve months." In a subsequent part of the will, he proceeded as follows:—"It is my will and mind, that when my daughter Catherine attains the age of twenty-one to receive her £4000, if the land above mentioned is not bought, to give security for £2000, to be returned if she dies without lawful heirs, to my son and daughters that have heirs, share and share alike, and provided the land be purchased, to be returned in the same manner." The testator bequeathed his residuary personal estate to his son.

No estate was purchased for Catherine and her lawful heirs as directed by the will. She attained twenty-one in 1785, and received the £4000, but gave no security for

(1) See *Lewis v. Bridgman*, 2 Simons, 465; *Codrington v. Houlditch*, 5 Sim. 287; *Angley v. Fisher*, 10 Sim. 349; *Devaynes v. Morris*, 1 Myl. & Cr. 213.

returning the £2000 in the event provided for, and this £2000 she afterwards invested in the purchase of £3216 3 per cents.

Catherine married in 1807, previously to which a settlement was executed by her and her intended husband, which recited the purchase of the stock with the £2000 subject to be returned. The stock was settled on her for her separate use for life and subject thereto, upon the trusts declared by the testator's will. The testator's son was a trustee under this settlement. He survived his co-trustees, and died in 1837, having appointed the Plaintiffs his executors, who thus became possessed of the stock upon the trusts of the settlement.

Catherine died a widow, in 1841, without having had any issue.

The bill was then filed by the executors of the son, praying the direction of the Court in the distribution of the fund.

[414] Mr. Pemberton Leigh and Mr. Little, for the Plaintiffs, stated that the questions were, first, whether the £3216 stock was to be considered realty or personalty.

Secondly, what estate or interest Catherine took.

And, thirdly, as to the validity and extent of the gift over.

Mr. Turner and Mr. Lewin, for the heirs of two children, argued that the stock must be considered as impressed with the character of realty; *Johnson v. Arundel* (1 Ves. sen. 169), *Earlom v. Saunders* (Ambler, 241), *Cowley v. Horstonge* (1 Dougl. 361; and see *Cookson v. Reay*, 5 Beavan, 22), and *Hereford v. Ravenhill* (5 Beavan, 51).

Secondly, that as the brothers and sisters would be the heirs general of Catherine in the event of her having no issue, the words "lawful heirs," in the gift over to them, must necessarily mean heirs of the body of Catherine, and that she therefore took an estate tail. (See 2 Jarman on Wills, 238, and the cases there cited.)

Thirdly, that the gift over to the brothers and sisters was valid, and gave to them either the fee or an estate tail; *Bailis v. Gale* (2 Ves. sen. 48).

Mr. Kindersley and Mr. Haddan contended that there had been no conversion of the fund into realty, and that the gift over was valid. They cited *Nicholls v. Skinner* (Pr. Ch. 528; 2 Roper on Legacies, 470), *Hughes v. Sayer* (1 P. Wms. 531; 1 Jarman on Wills, 526).

[415] Mr. Koe and Mr. Renshaw, for the real and personal representatives of Catherine, claimed the whole of the fund, contending that it was personal estate, the estate being only purchasable while she was under twenty-one, and if not done, the money itself was to be "received" by her. They contended that the gift over, being on a general failure of "lawful heirs," was void; *Campbell v. Harding* (2 Russ. Mylne, 390; and 8 Bli. 469); and that, therefore, Catherine was absolutely entitled. They argued further that, in any event, the stock was only a security for the return of £2000 sterling; and that the surplus value at least belonged to Catherine's estate.

Mr. Kenyon Parker and Mr. Milne, for the only surviving child, contended that the fund was impressed with the character of real estate; that Catherine took an estate tail, and that the gift over was valid; that the settlement had identified the stock as the produce of the money, and had declared the trust of the whole of it accordingly; that, by reason of Catherine's neglect originally to give security for the return of the £2000, there would have been an equity to treat the investment made for the general benefit of the parties entitled under the will, even supposing the settlement had not declared the trust upon that footing.

Mr. Little, in reply, contended, that the conversion into realty was only co-extensive with the gifts to Catherine and to the son and daughters; which gifts, in devises of lands, would make Catherine tenant in tail, with remainders to the son and daughters for life; that the words, "that have" heirs, vested nothing in the heirs or in the ancestors, but only limited the class of son and daughters who were to take. That the surplus [416] interest, after satisfying the above gifts, retained its original character of personalty, and not being otherwise disposed of, passed to the residuary legatee; and that the Plaintiffs, as his executors, were therefore beneficially entitled, subject to the life-estate of the surviving child in her share of the fund. 1 Jar. on Wills, p. 553, and the cases there cited.

THE MASTER OF THE ROLLS [Lord Langdale]. The construction of this will is

certainly very doubtful; but according to the best opinion that I can form, I think that this sum was intended to be converted into real estate, and that there is nothing to shew that it was, on any subsequent event, to be reconverted.

It was intended to pass as real estate; and though the testator had provided for the case of his younger daughter attaining twenty-one, in which event it was to be given to her on certain terms, yet it was intended on a contingency to come back; and I think that there is nothing to shew it was not to come back in the character of real estate.

The first question is, what estate is given; and the second what is the effect of the limitation over. The expression "lawful heirs," by itself would mean heirs general; but it is to be observed that he had used the same words in the previous bequest of all the real estates given to the other children in every one of the gifts over. In the construction of these words I am therefore bound to conclude that he did not mean heirs general, but heirs of the body; the consequence of which is, that he has limited the effect of the words "lawful heirs," and makes it heirs of the body: the result is to give an estate tail to the daughter.

[417] As to the gift over, I think I must collect he meant the same quantity of estate to go over which he had given in the first instance.

I think also that the gift over is not too remote.

The result is that the first gift is an estate tail, the gift over is valid, and that the gift over is of the same estate previously given; viz., an estate tail.

The plan of the will is the only thing which is clear. He gave the largest real estate to the son, charged with a sum which he contemplated giving to the daughters. He gave to three of his daughters respectively a real estate and a sum of money, and having (as it has been truly said) exhausted his real estate, and having no other real estate to give to his youngest daughter, he gave a sum of money with a direction to invest part in real estate.

All parties ought to have their costs out of the fund.

[418] PERRY v. TRUMFITT. July 5, 1844.

Motion being made for an injunction, it stood over with liberty to the Plaintiff to bring an action to establish his right. The Plaintiff neglecting to proceed therein, the motion was refused with costs.

On the 8th of December 1843 the Plaintiff moved for an injunction. (6 Beav. 66.) The motion was ordered to stand over with liberty to the Plaintiff to bring an action, and either party was to be at liberty to apply.

The Plaintiff not having commenced any such action, the Defendant now moved, that the motion might be refused with costs.

Mr. G. Turner and Mr. James Parker, for the Defendant.

Mr. Pemberton Leigh and Mr. Trotter, for the Plaintiff.

THE MASTER OF THE ROLLS [Lord Langdale], having stated that the Defendant was entitled to have the motion refused with costs, the suit was also at the same time, by arrangement between the parties, dismissed with costs.

[419] CHAMBEAU v. RILEY. July 13, 1843.

Depositions under a commission having been suppressed with costs, the payment of those costs was made a condition for granting a new commission.

A commission had been issued for the examination of witnesses on the part of the Plaintiff in France, in support of the state of facts of the Plaintiff upon an enquiry before the Master.

The depositions were afterwards suppressed for irregularity, with costs to be paid by the Plaintiff, and which, on taxation, were found to amount to £197.

Mr. Lloyd now moved, on the Master's certificate, for a new commission.

Mr. Pemberton Leigh and Mr. Kindersley resisted the application, on the ground that the former costs had not yet been paid.

Mr. Lloyd. The Defendant has taken proceedings in France against the Plaintiff, whereby his property has been attached. Either the Defendant has been paid there-with, or the Plaintiff is prevented, by that attachment, from complying with this order and making payment. The Defendant has taken some proceedings since the order; he is not therefore entitled to prevent the Plaintiff's further prosecuting his suit until the costs have been paid. *Onge v. Truelock* (2 Molloy, 41), was cited.

THE MASTER OF THE ROLLS [Lord Langdale]. Take the order upon payment of the former costs, but let the Plaintiff have liberty to shew that the amount has been paid, or that the Defendant's proceedings in France have prevented his making payment.

[420] STANLEY v. BOND. July 19, 1843.

[S. C. 6 Beav. 423.]

Where the bill is amended before answer, it is not necessary to serve a *subpoena* to answer the amendments.

Where a bill is amended before answer, the Defendant is not entitled to eight weeks from the amendment to answer it.

The original bill was filed on the 24th of October 1842, and on the 24th of March 1843, and before the Defendant had answered, an order to amend was obtained. The bill was accordingly amended, but no new *subpoena* was served.

On the 9th of May an attachment was issued for want of answer. More than eight weeks had then elapsed since the service of the *subpoena*, but less than eight weeks from the amendment.

Mr. G. Turner and Mr. Toller, moved to discharge the attachment. They argued that it was irregular, first, because no *subpoena* to answer the amended bill had been served; and, by the original *subpoena*, the Defendant was required to appear in eight days, and "answer concerning such things as should be then and there alleged against" him (Ord. Can. 60), and, therefore, this command could not extend to matters afterwards alleged by amendment.

Secondly, that where a Defendant had not answered, and the bill was amended he was entitled to the same time to answer the amended bill as he had to answer the original bill, namely, eight and not five weeks, otherwise a Plaintiff might introduce a few trivial amendments to his bill the day after it was filed, and thus reduce the Defendant's time for answering from eight weeks to five. That, therefore, for this purpose, a [421] bill amended before answer should, under the 10th Order of December 1833 (Ord. Can. 46), be regarded as an original bill, filed at the time of the filing the amendments; *Spencer v. Bryant* (9 Ves. 231). That, as forty-five days only had elapsed from the amendment, the Plaintiff was premature in issuing the attachment on the 9th of May, and that it ought therefore to be discharged.

Mr. Pemberton Leigh, *contrâ*, was not heard by

THE MASTER OF THE ROLLS, who said, I have no doubt of the regularity of the attachment, and I must refuse this motion with costs. If the Defendant had been entitled to any indulgence, he should have made an application for it; the Court would be disposed to grant it, if he could make out a proper case.

The cause being set down, in order that the bill might be taken *pro confesso* under the orders of the 11th of April 1842 (Ord. Can. p. 195),

Mr. Pemberton Leigh proposed to take such decree as he could abide by; but

THE MASTER OF THE ROLLS [Lord Langdale] said, you must take such decree as you are entitled to upon the record: you must state your case. (NOTE.—See *Evans v. Williams*, 6 Beav. p. 118, and *Hayes v. Buerley*, 3 Dr. & War. 274.)

[422] GIBSON v. NICOL. July 20, 1843.

A motion for an injunction and receiver being brought on, stood over at the request of the Defendant, who filed his answer the next day. Held, that the Plaintiff might use affidavits subsequently filed, in contradiction to the answer, and which, under these circumstances, must be treated as an affidavit.

A notice of motion having been given for a receiver and an injunction, and affidavits having been filed in support, the motion, at the request of the Defendant, was directed to stand over, to enable him to put in his answer, which he did the next day.

Subsequent affidavits were filed by the Plaintiff, in respect of title, and in contradiction of the answer, and a question was raised whether they could be received.

Mr. Pemberton Leigh and Mr. Wood, for the Plaintiff.

Mr. Kindersley and Mr. Calvert, *contra*.

Mr. James Parker and Mr. Rolt, for other parties.

THE MASTER OF THE ROLLS [Lord Langdale], under these circumstances, thought that the answer was to be treated as an affidavit.(1)

[423] STANLEY v. BOND. July 28, 1843.

A bill for the delivery up of securities on which the Defendant had commenced proceedings at law, was taken *pro confesso*. Held, that the Plaintiff was entitled to the costs at law, though the bill did not specifically pray for them.

The bill was filed for the delivery up of securities alleged to have been improperly retained by the Defendant from the Plaintiff, and on which he had commenced proceedings at law.

The bill having been taken *pro confesso* (see 6 Beav. 420) against the Defendant, Mr. Pemberton Leigh asked that the Defendant might be ordered by the decree to pay the costs of the proceedings at law: he submitted that though the bill did not pray for them, yet that the Plaintiff was entitled thereto under the prayer for general relief.

THE MASTER OF THE ROLLS [Lord Langdale]. You are to have such decree as is just; and I think it is just that you should have the costs of the proceedings at law.

[424] FUTTER v. JACKSON. Feb. 11, 1843.

A trustee admitted he had sold out trust stock, but he stated that he had invested the produce in other securities. A motion was made before decree, that he might repurchase the stock and transfer it into Court. Held, that the Court could make no such order.

The bill was filed by parties interested in the estate of the testator, who died in 1838. It alleged that the debts and legacies had been paid; that the residue had been invested in the sums of £2606, 11s. 9d. 3½ per cents. and £478, 8s. 9d. consols; and that the Defendant, the trustee and executor, had, in 1841, in breach of trust, sold out these funds and applied the produce to his own use. The bill sought to charge the Defendant with these sums.

The Defendant, by his answer, stated his belief that the debts and legacies had

(1) See *Maden v. Veavers*, 5 Beav. 512; *Norway v. Rowe*, 19 Ves. 143; *Morphett v. Jones*, *ib.* 350; *Shirreff v. Barnard*, 8 Sim. 161; *Smith v. Cleasby*, 10 Sim. 93; *Wright v. Tickell*, Jac. 154; *Clapham v. White*, 8 Ves. 35; *Lloyd v. Jenkins*, Beav. 230.

been paid; and that, at the latter end of May 1841, in consequence of the high value of the public funds, and in the hope of increasing the trust estate, he did sell out the sums of £2606, 11s. 9d. 3½ per cent. and £478, 8s. 9d. consols, "and temporarily invested the produce thereof in other securities." The Defendant gave no further explanation of the manner in which the produce of the sales had been applied or invested.

A motion was now made that the Defendant might repurchase and transfer into Court these two sums.

Mr. Pemberton Leigh and Mr. Parsons, for the motion, contended, that, as the Defendant had admitted the possession of the trust funds and had sold them out, and as he had not accounted for the produce, or shewn that it had been properly invested and secured, he was clearly liable to replace it, and that it ought at once to be brought into Court.

[425] Mr. Kindersley and Mr. Elderton, *contra*, contended that there was no such admission of the possession of the fund as to entitle the Plaintiff to this order on motion before the hearing. That, as the answer stated that the fund had been reinvested, the Court must assume that the fund was now upon a proper investment, and that to make such an order as that asked on an interlocutory application was contrary to the practice of the Court.

THE MASTER OF THE ROLLS [Lord Langdale]. I am asked, on motion, to order the Defendant to purchase stock, and then transfer it into Court. I am of opinion that this Court cannot make any such order.

I cannot give credit to the statement that the funds have been properly invested. Though the Defendant has not been asked by the bill, still he would do well to explain the matter. (NOTE.—See *Meyer v. Montrieux*, 4 Beavan, 343, and the cases there cited.)

[426] HARRIES v. LLOYD. Feb. 24, 25, 1843.

A. being entitled to three debts, covenanted with B., that in case he received them in full, he would pay him £1000, but in case he should receive part only, he would pay one-sixth of the sum recovered. A. received one of the debts, which he wholly retained. Afterwards, and within three months before A.'s imprisonment and taking the benefit of the Insolvent Act, he (without pressure) assigned one of the debts to B., to secure one-sixth of the debt recovered and those still unpaid. It set aside as fraudulent under the Act. Held, also, that B. had not, as against the insolvent's assignees, any lien on the remaining debts, for the one-third of the first debt improperly retained by A.

This bill was filed by the assignee of an insolvent debtor, to set aside a deed alleged to have been voluntarily executed by him, within three months before the commencement of his imprisonment.

By the Insolvent Debtors Act (7 G. 4, c. 57, s. 32, re-enacted by the 1 & 2 Vict. c. 110, s. 59) it is enacted, "That if any such prisoner shall, before or after his or her imprisonment, being in insolvent circumstances, voluntarily convey, assign, transfer, charge, deliver, or make over any estate, real or personal, &c., to or in trust for any creditor, every such conveyance, &c., shall be deemed fraudulent and void as against the assignees. Provided always, that no such conveyance, &c., shall be so deemed fraudulent and void, unless made within three months before the commencement of such imprisonment, or with the view or intention, by the party so transferring, &c., of petitioning the said Court for his or her discharge from custody under this Act."

The circumstances under which the assignment took place were as follows:—In 1835 David Williams was entitled to three debts, one of £3900 due from Sackville Gwynne, another of £2000 due from W. Rice, and the third of £1060 due from Sackville Gwynne and Elizabeth Lewis.

On the 2d of June 1835 David Williams, upon the marriage of his daughter with William Jones, executed [427] a settlement, by which he covenanted with David Lloyd and Stephen Jones that in case the said several sums of £3900, £2000, and £1060 should be recovered in full, and not otherwise, he would, within six months next after such recovery, pay to Lloyd and Jones the sum of £1000; but in case he should not be

the sums in full, then he would, at the time and in manner to Lloyd and Jones one-sixth part of and in such part he should be able to recover; the amount was to be held upon the trusts of a marriage settlement.

The Plaintiff commenced an action at law against David Williams, and obtained a verdict for £2750, subject to a reference. The reference was made on the 16th of December 1837, the amount due from David Williams being £2750, and by the arbitrator; he made his award in January following, for £2750 to the Plaintiff. For this sum David Williams was arrested in January 1838, and he thereupon took the benefit of the Insolvent Act. He was, however, and on the 19th of December 1837, David Williams was the debtor of Sackville Gwynne and Elizabeth Lewis for £1060 to David Williams, upon trust to retain £333, 6s. 8d. (being one-sixth of Rice's debt which had been received by David Williams previous to November 1837, and wholly retained by him), and such further sums as should be paid out of the sums received on the other debts of £1060 and £3900. Having been executed within three months before the commencement of the action, this bill was filed to set it aside, on the ground of its being void.

The debt of £3900 was considered desperate, and had been sold for £200.

The defence alleged for the defence was this: That William Jones, on or about the 1st of November 1837 had discovered that David Williams had received the sum of £2000, one of the sums comprised in the marriage settlement, and one-sixth part ought to have been paid and invested upon the trusts of that settlement, and thereupon applied to David Williams, and requested him to pay over the sixth part of such sum to the trustees of the settlement, and pressed him further to secure the payment, in like manner, of the sixth part of such further sums as should be paid out of the other sums of £3900 and £1060. That David Williams, having received the whole of the sum of £2000 to his own purposes, and being then unable to pay such sixth part, did, upon the application and instance of the Defendant William Jones, and not voluntarily or fraudulently, agree to secure the due payment of such sixth part thereof, and also of the other sums which might thereafter be due, by an actual assignment to the trustees of the settlement of the debt of £2000, and the security for the same, upon express trusts for that purpose; and accordingly, and some time in the month of November 1837, instructions were given to William Jones to Messrs. Jones & Bishop, as the solicitors of William Jones, to execute such assignment.

The only proof of the insolvency was the schedule in the Insolvent Court, which was being objected to by the Defendants, was received *de bene esse*.

Mr. Pemberton Leigh and Mr. Freeling, for the Plaintiff, contended, that the debt had been executed without pressure, within three months of the imprisonment, and was therefore void. *Stuckey v. Drewe* (2 M. & K. 190), *Herbert v. Wilcox* (6 M. & W. 103), *Binns v. Towsey* (7 Ad. & E. 869), *Davies v. Acocks* (2 C. M. & R. 461), *Smith* (2 M. & W. 191); and see *Margareson v. Saxton* (1 Y. & C. (Ex.) 525). It was unnecessary to shew that the debts of the insolvent exceeded the value of the property at the time; *De Tastet v. Le Tavernier* (1 Keen, 161); that if there existed any doubt an inquiry should be directed; *Townsend v. Westcott* (2 Beavan, 340); and that the trustees of the settlement had no lien on the debts for the sixth of the sum; *Watson v. The Duke of Wellington* (1 Russ. & M. 602).

Kindersley and Mr. James, *contrâ*. To avoid an assignment under this Act, it must be proved to have been made spontaneously, and without any pressure; *Bean* (8 Bing. 87, and 1 Moor. & Scott, 151). Here there was no spontaneous assignment by the part of the insolvent; he did no more than he was liable to do, and what he had been compelled to do, if a suit had been instituted against him for that debt.

He had received £2000, one-sixth of which ought to have been paid to the trustees, and under the settlement, the trustees had a lien on the other debts for payment of the sums agreed by the settlor to be paid. There was no fraud in perfecting the assignment, and such an act is not sufficient to avoid the transaction. *Mogg v. Mogg* (1 M. & W. 195).

There is no proof of insolvency; the schedule is not evidence as against the parties claiming under the as-[430]-signment. A settlor himself might, in the Insolvent Court, have made statements purposely to avoid the deed.

THE MASTER OF THE ROLLS. Some time previous to November 1837, but what is not stated, David Williams received the £2000 due from Mr. Rice; he committed a breach of covenant by not paying over £333, 6s. 8d., or one-sixth part to the trustees of the settlement. It is said, that about this time and before the completion of the reference to arbitration, application was made by the parties claiming under the settlement for some security for this £333, 6s. 8d., and that the deed of the 19th of December 1837 was in consequence executed.

That the deed of the 19th of December 1837 was executed within three months before the commencement of the imprisonment, is not disputed; but two points are raised, *first*, that it was not voluntary; and, *secondly*, that David Williams is not proved to have been in insolvent circumstances at the time.

As to the first question, it is said that it was not voluntary, because David Williams gave to the parties claiming under the settlement no more than what they were entitled to before; that he, being bound by covenant to pay to the trustees one-sixth of the monies recovered, did, in order to repair the breach of trust, assign the £1060 to the trustees, who were to retain thereout £333, 6s. 8d. (being one-sixth of the £2000), and then to retain one-sixth of the other sums. Was this any more than what the trustees were entitled to? It would have been an absurdity to have executed this deed, if the parties were entitled to what it gave independent of the deed. I am of opinion, that it was in-[431]-tended to give a benefit to the parties claiming under the settlement which they had not before, and that it was the intention to put themselves in a better position than the other creditors, and to obtain for themselves an additional benefit. I think the deed was voluntary, and that it was not the less voluntary, because the parties called on the insolvent for the additional security; being voluntary it is void, provided the party was at the time in insolvent circumstances.

The next question then is, whether the insolvency is proved, and I think that it is not sufficiently shewn to me that David Williams was insolvent at the time. His schedule alone is produced, but this does not enable me to adjudicate on the point without an inquiry.

Mr. Kindersley admitted the insolvency.

THE MASTER OF THE ROLLS. Then the assignment must be declared void against the Plaintiff.

Feb. 25. The Defendants having claimed to have a lien on the £1060, for the £333, 6s. 8d. (being one-sixth of the £2000 received by David Williams), the case came on to be argued as to that remaining point.

Mr. Pemberton Leigh and Mr. Freeling contended that there was no lien on the debt for the monies received in respect of another. That there had been a breach of covenant, in respect of which the Defendants must come in as creditors under the insolvency.

Mr. Kindersley, *contra*, contended, that assuming the three debts could not be received in full, the trustees [432] of the settlement were entitled to one-sixth of what was received, and had a lien on the whole for that amount.

Mr. Pemberton Leigh, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. The question is, what was the intention of the parties; it seems to have been this: if all three debts were received £1000 was to be paid to the trustees of the settlement, but if part only was received then one-sixth of the sum actually received was alone to be paid to them. What happened? one sum of £2000 was received by David Williams, and was applied by him to his own use, and no part was paid over to the trustees of the settlement; thereby committed both a breach of trust and a breach of covenant.

I do not mean to say that, in this state of things, and to prevent the further breach of trust, the persons claiming under the settlement might not have filed the bill, and, by means of the equitable jurisdiction of this Court, have prevented David Williams from receiving any further part of the debts, and by getting the funds into Court, they might not have worked out their equity; but before any relief had been

granted, or any order had attached on the funds, David Williams became insolvent, and ceased to have any control over the property. It became vested in other persons for the benefit of his creditors, so that any right established by this Court on the funds, would be to the prejudice of those creditors.

I do not think that the trustees of the settlement are entitled to have the £1060 applied in satisfaction of the £333, 6s. 8d. They will however be entitled to one-sixth of the £1060 when received.

[433] MILLAR v. CRAIG. *March 7, 9, 27, 28, April 3, 4, 1843.*

[A note in the Addenda to 10 Beav., states that the Defendants appealed, but, before judgment, the cause abated, and was afterwards compromised by the payment of a large sum. See *Alfrey v. Alfrey*, 1849, 1 Mac. & G. 94; 41 E. R. 1198 (with note).]

An account was settled, and releases executed between the residuary legatees of a partner and the representatives of the surviving partner. Numerous and important errors in the account having been proved, the release was set aside, but having regard to the lapse of time, and the loss of books and documents, the Court declined opening the accounts altogether, but gave liberty only to surcharge and falsify.

A stipulation that interest should be allowed on the capital of partners presumed under the circumstances.

In a partnership between A. and B. interest was allowed on the capitals. C., who was a clerk and relative, was cognizant of the terms on which this partnership was carried on. B. retired, and A. and C. continued the business: the whole capital embarked therein belonged to A. There was an absence of all proof of any agreement between A. and C. in respect of interest on capital. D. and E. were afterwards admitted into the business, and an interest account of capital was then resumed. Held, under these circumstances, and from the knowledge that C. had of the terms on which the first partnership had been carried on, that it must be assumed that interest on capital was to be allowed in the second partnership.

Partnership accounts having been directed to be taken by the Master, in a case in which some of the books had been lost, the Court directed the Master, if it should appear in taking the account that any necessary books, &c., should be wanting, to report the same specially; and whether, in consequence of the want of such books, he was unable to proceed satisfactorily in taking the accounts.

Where a release has been executed, and the parties have for a long space of time acquiesced in it, the mere proof of errors will not, in the absence of fraud, induce the Court either to set it aside or to give leave to surcharge and falsify; but the nature and amount of the errors alleged and proved, may have a very considerable effect in the consideration of the question, whether the release was fairly obtained.

The object of this bill was to set aside a release executed by the Plaintiffs in 1823, and to have the accounts of the estate of the testator James Craig (which at his death was wholly embarked in a partnership business), taken, as if no such release had been executed, or for liberty to surcharge and falsify such account.

The testator James Craig carried on a very extensive business as a merchant, in partnership with Joseph Corrie, down to the month of March 1804, when the latter retired from the concern.

James Craig afterwards took his nephew into partnership. The period at which this partnership com-[434]-menced was a matter of controversy between the parties to this cause, the Plaintiffs alleging it to have been about the year 1810, and the principal Defendant, on the other hand, contending that it commenced in 1804, when Corrie retired.

The business was however carried on by James and John, but with the capital of

James, until 1814; Charles Nicholls and William Lewis were then taken into the partnership, and that partnership continued down to the death of the testator James Craig, which happened in January 1818.

The testator, by his will, bequeathed his residuary estate to John Craig, but if he should die without issue living at the time of his death (which happened), then he bequeathed the residue principally to the Plaintiffs, and he appointed Ann Craig, the said John Craig, William Millar and the said Charles Nicholls, his executors, who proved his will. The business was continued after his death by the surviving partners.

In 1821 an account of the testator's estate was made out by an accountant, while William Millar the executor was pressed by the three other executors to sign, he having declined doing so, another account was thereupon made out and passed at the Legacy Duty Office by the three other executors.

John Craig the nephew died in January 1823, having appointed the Defendant James Craig his executor and residuary legatee. After the death of John Craig, the representatives of James, proposed to the residuary legatees, who resided in Scotland, to divide the residue on the basis of the account passed at the Legacy Duty Office, which shewed that the testator's estate consisted [435] of £38,266, and that the residue, after deducting certain charges, amounted to £22,251. This being agreed to, the amount was divided between the residuary legatees, and they, in July 1823, executed a release to the executors of all claims, &c. It did not appear that any explanations were then given of the accounts, or that they were vouched.

The Plaintiffs, as they alleged, subsequently discovered numerous and important errors and omissions in the account, and they filed this bill in 1831, specifying the errors, and praying that the release might be set aside, and that the accounts might be properly taken, or that they might be at liberty to surcharge and falsify the account. It appeared that many of the partnership books and papers were not forthcoming.

It is unnecessary, for the purpose of this report, to state the specific errors complained of, except one, which related to a claim made on behalf of the residuary legatees, to have interest on James Craig's capital in the concern paid out of the partnership assets. The circumstances relating to which are as follows:—Upon John Craig being taken into partnership, the whole of the large capital employed in the business was the property of the testator, his uncle; and it was not pretended that John Craig had any other property to bring into the partnership except the arrears of his previous salary as clerk to his uncle. No deed of partnership appeared ever to have been executed; no stipulation as to any allowance of interest on the capital was proved; besides which, no account seemed to have been made out or settled during the partnership between the testator and his nephew, from which the terms on which they carried on their trade could be collected.

[436] It appeared, that in the previous partnership of Craig & Corrie, interest had been allowed in the accounts on each partner's capital, and an interest account kept; and though nothing in this respect appeared in the partnership between the testator and his nephew, yet interest was again allowed after Nicholls and Lewis had been admitted partners in the concern, but there was no allotment of the interest, between James and John Craig. It appeared also, that in the first account prepared for passing at the Legacy Duty Office, an item of £8161 was inserted for interest on the testator's capital, which was subsequently struck out, the opinion of counsel being unfavourable to the claim. The Plaintiffs now claimed to have interest allowed on the amount of the testator's capital in the partnership concern.

Mr. Pemberton Leigh, Mr. Turner, and Mr. Rolt, for the Plaintiffs.

Mr. Kindersley and Mr. Dixon, for the principal Defendant.

Mr. Romilly, Mr. Cankrien, Mr. Wright, and Mr. Toller, for other parties.

THE MASTER OF THE ROLLS [Lord Langdale]. In this case, the bill is filed for the purpose of setting aside a release executed on the 5th of July 1823, on the ground that it was fraudulently obtained, and that the accounts in respect of which it was executed, contain very numerous and important errors. Very numerous and important errors have been proved in this case. I cannot help saying that I do not recollect any case, in which errors of such an amount and number have met with

faint an answer as has been given in this case. [437] Errors have been distinctly proved, but it is not necessary that I should observe on them, for unless the release is to cover all the errors detected in the accounts, the accounts, in some way or other, must be reconsidered.

I quite agree with the argument that has been used, that where a release has been executed, and the parties, have, for a long lapse of time, acquiesced in it, the mere proof of errors will not, in the absence of fraud, induce the Court either to set it aside, or to give leave to surcharge and falsify, but the principle must be taken with this qualification, that the nature and amount of the errors alleged and proved, may have a very considerable effect in the consideration of the question whether the release was fairly obtained.

Beyond all doubt, the Plaintiffs, who were in Scotland, never had an opportunity of examining those accounts. I do not find any proof whatever that the Plaintiffs relied on William Millar as their agent in the treaty with the other executors; on the contrary, I find that they employed their own solicitor or law agent in Scotland: I do not even find that William Millar assumed to act for them; and he himself, it must be observed, was an executor and an accounting party.

Looking at all that has taken place between these parties, what reason is there to think that the Plaintiffs had any means whatever of examining the accounts, or that they signed the release, except upon the mere confidence that these accounts had been truly and properly stated? This would entirely preclude the argument that these parties must be considered as having settled each and every disputed item, for the purpose of coming to an arrangement, agreement, or compromise. This release was signed in confidence: it was signed in the [438] belief that these accounts had been truly stated, a confidence, in some degree no doubt, reposed in William Millar, but a confidence which, if reposed in William Millar, was certainly reposed without any just or proper foundation. Seeing that the release was obtained under such circumstances, in respect of accounts containing errors so great as have been proved, I cannot think that it is consistent with justice to say, that, because a considerable length of time has elapsed, before these parties, resident in a remote part of the United Kingdom, discovered the errors, the account is for that reason to stand.

I confess, therefore, that I have felt no hesitation in coming to the conclusion that the Plaintiffs must be at liberty, at the least, to surcharge and falsify the accounts. Whether they ought to be at liberty to open them altogether, is a matter of difficulty, and I must take time to consider it. I conceive it may not altogether depend upon the question of fraud or no fraud, because, having regard to the lapse of time, all parties are entitled to be treated with some consideration. Though the lapse of time will not protect them from having the account examined, still it may protect them from the necessity of proving every item contained in the account. The difficulties of taking the account, together with the loss of some of the books, which might, by possibility, contain entries which would explain the errors, might render it very fit that the Plaintiffs should merely have liberty to surcharge and falsify the account, and also that the Master should have power to state special circumstances, with the particular view of stating whether any of those books containing entries which might possibly tend to clear up those errors, have been lost.

[439] The next point is as to when the partnership between James and John Craig commenced. The evidence is such that I am afraid it does not enable me satisfactorily to dispose of it. I will however consider it, and, if I cannot satisfy myself, I must direct an inquiry.

The question of interest rests in a strange state of ambiguity; but the question is, what is to be collected from the situation in which these parties were? In the business carried on by Corrie and James Craig, it is admitted that the parties were credited with interest on the amount of their respective capitals; therefore, according to the usage of the persons then engaged in this business, an interest account was kept. In that early period of the business, it is not left to what the legal presumption or conclusion might be, in a case where persons carry on a partnership without any agreement, and without any account being kept or made out from which an agreement might be implied, for at this period, each of the persons carrying on that business was credited with interest on the amount of his capital. This continued until March 1804.

It does not appear when John was admitted a partner, but the whole capital which the partnership business was carried on after 1804, whether it was a partnership with John or not, was the property of James, and all that John had, was the amount of certain arrears of wages that had become due to him in the service of Corrie Craig, and which was quite a trifle in comparison with what his uncle had embarked. Supposing John to have become a partner in the year 1804, the business was carried on for about ten years, without any account being stated between them. In this singular state of things, whatever property James had, whether it was properly plainly and avowedly in the business or exclusive of the business, all his income, and everything that he had, seems to have been brought [440] into the concern. If John Craig's notion was, that his uncle really intended that he James Craig should have had no property or income of any kind, in which he, his nephew John, was not to participate to the extent of one-half, I confess it appears to me to have been a very singular notion to have entertained, in the absence of any legal proof, memorandum or document of any kind from which such an intention could be collected. We are unfortunately left for ten years without the least light thrown on the subject, except that all the income which James was entitled to was brought into the concern, and is alleged by John to have been brought into the concern, for the purpose of being consolidated with that capital, to a moiety of the profits of which he considered himself to be entitled.

After the 1st of January 1814, when Nicholls and Lewis were admitted into the partnership, we again find that there is a computation of interest commenced. The capital, treated as the capital of James and John, was credited with interest against Nicholls and Lewis, and it so went on until the death of James Craig. That was the usage of Corrie and James Craig before John could have had anything to do with it, became again the usage of James and John Craig, the instant they admitted any other person into the concern. But we are again under the same ambiguity as to John and James, because even then there was no account stated, as between John and John, in respect of any interest whatever. Now supposing it to be the case (which I do not think is quite so clear), that, when you find partners equally laborious and equally attentive to the business, as I think is proved they were in this case, you allow no interest on any excess of capital, and that therefore you do not put the parties on equal terms in that respect, still you would clearly give to the party who has contributed the capital, from the circumstances, or from the usage between the parties, that there ought to be, or was intended to be, such a computation of interest. Can one believe that the party to whom the whole capital belonged renounced all advantage in that respect, and continuing to take an equally laborious part in the transaction of the business, should bring in his whole income, both partnership and private, and yet intend to reserve no advantage of that income upon the settlement of accounts between himself and co-partner? I must say, I have great difficulty coming to such a conclusion as that. My present opinion is, that interest ought to be charged. I will look a little further to see whether there are any authorities to the contrary: and I will reserve that point.

With regard to the length of time that has elapsed, I feel considerable apprehension in opening these accounts altogether, from the possible loss of documents during that time, and particularly, in consequence of John Craig being represented by Defendant James Craig, and of a great number of the partnership documents having got into the possession of Mr. Nicholls independent of James Craig. I confess, unless bound, I should be reluctant to do it.

April 3. THE MASTER OF THE ROLLS [Lord Langdale]. On the best consideration I can give to this case, I think that John Craig must have known all the arrangements which took place in the business of Corrie & Craig, and the principles on which it was carried on, and the mode of computing interest on the capitals of the partners. My opinion, therefore, is, that interest ought to be computed on James Craig's capital. On the other point, I think that the justice of the case will be sufficiently answered by giving the Plaintiffs liberty to sur-[442]-charge and falsify the account. The case may be in the paper to-morrow.

April 4. THE MASTER OF THE ROLLS [Lord Langdale]. On consideration of this case, I retain the opinion I before expressed, that interest ought to be charged on

the capital of the partners engaged in this concern. I think, that the circumstance of John Craig being perfectly aware of the nature of the accounts kept as between James Craig and Corrie, and the fact that there was no agreement entered into and no act done, in any way to shew that the business between James Craig and John Craig was to be carried on on any other footing than it had been previously carried on between James Craig and Corrie, make it almost a necessary inference that an allowance of interest upon the capital must have been intended.

As to the relief which ought to be afforded, it appears to me, that under the circumstances of this case, justice will be sufficiently answered by giving the Plaintiffs leave to surcharge and falsify the accounts. Under all the circumstances, some considerable risk of undue loss to the legal personal representative of John Craig might be incurred, if the accounts were altogether opened.

The decree I propose to make is this:—Declare that the indenture of release of the 15th of July 1823 shall stand only as a discharge for the several sums of money hereby stated to be retained by, or paid to, the several parties thereto as therein mentioned. Declare that the account in the indenture mentioned to be stated shall stand, with liberty to the Plaintiffs and the Defendant, the legal personal representative of John Craig, to surcharge and falsify the same. Direct the Master to [443]—certain and state, what, at the date of the indenture, was the just amount and value of the residuary estate of James Craig deceased. Direct an inquiry at that time John Craig deceased was admitted to be, and became, a partner with James Craig, in the business in the pleadings mentioned. Direct that, so far as it may be necessary for the purpose stated, the Master is to take an account of the dealings and transactions of the partnership subsisting between John Craig deceased and James Craig deceased, from the commencement thereof to the time when Charles Nicholls and William Lewis were admitted partners in the said business, and also of the dealings and transactions of the partnership subsisting at the decease of James Craig, and at the decease of John Craig, between Charles Nicholls and William Lewis, from the commencement thereof up to the time of the death of James Craig. Let the Master ascertain and state what was due to James Craig deceased, from the said partnership firms, or either of them, at the time of his death; and, in taking those accounts, interest is to be allowed to each partner for the amount of his capital, from the time, employed in the concern. Let the Master also, so far as it may be necessary for the purpose aforesaid, take an account of the personal estate and effects of James Craig deceased, possessed by John Craig deceased, William Millar and Charles Nicholls, or any or either of them, the Plaintiffs waiving all relief against John Craig, the estate of John Craig deceased, and William Millar and Charles Nicholls, in respect of any acts and receipts of Ann Craig on account of the estate of James Craig. Let the parties produce before the Master all books, documents, &c., in the usual way, and if, in the proceeding to surcharge and falsify the accounts mentioned in the indenture of release, or, in taking any of the accounts hereby directed, it shall appear, that any books, documents, or writings necessary [444] or useful as evidence in respect of the matters aforesaid, or any of them, are wanting, let the Master report the same specially (see *Turner v. Corney*, 5 Beavan, 515), and also state, whether, in consequence of the want of any such books or documents, he is unable to proceed satisfactorily in taking the accounts, or in making the enquiries hereby directed.

Reserve all the costs.

[444] THE ATTORNEY-GENERAL v. RICKARDS. April 26, 27, 28, 1843.

12 L. J. Ch. 393; 7 Jur. 362; 1 Ph. 383; 41 E. R. 677; 13 L. J. Ch. 238; 13 Jur. 230; 12 Cl. & Fin. 30; 8 E. R. 1306; 9 Jur. 383. For subsequent proceedings, see 8 Beav. 380.]

Objections for impertinence cannot be maintained, if the materiality of the passages is so connected with the merits of the cause as to render it proper matter for discussion and for the determination of the Court at the hearing.

An information was filed by the Attorney-General at the relation of A. B., to set aside a fraudulent deed executed by an outlaw in a civil action, between the judgment and inquisition. Held, that statements shewing the interest of the relators and the motives for the execution of the deeds, as against the creditors, were not impertinent.

The question in this case was, whether certain passages in the information were or were not impertinent.

The information was filed by the Attorney-General, at the relation of three persons named Engler, Stulz, and Housley, and the substance of the statement was this:—Mr. Annesley was indebted to Engler, who proceeded against him to outlawry. Judgment of outlawry having been entered up against Annesley in 1835, the sheriff held an inquisition under a *capias ulagatum*, and, on the 11th of January 1841, returned, that A. was not seised of any lands within his county. The information alleged, that such return had been made, in consequence of a fraudulent deed executed by Annesley, whereby his freehold property had been conveyed to Rickards and Walker, his attorneys. The information insisted that this deed was voluntary and fraudulent, and that it had been executed between the return to a former writ, which turned out to be defective, and the return to the present writ.

[445] The information prayed, that Her Majesty's Attorney-General, on behalf of Her Majesty, might have the benefit, in equity, of the said judgment of outlawry and of the said writ of *capias ulagatum* issued thereon; that the said indenture or deed of trust might be declared fraudulent and void, and of none effect, as against the right or title of Her Majesty under and by virtue of the said outlawry; that all the estate and interest which belonged to the Defendant Annesley in the lands and hereditaments comprised in the said indenture, or (in case the said indenture should be to any extent valid or effectual) then such estate as still belonged to him beneficially in or out of the same lands and hereditaments, might be answered to Her Majesty and for an injunction and receiver.

The information contained the following passages, which, it was contended, were impertinent:—

"That, by indenture of assignment, bearing date the 19th day of August 1835, the said Frederick Engler, for good and valuable consideration, duly assigned the said bond and all principal monies and interest due or to become due thereon, unto Stulz and Housley, the two other relators herein named," &c., "and thenceforth the debt remained "in trust as to the beneficial interest therein for the said Stulz and Housley."

"That the said indenture was devised and contrived fraudulently, for the purpose and intent to delay, hinder, or defraud the creditors of the Defendant, A. Annesley, of their just and lawful actions, suits, debts, and demands, and in particular to delay and defeat the debt of the said Frederick Engler, and his proceedings, in or under the said outlawry."

[446] "That, at and before the time of executing the said indenture, the said Defendant A. Annesley was residing at Holyrood House, for the purpose of avoiding his creditors, or of preventing or delaying the proceedings against him, and he was in very embarrassed circumstances, and indebted in very large sums of money, which he was wholly unable to pay."

These and the corresponding interrogatories and some other minor passages were objected to as impertinent, and the Master, upon exceptions, so found them. The Plaintiff thereupon brought the case before the Court upon exceptions to the Master's report.

Mr. Pemberton Leigh and Mr. Campbell, for the Plaintiff, in support of the exceptions to the Master's report. These statements are not impertinent. "Impertinencies are where the records of the Court are stuffed with long recitals, or with long digressions of matters of fact, which are altogether unnecessary and totally immaterial to the point in question: as where a man will tell a tale of a tub, when he sets forth a long deed, which is not prayed to be set forth, in *hac verba*, where he stuffs his answer with long recitals, which are nothing to the purpose." (Gilbert For. Rom. 209.)

Here it was necessary and proper to shew why these persons were made relators, and their real interest in the matter, and why, in substance, they proceed in the name of the Attorney-General. The deed is alleged to have been executed for the purpose of defrauding the creditors. The fraud, as against the Crown, flows from the fraud against the creditors, and, to shew that fraud, it is most important to state the objects and motives of [447] the parties. Though the forfeiture on an outlawry is nominally to the King, yet, in truth, it enures to the Plaintiff in the action, and the produce goes towards payment of his demand. If the debt and costs were paid, the outlawry would be reversed. The Crown, therefore, in substance, stands in the nature of a trustee for the creditors. (See *Rex v. Wilkes*, 4 Burr. 3549.)

If these passages were really impertinent, they are too trifling to make it reasonable to incur the expense of expunging them; the only object of the Defendant in getting these exceptions allowed is to enable him to demur to the information, long after the time for demurring has expired. If there be the slightest doubt of these passages being found material at the hearing, the Court would not now expunge them; it would be deciding the merits of a case upon exceptions for impertinence—a course so manifestly inconvenient that the Court would hesitate to adopt it.

Mr. Kindersley and Mr. Kenyon, for the Defendants. The statements contained in this information relative to the assignment of the debt by Engler, to the fraud alleged to have been practised on the creditors of Annesley, and to his residence at Plywood House, and his object in so doing, are wholly irrelevant to the issue, and to the case of the Crown; they are therefore impertinent.

The Attorney-General might, in a case of this description, have sued without any relator; Engler, Stulz, and Housley are not parties to this information, and it is therefore perfectly immaterial what claims they [448] may have against Annesley. If they have no recognised interest under the outlawry, the Crown alone would be entitled to any property seized under the *capias utlagatum*; *Rex v. Fowler* (10 B. & C. 38). It is true that the Crown usually makes a grant of the property to the outlaw; but this is an act of mere grace and favour; and the practice does not, until the grant has been made, confer on the creditor any acknowledged right or interest in law, to the outlaw's property. The case is similar to that of a bastard dying intestate, and without heirs, though the Crown, in such a case, usually grants the escheated property to the family, still they have no interest which would enable them to maintain any proceedings in respect of the bastard's property. "The Crown is not and cannot be a trustee for the creditors. It is merely matter of grace that the King makes such grant of the goods of persons outlawed to the Plaintiffs, who have no manner of right in the goods until the grant has been obtained from the Crown." — *v. Bromley* (2 P. Williams, 269; and see *Cuddon v. Hubert*, 7 Sim. 485).

The *capias utlagatum* has relation to the lands of which the outlaw was seized on the day he was outlawed, or at any time since (see Lilly's Entries, 465, 552); the deed was subsequent.

THE MASTER OF THE ROLLS [Lord Langdale]. This is an information filed for relief, which is certainly of a singular description, and may require great consideration before the cause is ultimately disposed of.

[449] It contains some few allegations, which are not alleged to be tainted with prolixity or unnecessary length, with regard to the matter intended to be proved, but which are said to express matters wholly immaterial, and which, therefore, ought to be treated as impertinent. The matter complained of, independent of the interrogatories, contains twenty lines in the stating and charging part. I am not at all prepared to say that matter of this length introduced into pleadings ought not to be so plainly irrelevant, and so unlikely to afford any foundation for the relief prayed, as to make it proper to apply to the Court to expunge it as impertinent. I consider the questions which constantly arise at the hearing, as to the materiality or immateriality of an allegation. Those who are accustomed to attend Courts, hear, day to day, arguments alleged at the Bar by counsel on the one side, that a particular allegation is important, and by the other side that it is not; and the Courts, in their judgments, and upon the result of a careful examination, reject, I think, I may say without exaggeration, four-fifths of what is alleged to be material, and found their judgments on the remaining fifth. Those who are acquainted with

this cause of proceeding, and with the real difficulty there often is in ascertaining whether an allegation is material or not, would not, in the least degree be disposed to concur in the opinion, that because a fact may, at the hearing or at the end of a cause, turn out to be immaterial, it is therefore to be treated as impertinent from the beginning.

I think that these exceptions to the Master's report ought to be allowed, and for this reason, that it will be matter of argument upon the merits of the cause, at the hearing, whether these passages are or are not material.

[450] The Court cannot go into all the merits of a case and consider what the ultimate rights of a Plaintiff may be, for the purpose of determining, and that upon an imperfect argument, whether certain allegations, the materiality of which may be doubtful, are actually to be considered as immaterial. It would have the effect of drawing the whole merits of a cause into question, upon an allegation of impertinence. This would certainly be an inconvenient mode of proceeding, and one not in the least degree, calculated to preserve any right which [the party who takes the] objection has in the cause; for if it should appear, upon the consideration of the case on the merits, that the allegations complained of are immaterial, they cannot, in any degree, support the equity of the case, or give the Plaintiff any right as against the Defendant.

It is a matter of importance to avoid unnecessary length; but it is of much more importance, in discussing a question of length or materiality, not to determine the merits before the Court has before it all that is material to the merits. It is for this reason that I think these exceptions had much better never have been filed; and for this reason also I think the Master has come to an erroneous conclusion; the exceptions to his report must therefore be allowed.

I wish to observe I have not at all determined whether these passages are material or not. If this matter had come on upon the merits, it would then have been necessary to consider whether these allegations were material, and whether they did or did not tend to support the equity raised by the information. I think the exceptions for impertinence, in respect of matters alleged to be immaterial, cannot be maintained, when the question [451] of the materiality is so connected with the merits of the cause, that it cannot be decided without going into the consideration of the whole merits of the cause. (NOTE.—Affirmed on other grounds by the Lord Chancellor, 1 Phillips, 383.)

[451] BRADSTOCK v. WHATLEY. May 9, 1843.

Where a cause is set down upon an objection for want of parties, the Plaintiff begins. Where a cause is set down upon an objection for want of parties under the 39th General Order of August 1841, the Court merely gives its opinion on the record, and it then stands. The objection can only be finally disposed of at the hearing when the record and evidence are complete.

Form of order in such case. Costs reserved.

The bill, in substance, alleged, that the Plaintiff had been induced by two solicitors who were in partnership, to consent to be appointed a new trustee of the will of Walter Woodcock, in the room of a deceased trustee. That he had been so appointed upon their undertaking to indemnify him, and that the solicitors afterwards acted on the Plaintiff's behalf, in the trust. The bill sought to make the estates of the solicitors liable for the receipt of trust monies.

The Defendants, by their answer, objected that the suit was defective for want of parties, and amongst other persons, they insisted that the personal representative of Woodcock was a necessary party. The Plaintiff, under the 39th Order of August 1841 (Ordines Can. 175), set down the cause for argument upon the objection that the personal representative of Woodcock was a necessary party, and submitted to the other objections.

Mr. Pemberton Leigh, for the Plaintiff, insisted on his right to begin, he also having the right to set down the objection.

[452] Mr. Turner, for the Defendants. The objection being raised by the Defendants, they have a right to begin, in the same way as upon a plea or demurrer or want of parties. At the hearing, though the Plaintiff opens his case, the Defendant has the reply on an objection for want of parties.

THE MASTER OF THE ROLLS decided that the Plaintiff was entitled to begin.

The objection for want of parties was then argued.

Mr. Pemberton Leigh and Mr. Bevir, for the Plaintiff.

Mr. Turner, *contra*.

Mr. Pemberton Leigh, in reply.

Beasley v. Kenyon (3 Beav. 544), *Seddon v. Connell* (10 Simons, 79), *Slater v. Wheeler* (9 Simons, 156), *May v. Selby* (1 Y. & C. (C. C.) 235), were cited.

THE MASTER OF THE ROLLS [Lord Langdale] decided that the objection was not enable, and during the discussion said: Where a Plaintiff declines to set down for argument, an objection for want of parties raised by the answer, he subjects himself to this penalty:—He will not at the hearing, be entitled, as of course, to an order to amend by adding parties. He would still, however, be at liberty to make out a special case for the exercise of the discretion of the Court in his favour, and the Court would then have to decide whether his bill should be dis-[453]-missed for want of parties, or retained with liberty to amend.

When a cause comes before the Court under the 39th Order, the Court can only give its opinion on the record as it then stands; the objection cannot finally be disposed of until the hearing, for it is impossible at the beginning of a cause to say who will be necessary parties at the end. The Court cannot finally determine the matter until the record has been completed and the evidence taken. Whatever the Court might decide on such an occasion, the Plaintiff might the very next day amend his bill and vary his case, and the suit might again undergo a variation by the further answer and evidence. The judgment of the Court on such an occasion cannot therefore be conclusive.

As to the form of the order, I think there ought to be some *constat* of what has been decided by the Court. The proper form of order would seem to be this:—The Defendants having by their answer objected that certain persons (naming them) are necessary parties to this suit, the Plaintiff caused the objection to be set down, and demanded the opinion of the Court, whether the personal representative of Woodcock was a necessary party to the suit. Whereupon, &c., the Court held, that as the record was now framed, such personal representative was not a necessary party.

The costs should be reserved until the hearing.

[454] THE ATTORNEY-GENERAL V. LORD CARRINGTON. June 6, 1843.

[S. C. 12 L. J. Ch. 453.]

An information related to two objects, one failed, and the decree dismissed so much of the information as related to it, without costs, and ordered the Defendant to pay the informant his costs of the suit. Held, that the Taxing Master was wrong in apportioning the general costs of suit between the two objects.

The Court will not interfere with the discretion of the Taxing Masters as to the *quantum* of fees to counsel.

Costs of process of contempt for not answering, not allowed in the taxation of costs of suit as between party and party.

By the decree the lands of the Defendant were declared chargeable with £40 a year, and the Master was directed to take an account of the arrears, and the Defendant was ordered to pay what should be found due. Held, that the Defendant was not, under the 1 & 2 Vict. c. 110, ss. 17, 18, liable to pay interest on the amount due, from the date of the decree to the date of the Master's report.

This case came before the Court upon petition, partly impugning the correctness of the Master's taxation of costs.

The information was filed, seeking to charge the estates of Lord Carrington with two perpetual annuities of £40 and £4. At the hearing, the relief in respect to the latter was abandoned, and by the decree it was ordered, that so much of the information as sought to charge the lands with the payment of the annuity of £4 should be dismissed without costs. And it was declared that the said lands were chargeable with the annuity of £40 per annum, and an account of the arrears was directed, and it was ordered that the Defendant Lord Carrington should pay into the bank what should be found to be the amount of the arrears, and it was ordered, that the Defendant should pay to the informant *his costs of the suit*, and also pay to the other Defendants their costs of the suit, the said costs to be taxed by the Taxing Master.

The Attorney-General took in his bill of costs for taxation, which amounted to £333. The Taxing Master taxed it at £101, having struck off several items, and having disallowed £79 by way of apportionment of the general costs of the suit common to the two annuities of £4 and £40.

[455] What took place on the taxation as to this latter item, will be explained by the following extract from the Taxing Master's note:—

"On the taxation of the bill of costs of the informant, it was insisted before me on the part of the Defendant Lord Carrington, that inasmuch as the information had been filed to establish two distinct annuities, and as the informant had failed as to one of two objects sought to be attained by his suit, there must be an apportionment of the pleadings, and also of the general costs of the suit applicable thereto, and that the informant could only be allowed for such part of the pleadings as sought to charge Lord Carrington's estate with the £40 annuity, and also of a proportionate part of the general costs.

"On the other hand, it was insisted, on the part of the informant, that inasmuch as the costs occasioned by the unsuccessful attempt to charge the Defendant Lord Carrington's lands with the payment of the annuity of £4, had not at all increased the length of the pleadings (the whole of such pleadings, with the exception of a very few words, being quite as much applicable to the annuity of £40 singly, as to the two annuities together); moreover, that as the decree, after directing the dismissal as to the charge of the £4 annuity without costs, had gone on to direct the Defendant Lord Carrington to pay the informant's costs of the suit, it must be understood to have given the latter the whole of the costs of the suit, without any apportionment in respect of the unsuccessful part of it.

"The terms adopted by the parties in the drawing up of this decree, are, as it seems to me, precisely in accordance with the view contended for either on [456] one side or on the other; and, accordingly, the intention of the Court with regard to the informant's costs, is by no means so clear as it might have been made. On the whole, however, it appeared to me, that the best construction to put upon this decree was, that it was not the intention of the Court to make this case an exception to the general rule, which precludes a party entitled to the costs of a suit generally, from having allowed to him the costs of that portion of the proceedings therein in which he has failed, but simply to direct that the informant should be allowed such costs as he is entitled to by the course and practice of the Court; I accordingly decided on disallowing a proportionate part of the pleadings, and also of the general costs relating to the £4 annuity on which the informant had failed, according to the decision in *Heighington v. Grant* (1 Beavan, 228).

"With regard to the mode of such apportionment, I found, on a perusal of the pleadings, that it had been correctly stated to me on the part of the informant, that the information and answers related quite as much to the annuity of £4 as to that of £40, and, consequently, there seemed to me to be no other course to be adopted, but that of allowing the informant one-half only of such pleadings and of the general costs applicable thereto, down to the decree; thus ascribing the other half of such pleadings and general costs down to the decree, to the part of the suit on which the informant had failed. (See the case of *Heighington v. Grant* before referred to.) The remainder of the costs subsequent to the decree I allowed in full."

This petition stated, that as to the claim in the information for the said annuity of £4, the information [457] was increased in length by reason thereof one hundred and twenty words, or one folio and thirty words, and no more, and the length of the

Defendant's answer was increased, by reason of such claim, to seven folios and twenty-two words, and no more.

Mr. Pemberton Leigh and Mr. Blunt, in support of the petition. Although the Court has dismissed without costs so much of the information as related to the £4, still it subsequently directs the Defendant to pay the whole costs of suit. The length of the proceeding was scarcely, if at all, increased by the claim in respect of the £4 annuity; the intention of the Court was merely to relieve the Defendant from the costs of that small portion of the pleadings which related to the £4 annuity, and certainly not to release him from a half of the general costs of the suit which has succeeded.

Mr. Turner and Mr. Greene, *contrà*. The Master has proceeded according to the usual mode, in ascertaining the proportion of the costs attributable to the second object of the information; *Heighington v. Grant* (1 Beavan, 228).

If so much of the suit as related to the £4 annuity had been dismissed *with costs*, it is clear that the informant would then have been properly charged with the £79: the effect of dismissing it *without costs*, is merely to relieve him from the payment of that sum. To give it him will be to dismiss a portion of the information, and yet make the successful Defendant pay the costs of it.

It is said that the addition occasioned by the claim is small, but the same would have been said if the informant had succeeded as to the £4 and failed in the [458] £40. In reality, the whole information relates as much to one as to the other. Ought a Defendant who attempts to support his suit by two independent claims, to have the whole general costs if he succeeds in one, though he entirely fails in the other?

THE MASTER OF THE ROLLS [Lord Langdale]. I think it clear that the Master has mistaken the effect of this decree.

Where various matters are comprised in a suit in equity, it is by no means an uncommon occurrence, that the Plaintiff may so succeed, as to entitle him to a decree with costs as to one of the objects of his suit, and yet may entirely fail in another object, and as to that, have his bill dismissed with costs.

The ordinary practice of the Court, when a Plaintiff obtains a decree with costs as to part, and has his bill dismissed with costs as to another part, is to direct an apportionment to be made of the costs, and that the costs of one part shall be set off against the costs of the other part. In order to obtain that end, an apportionment must necessarily be made of the pleadings, and of the different proceedings that have, from time to time, taken place. Whether that is effected in the best manner, according to the practice of the Court, is more than I will undertake to determine, for I confess there were things in the certificate in *Heighington v. Grant* which a little surprised me at the time I acted on it. The rule seemed to be this, that if matters relate exclusively to one object, then, in the apportionment, the costs relating to them were apportioned to that object alone; but if such matters were common to both objects, then the costs would be equally divided between them.

[459] The state of things may be this:—A decree may be made with costs as to part, and the bill may be dismissed with costs as to the other part, if there appears to have been considerable costs incurred with respect to that part of the demand which has failed; on the other hand, a different order would be made, if it appeared quite manifest, that the costs incurred upon that part which has succeeded have not been at all, or scarcely at all increased, by that part which has failed. This is peculiarly so in this very case. A great quantity of pleadings and different documents had been stated relating to the first object, and a few words were put in making a claim which failed. It is not alleged, that the costs of this suit have been sensibly increased by that claim. The contrary, appears by the certificate which the Master has, with great propriety, made in this case, and all parties have agreed in that fact. The matter being considered at the hearing of this case, and it being clear there ought not to be an apportionment as to the matter that related to the object which failed (it being so trifling as to be of no consequence at all), the information was dismissed without costs as to that. It is supposed that this is no exception to the general rule. The information was dismissed without, and not with costs, as to part, and a decree was made with the costs of the suit. Now the Master

is said to have conceived, in his construction of the decree, that it was not the intention of the Court to make this case an exception to the general rule. In that particular I think the Master was mistaken. The case was an exception to the general rule. The taxation was not to be according to the general rule, but according to the particular direction given at the hearing. That being so, I think the report ought to be reviewed by the Master.

[460] Some other points arose in this case.

The fees paid to the Attorney-General and two counsel with him amounted to £39, 4s., of which the Master taxed off £15, 15s. The Petitioner insisted, that having regard to the time devoted to the case, the cause having occupied two days, the fees paid were reasonable and proper; and that the whole ought to have been allowed.

THE MASTER OF THE ROLLS. This is a mere question of *quantum*, I cannot deal with it.

The Master had disallowed two items of £1, 4s. 8d., which were costs incurred in issuing process of contempt against two Defendants who had not answered within the limited time, but which had not been executed. The Petitioner sought to have these sums allowed.

It was said that it was contrary to practice to allow these costs, unless specially directed by the order of taxation.

THE MASTER OF THE ROLLS. There is a rule that you cannot get the costs unless they are specially applied for. (1 Smith's Pr. (3d ed.) 208.) The Master is right.

By the decree, dated the 13th of December 1842, the lands of the Defendant were declared chargeable with an annuity of £40 a year, and the Master was [461] directed to take an account of the arrears of the annuity of £40; and it was ordered, that what the Master should find to be the amount of such arrears should be paid by the Defendant into the bank.

The Master by his report, made in April 1843, found £917 to be due, which was immediately paid into the bank.

The Attorney-General now contended, that, under the 1 & 2 Vict. c. 110. ss. 1 & 18, the Defendant was liable to pay interest at 4 per cent. on this sum from the date of the decree to the date of the Master's report.

On the other hand, it was contended, that there was no decree whereby any sum of money was payable, at least until the amount had been ascertained by the Master, and to order interest to be paid would be to vary the decree.

THE MASTER OF THE ROLLS was of opinion that the Defendant was not chargeable with interest during this period.

[462] STURGE v. DIMSDALE. June 9, 1843.

[S. C. 7 Jur. 543. See *Robinson v. Geldard*, 1849-52, 3 De G. & S. 501; 3 Mac. & G. 740; 42 E. R. 444; *Beaumont v. Oliveira*, 1869, L. R. 4 Ch. 316. Observed upon *Wills v. Bourne*, 1873, L. R. 16 Eq. 487.]

A simple declaration that charity legacies are to be paid out of pure personalty, will not give to such legacies a priority upon the pure personalty over other legacies and charges; nor exempt any part of the estate, from the ordinary rules of applying and distributing the assets.

A testatrix created a mixed fund of realty and personalty for payment of her debts and legacies, but she directed the charity legacies to be paid out of pure personalty. She afterwards directed her trustees to set apart a sum of stock sufficient to provide for a number of annuities, and as the annuitants died, the stock let loose was to be applied in payment of the charity legacies. *Semble*, that the direction alone was not of itself sufficient to exempt the charity legacies from being payable out of the realty, in the proportion of the realty to the personalty, but held, that the second

part created a demonstrative fund of pure personalty, out of which the charity legacies were to be paid.

The testatrix Ann Dimsdale devised her freehold, copyholds and leaseholds to trustees upon trust to sell, and stand possessed of the produce and of her personal estate, upon trust, in the first place, to pay her debts and funeral and testamentary expenses, and then to pay the several legacies and annuities thereafter bequeathed, so far as the same would extend, and she then proceeded as follows:—"Provided nevertheless, and my will is, that none of the legacies hereinafter bequeathed to charitable societies or institutions, or for charitable purposes, shall be paid out of the monies to arise by the sale of my estates, messuages, lands, tenements and hereditaments, or any of them, but *shall be paid*, so far as the same shall or may become payable under and by virtue of the directions hereinafter contained, *exclusively out of and from such part of my personal estate only, as is legally applicable thereto.*"

The testatrix then gave a number of annuities to individuals; and, for the purpose of providing a permanent fund for payment of the annuities, she directed her trustees to retain so much of the capital stock in the three per centum consolidated Bank annuities which she might have at the time of her decease, if she should have sufficient for the purpose, and if not, then to purchase with other part of her personal estate so much more of the said capital stock as, with the capital she [463] should have therein, should produce such annual interest and dividends as should be equal to the aggregate annual amount of the annuities which she had thereinbefore given.

She then gave a number of pecuniary legacies, and also a charitable legacy of £500 "to be paid out of her personal estate only," and twelve legacies of £500 to individuals. And in case her real and personal estate, after payment of her debts, funeral, testamentary and other expenses, and after making such investments in the three per centum consolidated Bank annuities, as she had directed, and payment of all the legacies and sums of money thereinbefore given (except the said last-mentioned twelve legacies of £500), should prove insufficient to pay the said twelve last-mentioned legacies of £500 each, then the deficiency was to be paid in manner thereafter mentioned. And she declared, that her trustees should stand possessed of the said sum of capital stock in the three per cent. consols., subject to the charges thereon, under and by virtue of that her will expressed, upon trust, as the said annuitants died, to sell out sufficient capital stock, to pay off so much of the twelve legacies as there should remain unpaid. And after full payment of all the legacies, annuities, and charges thereinbefore given, she bequeathed unto the British and Foreign Bible Society, and the Moravian Missionary Society the sum of £1000 each, and to the Bristol Infirmary, the Bristol Strangers' Friend Society, the Bristol Refuge Society, the Bristol Lying-in Society, the Bristol Guardian Society or House, the Bristol Misericordia Society, the Bristol Dorcas Society, and the Prison Discipline Society, the sum of £500 each, payable in manner thereafter mentioned without any interest.

[464] And as the annuitants died, she directed the trustees to sell such part of the said capital stock as they should think fit, and to pay the produce thereof rateably and in proportion to and amongst the said ten charitable societies or institutions, until the whole of the said legacies should be paid. And she gave any surplus of the said capital stock and residuary estate unto the said ten societies in proportion to their several legacies.

The value of the real estate of the testatrix amounted in round numbers to about £22,000: her personal estate consisted of about £46,000 consols, and £11,000 reduced, and a sum in cash.

By an order of the Court a sum of £28,081 consols had been set apart to answer the annuities. The cause now came on for further directions.

Mr. Pemberton Leigh and Mr. Piggott, for the Plaintiffs, the executors.

Mr. Spence, Mr. Wood, Mr. Kindersley, Mr. Kenyon Parker and Mr. Goodeve, for the charity legatees, contended that they were payable in full out of the personal estate, or at least out of the £28,081 which was a specific fund directed (subject to the rights of the annuitants) to be applied in payment of the charitable bequests.

Mr. Milne, Mr. Hellyer, and Mr. Rolt, for other parties.

Mr. Turner and Mr. Craig, for Baron Dimsdale, the heir at law. The direction that the charity legacies shall be paid out of the personal estate legally applicable thereto, is not of itself sufficient to give to the charity legacies a priority upon the pure personalty over the [465] other legacies and charges. *The Philanthropic Society v. Kemp* (4 Beavan, 581). There must, therefore, be an apportionment of the legacies between the real and personal estate, and the charity legacies will fail in the proportion of the realty to the personalty. The produce of the real estate thus released will belong to the heir at law; *Roberts v. Walker* (1 R. & M. 752) and *The Attorney-General v. Southgate* (12 Sim. 77) were cited.

THE MASTER OF THE ROLLS [Lord Langdale]. It appears to me that the effect of the first words of this will is, to create a common fund composed of realty and personalty, which would consequently be liable to the ordinary rules of apportionment between the parties entitled to the fund, who stand in different characters; but there follows a direction that the charity legacies are not to be paid out of the real estate, but are to be paid, "exclusively, out of and from such part of her personal estate only as might be legally applicable thereto." I do not feel disposed to alter the opinion which I am reported to have expressed on a former occasion. (4 Beavan, 581.) Certainly I very much doubt, whether words of this kind will be sufficient to exempt any part of the estate from the ordinary rules of applying and distributing assets. The words here do not contain any direction that the charities shall, in the distribution of the assets, have any priority over any other demands upon the general assets. If therefore it rested upon these words alone, I should have hesitated a great deal before I could give full effect to these charity legacies, but what occurs afterwards in the will seems to me to be most material.

[466] The testatrix was very anxious to have various annuities paid in full, and she directed that a sufficient amount of stock should be set apart for answering them; having created a fund for the payment of these annuities, she directed that if the other parts of her estate should not be sufficient for the payment of the twelve legacies of £500 each, then that the fund set apart for the payment of the annuities should be made answerable for any deficiency that might occur. When the annuitants die, and it becomes clear that a portion of the *corpus* of the fund provided for their payment can be safely applied, she directs the trustees to sell the released portion and apply the proceeds, first in payment of the twelve legacies of £500 each, and then among the persons entitled to the charity legacies.

But for this direction, I own I should have had great difficulty, but with it I feel none. There is a fund constituted, or, according to the term which is used on occasions of this sort, a fund "demonstrated" by the testatrix herself, for the payment of these charity legacies. If it were perfectly clear that the whole of that fund of £28,061 consisted of pure personalty, I think there would have been nothing more to be said about the matter; for it appears to me, that the charity legatees are entitled to be paid, by means of the specific fund out of which the testatrix has directed them to be paid, and which was to consist of pure personalty.

I should not have felt clear on it if the question depended on the first clause alone; for I doubt whether a mere declaration that charity legacies are to be paid out of pure personalty will give them a priority over the other legacies and charges.

[467] LLOYD v. CLARK. June 15, 1843.

A Defendant put in an insufficient answer; the Plaintiff obtained an order to amend, and that the Defendant might answer the exceptions and amendments together. Held, that the Defendant's answer to the amended bill was to be deemed sufficient at the end of two months, under the 4th Order of April 1828, and not at the end of three weeks under the 6th Amended Order of April 1828.

The 6th Order of April 1828 does not apply to a case, where a Defendant is ordered to answer amendments and exceptions together.

The bill in this cause was originally filed against Clark. The common injunction

was obtained, for want of answer, and Clark's answer having afterwards been filed was found insufficient; whereupon,

On the 16th of June 1842 the Plaintiff obtained a common order to amend without prejudice to the injunction, and that Clark should answer the exceptions and amendments at the same time.

The Plaintiff by amendment made Argent a party.

On the 23d of February 1843 Clark put in a sufficient answer. Argent, the only other Defendant, having then already put in a sufficient answer, the injunction was continued as against Clark (6 Beav. 309) on merits confessed.

On the 31st of May 1843 the Plaintiff obtained an order of course to amend without prejudice to the injunction, undertaking to amend within one week. The question was whether this order of the 31st of May was regular, that is, whether it had been obtained in time.

By the 13th Amended Order of April 1828 (Ord. Can. 8), a Plaintiff must obtain an order to amend within six weeks after the last answer is to be deemed sufficient.

By the 4th Order of April 1828 (Ord. Can. 6), an original answer is to be deemed sufficient, if exceptions are not taken within *two months* from the filing.

[468] The 6th Order of April 1828 (Ord. Can. 6), directs that if the Plaintiff do not, within *three weeks* after a Defendant's second or third answer is filed, refer the same for insufficiency on the old exceptions, such answer shall thenceforth be deemed sufficient.

If, therefore, Clark's second answer was to be deemed sufficient at the end of three weeks (16th March), the order to amend (31st May) had not been obtained within the six weeks. If, on the other hand, the answer was to be deemed sufficient at the end of two months (20th April), the six weeks expired on the 1st of June, and the order to amend, obtained on the 31st of May, was therefore regular.

The Defendant, on the 5th of June 1843, gave notice of motion to discharge the order to amend of the 31st of May for irregularity, which motion was now brought on.

Mr. Kindersley, in support of the motion.

Mr. Pemberton Leigh and Mr. Bates, *contra*.

THE MASTER OF THE ROLLS [Lord Langdale]. The answer of Clark, to the amendments and to the exceptions, was filed on the 23d of February 1843, and the title of that answer was, I presume, in the ordinary course, the further answer to the original bill and the answer to the amended bill; and the question is, whether an answer so entitled, comes within the description of the 6th Order of 1831, by which, "if the Plaintiff do not, within three weeks after a Defendant's second or third answer is filed, refer the same for insufficiency on [469] the old exceptions, such answers shall thenceforth be deemed sufficient." This was not a second answer to the original bill, but an answer to the amendments conjoined with the unanswered portion of the original bill. Is it not the first answer, so far as regards the amended bill?

It is quite clear that the 6th Order contemplates an answer to the same bill, namely, the second and third answer to the original bill; but if you have an answer which cannot be called the second or third answer to the same bill, but to that bill conjoined with amendments, then the case does not fall under the provisions of this order.

If such an amended bill were within the 6th Order, then, however insufficient the first answer might be, however important the matters of amendment might be, and however long it might require to investigate the sufficiency of the second answer, yet such answer would be deemed sufficient at the end of three weeks, instead of two months, and the Plaintiff's time for amending would consequently be reduced by five weeks. I must refuse this motion without costs.

[470] THOMPSON v. BLACKSTONE. June 23, 1843.

A trustee entered into a contract for the sale of trust property, and it was agreed that the purchaser should, out of the purchase-money, retain a private debt due to him from the trustee. On a bill by the trustee: Held, that this Court would not decree the specific performance of such a contract.

This was a bill for specific performance.

The bill was rather vague in its statements, but it alleged that the testator, by his will dated in 1822, devised certain estates to his wife for life, and after her decease unto his sons, the Plaintiffs Richard, Thomas and Edwin Thompson, "in trust to sell and dispose of the same, for the best price, or sum or sums of money that could be had or gotten for the same;" and he declared that their receipts should be good as sufficient discharges to any purchaser for the purchase-money. The bill did not state any trusts on which the produce was to be held.

The widow became indebted to Blackstone during the Plaintiff's minority, and deposited with him the title-deeds of the estate: Richard also became indebted to Blackstone.

The widow died in 1839, and in 1840 Richard, on behalf of himself and the other Plaintiffs (Thomas and Edwin) agreed with Blackstone for the sale to him of the property for £620, of which sum £240 was to be retained for the debts due to him from the widow and Richard, but Richard Thompson was "to be accountable to the estate of the said testator for the sum of £620." An agreement in writing was executed, whereby Blackstone agreed to purchase the property for £380.

The bill prayed a specific performance, and that the Defendant might pay the residue of the £380.

[471] There were statements in the bill which tended, though not very distinctly to shew, that there were trusts to be performed; as, that a Mr. Charlwood and his wife were beneficially interested under the will of the testator, that the three sons "in the execution of the trusts of the will of the testator," prepared conditions of sale of the property.

The Defendant demurred to the bill for want of equity.

Mr. Pemberton Leigh and Mr. Hardy, in support of the demurrer, argued, that upon the face of the bill, it appeared that the trustee had entered into an engagement to sell trust property, a part of the produce of which was, according to the terms of the agreement, to be applied in payment of the private debt of the trustee and of the widow. That this Court would not enforce a contract involving a breach of trust (see *Ord v. Noel*, 5 Mad. 438; *Wood v. Richardson*, 4 Beavan, 174), and that, therefore, there was no equity to support the bill. They objected also that Charlwood and his wife were necessary parties.

Mr. Kindersley and Mr. Bromhead, *contra*, contended that, upon the face of the bill, there appeared no trusts to perform, except the trust to sell the property. That it must be assumed, that the purchase-money belonged beneficially to the vendors; at all events, there being no trusts declared, that it belonged, as a resulting trust, to Richard the heir at law.

Mr. Pemberton Leigh, in reply. The bill shews that there are existing trusts under the will to be performed. It is not shewn that Richard is the heir at law; and [472] is a mere assumption that there is any resulting trust. A purchaser having notice of the improper mode in which the purchase-money is to be applied, cannot safely complete. He would be himself joining in a breach of trust.

THE MASTER OF THE ROLLS [Lord Langdale]. This bill is filed for the specific performance of the agreement, for the sale of the estate in question. The Plaintiffs state that, at the time it was entered into, there was an agreement and understanding between them to this effect. The Plaintiffs agreed to sell this estate to the Defendant for £620, of which £240 was to be retained by the purchaser, in satisfaction of a debt due to him from the widow and one of the vendors, and the remainder was to be paid over to the Plaintiffs. The Plaintiffs, receiving £380 only, were to be accountable to the estate of the said testator deceased for the full sum of £620.

and the sum of £240, part of the purchase-money, was to be applied in satisfaction of a debt, which, from the other statements of the bill, appears to be a debt originally due, in part from the widow of the testator, and as to the rest, from the Plaintiff Richard Thompson himself. £620 is distinctly stated to be the sum for which the Plaintiffs were to be accountable to the estate, and £240 of that, by the arrangement, was to be applied to debts due from other persons, and not from the estate of the testator. Is not that necessarily a breach of trust, if there be any trust alleged?

There is a trust alleged, which, though not very distinct, is more than sufficient to prevent such a contract as this being carried into effect by the aid of this Court upon a bill for specific performance.

[473] A beneficial interest is alleged, as well as a trust for sale; yet I am desired to suppose, that the trust for sale was without any object, so that there was a resulting trust for the benefit of the heir; and I am further to assume, that one of these Plaintiffs is the heir, though he is not so stated to be. I cannot assume either of these facts, especially when I find this statement, that the trustees for sale are to be accountable to the estate of the testator for the whole amount of the purchase-money, and words which, though somewhat vague, shew an interest in Charlwood and his wife. I think there is sufficient to shew that there is a trust to be carried into effect under the will, and that that which is sought to be carried into effect is a deviation from those trusts. I think on that ground, that this demurrer ought to be allowed.

It is unnecessary to say anything as to parties. (NOTE.—*Mortlock v. Buller*, 10 Ves. 292; *Ord v. Noel*, 5 Mad. 438; *Wood v. Richardson*, 4 Beavan, 174.)

[474] ARCHER v. HUDSON. July 3, 7, 1843.

The Plaintiff having obtained the common injunction upon the allowance of exceptions for insufficiency, procured an order to amend without prejudice to the injunction, undertaking to amend within a week, and that the Defendant might answer the exceptions and amendments together. The amendments having been made accordingly, the Court extended the common injunction to stay trial.

The bill in this case prayed for the common injunction. On the 26th of June the Defendant's answer was found insufficient by the Master, and the Plaintiffs there upon obtained the common injunction.

On the 27th of June the Plaintiffs obtained an order to amend their bill without prejudice to the injunction; and that the Defendant might answer the exceptions and amendments at the same time, the Plaintiffs undertaking to amend within a week. The bill was amended accordingly.

On the 30th of June notice of trial was given for the next Assizes at York, where the commission day was appointed for the 12th of July.

A motion was now made, on the usual affidavit, to extend the common injunction to stay trial. The truth of the amendments was also verified by affidavit.

Mr. Pemberton Leigh and Mr. Rolt, in support of the motion.

Mr. Turner and Mr. Elmaley opposed the motion, insisting that, according to the practice, the common injunction could not be extended upon an amended bill, especially on the eve of trial.

Howard v. Cliffe, before Lord Cottenham (10th May 1839), *Mellor v. Cresswell* (2 Mylne & K. 616), *Simes v. Duff* (8 Sim. 270), and [475] the second and third orders of 9th of May 1839 (Ord. Can. 135, 136), were cited.

THE MASTER OF THE ROLLS [Lord Langdale]. It is very important that this Court should strictly adhere to any rule laid down by the Lord Chancellor; and whatever I may think, yet, if the authority of *Howard v. Cliffe* applies, I must refuse this application. I will inquire what orders had been made in that case, and mention the case on Friday. If the authority applies, I shall not have the least hesitation in refusing this application.

The General Orders which have been now referred to, do not seem to have been brought under the consideration of the Lord Chancellor in that case. I have a perfect

recollection of the reason for those General Orders, and of all the inconveniences they were intended to remove.

The order to extend the common injunction has never been understood to make it a fresh injunction: it is an extension of the same injunction, and an order to dissolve, dissolves the whole.

July 7. THE MASTER OF THE ROLLS, after referring to the orders made in *Howard v. Cliffe*, made the order extending the injunction.(1)

[476] FLOWER v. HARTOPP. June 8, 9, July 8, 1843.

[S. C. 12 L. J. Ch. 507; 7 Jur. 613; 8 Beav. 199.]

King Charles the Second, by letters patent, granted some property in fee, subject to a fee-farm rent, and to a proviso of re-entry, in case a decree should be made at the suit of the King for repairing the property, and the same should afterwards remain for a year out of repair. The Crown afterwards granted away the rent. Held, that the proviso for re-entry could not be exercised, and that it therefore formed no objection to the title to the property.

By the conditions of sale, no further evidence of identity was to be required than what was afforded by the abstract and the documents therein abstracted. The descriptions held in the documents differed amongst themselves, and from the description in the particulars of sale. Held, that the purchaser was entitled to have further proof of the identity.

One general exception was taken to the Master's report of a good title, which did not point out the objections to the title. The Court disapproved of this inconvenient mode of proceeding.

A water corn-mill and premises were sold under the decree of the Court, and a reference was made to the Master to inquire and state whether a good title could be made thereto.

Upon that reference, it appeared, that by letters patent dated the 8th of April 1635, King Charles I. granted to Edward Ferrers and William Ferrers, their heirs and assigns, "all those water and corn-mills beneath the Castle of Leicester with all soke and suit to the same belonging" &c. (which was alleged to be the property sold), yielding a fee-farm rent of £17 to the King, subject to the following proviso:—

"That if, at any time thereafter, any mill thereby granted should be in decay, or totally ruined, thrown down or prostrated, and any cause, suit or plea should be instituted or mooted in the Court of the Duchy of Lancaster, on behalf of the King, his heirs or successors, against any tenant, farmer or occupier of the mills and other premises, for not repairing, sustaining and maintaining the same, or any of them, or on account of the same being totally ruined, prostrated or subverted; and a decree or decrees should be made by the said Court, for repairing and sustaining of all or any of the said [477] mills and other premises, and for the preserving, keeping and maintaining them in good state and repair, or for newly building, erecting or constructing them, or any of them; and nevertheless, the tenant, farmer or occupier thereof, should not, within one year next after such decree or decrees so, from time to time, made, repair, maintain, sustain, erect, build or otherwise restore the same mill, according to the form or effect of such decree or decrees, that then and so often it should be lawful for the King, his heirs and successors, into all or any of the said mill or mills, for the repairing, maintaining, newly building or erecting of which such decree or decrees shall have been made, to re-enter the same, and to have again and repossess for ever, anything in the letters patent to the contrary notwithstanding."

The letters patent also contained a covenant, on the part of the King, not to build any other water-mill upon any stream on which any mill thereby granted was erected,

(1) See *Brown v. Reina*, 3 Younge & J. 389; *Martin v. Mortlock*, 1 Newland's Pr. 356; *Goddard v. Smith*, Rolls, May 30, 1844; *Stratford v. Lewis*, V.-C. E., 23d May 1844.

or any wind or horse-mill within any manor, field, or place in which any wind or horse-mill then stood, or in any place near the mills thereby granted, whereby any injury could arise to them.

The property thus granted to Edward Ferrers and William Ferrers was, in 1636, conveyed by them to Edward Moseley, and afterwards, in the same year, by him to the Corporation of Leicester, and, in 1686, by the Corporation of Leicester to Lawrence Carter, under whose will, dated 1771, it was sold, and at length it became vested in Lewthwaite Flower, whose estate was administered in this cause.

The fee-farm rent was afterwards sold and conveyed under the statutes of Charles II. (22 Car. 2, c. 6, and 22 & 23 Car. 2, c. 24), to the trustees of [478] Colston's Hospital in Bristol, in whom the same was now vested.

This property being sold in this suit, a reference as to the title was made to the Master, who having reported in favour thereof, the case came on, upon an exception to his report. There were two objections, first, that the estate was subject to a right of re-entry, either in the Crown or in the grantee of the Crown; the second related to the identity, with respect to which it is necessary further to state, that, by the sixth condition of sale, it was provided as follows:—"That no further evidence of identity of the parcels shall be required, than what is afforded by the abstract, or the deeds, instruments or other documents therein abstracted."

The modern description in the particulars of sale differed from that in the will, letters patent, and subsequent deeds; and the description in the will, differed from the former instruments, the descriptions in which were not precisely the same.

Mr. Turner and Mr. Heathfield, for the purchaser, in support of the exception. The vendor can have no title to the assistance of this Court, unless he is able to give to the purchaser a secure title to the possession of the property for the term which he has contracted for. *Fildes v. Hooker* (3 Mad. 193). Here the Plaintiff has sold the fee-simple, subject only to a rent, and to the ordinary remedies for recovering it: nothing is stated in the conditions of sale, of the condition by which the estate might be wholly defeated. The right of re-entry is shewn to exist, and no presumption can be raised against [479] this express reservation. *Adair v. Shaftes* (mentioned in 19 Ves. p. 156). A purchaser is not compellable to accept a title to premises formerly subject to an incumbrance, the discharge of which is shewn only by presumption. *Barnesell v. Harris* (1 Taunt. 430). The consideration was reserved for the benefit of the King's subjects or his tenants; and if the vendor alleges that it is neither in the King nor in the purchaser of the fee-farm rent, he must shew, clearly and distinctly, how it has been destroyed.

The identity of the property is not sufficiently shewn; notwithstanding the conditions of sale, the identity must be proved; it is only by proving the identity of the property that you can shew that the abstracted deeds relate to it. To evidence a good title to property by the abstracted deeds, you must shew that the deeds relate to that very property.

The conditions of sale are catching, and not to be favoured. *Taylor v. Martindale* (1 Y. & Col. (C. C.) 658); *Southby v. Hutt* (2 Myl. & Cr. 207; and see *Hyde v. Dallaway*, 4 Beavan, 606).

Mr. Pemberton Leigh and Mr. G. L. Russell, for the Plaintiff. The purchaser has wholly failed in shewing that the proviso for re-entry exists. If it does now exist, it must either be in the Crown, or in the purchaser of the rent. It cannot be in, or be exercised by the Crown, for by re-entering, the Crown would not only defeat the estate of the vendor, but also the rent granted by it to Colston's Hospital, and the effect would be to get back the property, discharged of the rent. The Crown cannot defeat its own grant of the rent. The statute of Charles II. (22 Car. 2, c. 6, s. 4) vests the rent in the grantees absolutely, [480] and provides that the grant is to be expounded most beneficially for the patentees and grantees of the rent. It became impossible, therefore, for the Crown to take advantage of the condition for re-entry. On the other hand, the right of re-entry cannot be in the purchaser of the rent, because, by the common law, no assignee of a reversion can take advantage of a re-entry by force of any condition, and the grant was not of a reversion within the statute 32 Hen. 8, c. 34; again the owner of the fee-farm rent cannot have, at the suit of the Crown, that decree, upon which alone the right of re-entry is to be founded,

It cannot therefore now exist, and, after the long possession, it must be presumed to be extinguished. *Gibson v. Clark* (1 Jac. & W. 159). If the right does exist, it can only arise upon a decree in the Duchy Court at the suit of the Crown, which never could be obtained.

The identity is proved according to the express terms of the conditions of sale. The purchaser is entitled to no further evidence of the identity than what is afforded by the abstract.

Though there may be a variation in description, it may be accounted for by the ordinary changes which property undergoes by lapse of time. There is a sufficient moral certainty of the property being the same, and it is fortified by the fact of the long possession.

Mr. Turner, in reply.

Lord Braybrooke v. Inskip (8 Ves. 417), *Lyddall v. Weston* (2 Atk. 19), were also cited.

[481] THE MASTER OF THE ROLLS [Lord Langdale]. In this case two objections are taken to the title. The first as to the right of re-entry on the part of the Crown; and second as to the identity of the parcels.

With respect to the first, which is the important objection, I will take time to consider it. It may be necessary to have it decided in another place.

As to the question of identity, I am not satisfied with the evidence produced before the Master. The vendor goes to a sale with a certain description of the property in his particulars, and he has a condition of sale which says: "That no further evidence of the identity of the parcels shall be required, than what is afforded by the abstract, or the deeds, instruments, or other documents therein abstracted."

When these instruments are looked into, we find that the description contained in the last, which is a will of not less than seventy years old, differs from the description in the particulars. Then, it was justly said, you are not to confine yourself to the will, but you are to look at the other instruments stated in the abstract; and if you find that the words used in the will, being modified when compared with the expressions used in the previous deeds, induce a conclusion which identifies the property with the description contained in the particulars, then the vendor has done all that can be required. But, upon looking back to the other descriptions contained in the three or four previous instruments, it is found that they vary more than the last instrument, from the description contained in the particulars. This, therefore, does not aid the vendor, but rather makes the identity more difficult. The lapse of [482] seventy years would well justify a change in the state of the property, and a variation in the description; but the instant you have a variation in the deeds, the description in the deeds cannot, of itself, be evidence of the description contained in the particulars: something else must be introduced to correct them; and therefore, although the purchaser may not be entitled to require any further evidence of the identity of the parcels than what is afforded by the deeds, yet he is entitled to have what he has bought distinguished, and without that, it cannot be said by the vendor that he has proved, by the instruments, the parcels described in the particulars. It is very possible that a short affidavit might remove the difficulty, but I think, as the matter at present stands, the exception, as to the identity, must be referred back to the Master, unless the parties agree on some other course.

I will reserve the other question.

July 8. THE MASTER OF THE ROLLS [Lord Langdale]. This case comes on upon an exception to the Master's report dated the 3d day of March 1843, finding that a good title was shewn to an estate purchased by the exceptant under the decree of the Court.

On the hearing of the exception, two points only were raised in argument. It was alleged, first, that the estate was subject to a right of re-entry, either in the Crown or in the grantee of the Crown; and, secondly, that the identity of the premises sold, with the premises to which the vendor has made out a title, was not sufficiently established. Upon the second point, I thought the [483] exception good; as to the first, I reserved the question for further consideration.

The title is traced up to the letters patent dated the 8th day of April 1635 (11 Car. 1), whereby, that which is alleged to be, and which for the present purpose must

be assumed to be, the property in question, was granted to Edward Ferrers and Williams Ferrers in fee, yielding a fee-farm rent of £17 to the King.

The property in question was in part described as "all those water and corn-mills beneath the Castle of Leicester with all soke and suit to the same mills belonging." And the letters patent contained a proviso "That if at any time thereafter," &c.

The property thus granted to Edward Ferrers and William Ferrers was by them conveyed to Edward Moseley, and afterwards by him to the Corporation of Leicester, and, at a subsequent period, by the Corporation of Leicester to Lawrence Carter, under whose will it was sold, and at length it became vested in Lewthwaite Flower, whose estate is administered in this cause. The proviso for re-entry which is contained in the letters patent, was not noticed in the particulars and conditions of sale; and the question is, whether the right of re-entry is now in force; for if it is, the vendor cannot compel the purchaser to complete the purchase.

It does not appear that the right of re-entry was ever made the subject of any grant or release, but the fee-farm rent, which was all the interest reserved to the Crown by the letters patent, was some time afterwards granted to, and is now vested in, the trustees of Colston's Hospital at Bristol.

[484] The purchaser alleges that the existence of the fee-farm rent proves the existence of the right of re-entry, or, at least, that it ought to be proved by the vendor that the right of re-entry is extinct. His argument is shortly this: the right exists or not; if it exists, it is either in the Crown or in the grantee of the fee-farm rent, and to the purchaser it is immaterial which; and if it does not exist, the vendor ought to shew how it has been destroyed.

The vendor scarcely, if at all, objects to the form or substance of the argument; but he insists, that at this time, there is no right of re-entry, for if any, it is true, as the purchaser says, that it must be in the Crown, or in the grantee of the fee-farm rent; it cannot be in the grantee of the fee-farm rent, because the grant was not of a reversion within the statute 32 Hen. 8, c. 34, and also because the owner of the fee-farm rent cannot have, at the suit of the King, that decree upon which alone the right of re-entry is to be founded; and it cannot be in the Crown, because the exercise of it would defeat the grant of the fee-farm rent.

The argument of the vendor appears to me to be valid. There is nothing to countenance the conjecture made by the purchaser, that the right of re-entry was reserved by the Crown for the public benefit, to secure the existence of a mill where corn can be ground. The whole interest of the Crown has been alienated. The right of re-entry could only be enforced under a decree obtained at the suit of the Crown. The re-entry, if obtained, would make void, *ab initio*, the estate granted by the letters patent, and defeat the rent charge; and, on consideration of the nature of the proviso, the alienation of the fee-farm rents, and the effect of the statutes (32 Hen. 8, c. 34, 22 Car. 2, c. 6, and 22 & 23 [485] Car. 2, c. 24), I am of opinion, that there is not, under the proviso, any right of re-entry which can now be enforced. I must therefore overrule the exception, so far as it is founded on the objection that such right of re-entry is in force.

Refer it back to the Master, upon the objection that the property described in the abstract is not sufficiently identified with the property described in the printed particulars.

One general exception only had been taken to the report, "for that the Master had certified that a good title was shewn to the property, whereas the Master ought not to have so certified."

It was objected, that the form was improper, and that the purchaser ought to have specified the objections on which he intended to rely, and costs were, in consequence, asked against the exceptant.

THE MASTER OF THE ROLLS disapproved of the mode in which the questions had been presented to the Court, and held, that the order now made ought to specify the objections insisted on by the exceptant: he said, however, that he could make no special order as to costs.

[486] CANNEY v. BOND. July 18, 1843.

[S. C. 1 L. T. (O. S.) 409.]

Part of a testator's assets consisted of a promissory note. The executor, though requested by the parties interested so to do, neglected to get it in; and about two years afterwards it was lost by the insolvency of the debtor. Held, that the executor was personally liable.

The object of the suit was to make an executor liable for a sum of money which had been lost by the insolvency of the debtor, on whose personal security the debt had been allowed by the executor to remain.

In 1825 the testator advanced to a Mr. Phillips a sum of £500, to be invested by the latter on some mortgage security. For securing it in the meantime, Mr. Phillips gave to the testator his promissory note, payable with interest.

In January 1826 the testator died, and his will was proved by Jones and Bond, his executors. Shortly afterwards, Jones and one of the persons interested in the testator's estate, pressed Bond to call in this debt, and invest it in the funds; but Bond replied, "that he should not think of removing the money from Mr. Phillips' hands, as it was as safe there as if it were in the Bank of England." Other similar applications were afterwards made to Bond, but with no better success. In 1827 Bond received £100 from Mr. Phillips, in part payment, and the remainder was lost by the death and insolvency of Mr. Phillips in March 1828. There was evidence to show that Mr. Phillips, if pressed earlier, would have paid the amount.

Under these circumstances, it was insisted, by the bill, that Bond was personally liable for the £400 and interest.

[487] Mr. G. L. Russell (in the absence of Mr. Pemberton Leigh), for the Plaintiff, cited *Lawson v. Copeland* (2 B. C. C. 156), *Powell v. Evans* (5 Ves. 839), *Clough v. Bond* (3 Myl. & Cr. 490).

Mr. Kindersley and Mr. Lovat, for Bond.

Mr. Turner and Mr. Elderton, for another Defendant.

THE MASTER OF THE ROLLS [Lord Langdale]. At the death of the testator part of his estate was outstanding on personal security. It was the duty of the executors, quite independently of any application being made to them by the persons interested in the estate, to take steps to get in this money. In the exercise of a full discretion, they were not to commence legal proceedings unnecessarily, but they ought to have exerted themselves to get in the debt, and, if necessary, to have commenced compulsory proceedings to obtain it.

The persons beneficially interested, not considering the money safe where it was requested the Defendant Bond to get it in. Instead of complying with this request he refused to do so, saying that the money was as safe as in the Bank of England; two years afterwards the money was lost by the insolvency of the debtor.

If, in any case, an executor is to be charged for wilful default, it is in a case of this sort, where the money not only is found on a security not sanctioned by the Court, and which ought therefore to be got in, but where also the executor has been requested to call it in, and has refused on the ground that it is perfectly safe.

[488] The Defendant, by his conduct, has taken upon himself the risk of the security, and he must therefore be charged with it, and with the costs down to the hearing.

[488] JONES v. POWELL. July 17, 22, 1843.

An executor, upon transferring stock to a legatee, paid one-sixteenth per cent. to a stockbroker for identifying him at the bank. He was allowed the payment in passing his accounts.

The testator gave to each of his three children £20,000, and he directed that during their minorities, their legacies should be invested in their names in the

funds. By the terms of the will, the trustees were authorised to retain, out of the estate, all costs, damages, and expenses which they might sustain in the execution of the trusts.

The three children being infants, Mr. Paterson, the executor, transferred three sums of £21,728, 8s., 3 per cents. (being the amount which would have been purchased with the legacies after deducting the legacy duty), from the name of the executor to the names of the executor and the infants.

He paid to the stockbroker for such three transfers, one-sixteenth per cent., or £40, 14s. 10d. On passing his accounts before the Master, Mr. Paterson was allowed £6, 6s. only for the fee on such transfers.

There were three other sums of £36, 5s., £42, 18s. 4d., and £9, 14s. 5d., charged by the executor for fees on transfers of other stock, for which the Master respectively allowed £2, 2s., £6, 6s., and £2, 2s. only. All the transfers had been made previous to the institution of the suit.

[489] The charges for expenses to brokers for transfers therefore amounted to £96, 12s., which the Master disallowed except as to sixteen guineas.

The Defendant Paterson took exceptions to the Master's report, insisting that the whole £96, 12s. ought to have been allowed him in passing his accounts.

In support of the charge, five stockbrokers deposed, that it was the custom of stockbrokers always to receive one-sixteenth per cent. for transfers (except where no charge was made); and one of them said, that according to the rule of the Bank of England, the executor would not have been allowed to make the transfer without a sworn broker, or his representatives, being present to identify him as a proper person to make the same.

On the other hand, the clerk of a respectable firm of solicitors stated, that he had been for twenty years past in the habit of attending at various times at the Bank of England, for the purpose of identifying persons making transfers of stock standing in their names, and that he was well acquainted with the practice of the Bank of England on the transfer of such stock. That any proprietor of Government stocks transferable at the Bank of England was capable of transferring the same, without the intervention or assistance of any broker or member of the Stock Exchange, upon being identified by some person known to some clerk or clerks in the said Bank of England. That his employers were not brokers or members of the Stock Exchange, nor was the witness.

Another witness stated that he had been, for a period of eighteen years, a clerk in the banking-house of [490] Messrs. Barclay, Bevan, & Co., and that he was well acquainted with the practice of the Bank of England on the transfer of stock, and on other matters. That any proprietor of Government stock transferable at the Bank of England, was capable of transferring the same, without the intervention or assistance of any broker or member of the Stock Exchange, upon being identified by some person known to some clerk or clerks in the said Bank of England, and that he and his employers were frequently in the habit of attending at the bank for the purpose of transferring stocks belonging to customers of his said employers, and identifying the parties intending to make the same; and that, in such instances, no broker or member of the Stock Exchange was employed in the matter.

Mr. Pemberton Leigh and Mr. Renshaw, for Mr. Paterson, (1) in support of the exceptions. The executor ought to be allowed the usual charges paid by him for the transfer. It is the ordinary practice to employ a broker in effecting a transfer of funds, and the invariable charge is clearly proved, by the evidence, to be one-sixteenth per cent., and it is even stated that the bank would not permit a transfer without a broker being present to identify the transfer. The duty of the broker in this case was more than to identify, he was to make a calculation of what sum of stock, according to the market price at the moment, and which constantly varies, could be purchased with the legacy in sterling money after deducting the duty. The sums transferred were very large, and, according to the practice, this sort of charge has always been allowed to executors.

(1) The exceptions, though taken nominally by the Defendant Paterson, were understood to have been, in reality, brought forward by the committee of the Stock Exchange.

[491] Mr. Kindersley and Mr. Tyrrell, *contra*. This case has been brought forward by the Stock Exchange, and the brokers who have made affidavits are interested in supporting this unreasonable charge: the evidence is therefore to be regarded with some suspicion.

The bank are bound by law to allow a transfer to be made in their books without charge, and the interference of a broker is altogether unnecessary. All that the bank requires for their protection is, that the party shall be identified by any respectable person known to them, as by a banker or his clerk: only one of the several brokers swears that the intervention of a broker is indispensable, and that is contradicted by two witnesses. The employment of a broker implies a buying and selling, which a transfer is not. Supposing, however, that it is necessary to employ a broker, it is perfectly unreasonable to allow a per centage for identifying, the trouble being in no way increased by the amount. The sum of one guinea only is allowed to the broker of the Accountant-General; and where executors were ordered to transfer a fund into Court, and paid £12 for the transfer, one guinea alone was allowed them; *Hopkinson v. Roe* (1 Beavan, 183). It is preposterous to say that £96, 12s. is a reasonable sum to pay a broker for walking to the bank, and saying "This is Mr. Paterson." The executor might have got his banker or his clerk to identify him at an expense of a guinea.

The Master is therefore right, and the exceptions to his report ought to be overruled.

Mr. Benson, for another party, supported the Master's report.

[492] Mr. Pemberton Leigh, in reply. *Hopkinson v. Roe* does not apply. There the transfer was into Court, and the charge is settled by arrangement with the Accountant-General's broker.

THE MASTER OF THE ROLLS said he would make inquiries as to the practice, and had these sort of matters had been usually dealt with in the Master's offices, because if there had been a habit of allowing to executors the expense of transfers, then, in the present case, in which no special circumstances had been proved, the sums paid ought to be allowed. He added that he thought that the case of *Hopkinson v. Roe* did not apply to this case.

July 22. THE MASTER OF THE ROLLS [Lord Langdale], after making inquiries, allowed the exceptions to the Master's report, thereby deciding that the executor was entitled to the sums paid by him to the stockbroker.

[492] GREENWOOD v. ROTHWELL. July 17, 1843.

[S. C. 7 Beav. 279, 291; 6 Scott (N. R.), 670; 5 Mac. & G. 628; 12 L. J. C. P. 250]

Devise to A. for his life, and from and after his decease, "unto all and every the issue of the body of the said A., share and share alike, as tenants in common, and the heirs of such issue." Held, that A. took an estate for life only.

The testator, John Mitchell, by his will, dated in 1811, after directing his debts and legacies to be paid out of his real and personal estate, devised as follows:—"I also give and devise unto Jonas Greenwood, the son of my late brother-in-law Jonas Greenwood, all my lands and hereditaments situate in Clayton aforesaid, and now in the occupation of John Mortimer; and [493] also all other my messuages, cottages, lands and tenements situate in Clayton aforesaid, for and during the natural life of the said Jonas Greenwood; and from and after his decease, I give and devise the said premises unto all and every the issue of the body of the said Jonas Greenwood, share and share alike, as tenants in common, and the heirs of such issue."

Jonas Greenwood survived the testator, and died in 1840.

This bill was filed by the children of Jonas Greenwood, insisting that, under the will, he took a life-estate only. It alleged that, in 1823, he conveyed the property by lease and release to Abraham Tempest in fee, and to bar the estate tail, Jonas Greenwood thereby covenanted to levy a fine, which the bill stated "had been levied accordingly."

To this bill the Defendant pleaded that Jonas Greenwood levied the fine *with proclamations*; and averred that the estate and interest which the Plaintiffs would otherwise have had was thereby barred and extinguished.

The plea came on upon the 22d of June 1842, when a case was directed to the Common Pleas on the construction of the devise. That Court certified that Jonas Greenwood took an estate for life. (6 Scott (N. R.) 670.)

The plea now came on for argument.

Mr. Pemberton Leigh and Mr. Rogers, for the Defendant.

[494] Mr. Turner and Mr. Thomas Turner, for the Plaintiffs.

THE MASTER OF THE ROLLS [Lord Langdale]. In cases of this sort, you are to consider the rules of law and apply them to the particular cases, having regard to the intention of the testator, to be collected from all the words of the will.

Here there is a gift, in the first instance, expressly for life; therefore, so far, there is a clear intention that Jonas should only take a life-estate. The next gift is after his decease, to "all and every the issue of the body of the said Jonas Greenwood, share and share alike, as tenants in common."

The word, issue, by itself is ambiguous; it may mean the children of Jonas, or it may mean the issue of Jonas intended to take in a certain order of succession for ever. But under what circumstances are they to take here? What are the *indicia* of intention? "All and every of the issue" are to take, "share and share alike as tenants in common." There is to be a distribution among them, and there is a superadded limitation "to the heirs of such issue."

There is therefore a distinct gift to a person for life, and after his death, to his issue, share and share alike, and with the word "heirs" superadded. This does not look like an intention that they should take in perpetual succession. It is to be further observed, that the gift over, which has been relied on in other cases, is wholly wanting here.

The distinctions in all these cases are very nice. The Court must carefully look at all the *indicia* of intention, and looking at them in this case, I am not satisfied [495] that the decision of the Court of Common Pleas is erroneous. I believe it is consistent with the other authorities, and I do not think it ought to be disturbed.

Overrule the plea without costs, and let the Defendant have a month's time to answer.

[495] MADGWICK v. WIMBLE. July 13, 1843.

[S. C. 14 L. J. Ch. 387; 7 Jur. 661.]

Difficulties in appointing a receiver of a partnership upon motion.

Surviving partners insisted on continuing the partnership with the assets of a deceased partner. The Court thought the representatives of the latter entitled to a receiver. Partnership stipulation, that a son of one partner, or in case of his minority, the executor should, on the death of such partner, succeed to his share. The Court, on the terms of the partnership deed, considered it an option, and not an obligation.

In June 1849 Messrs. Warner, Attwood and Wimble entered into partnership for a term of years. By the deed of partnership it was provided, that Attwood was to be entitled to introduce his eldest son as an apprentice, and, after the expiration of the apprenticeship, he was to be at liberty to transfer to such eldest son his own share and interest in the said partnership. "And in case the said William Attwood should depart this life during the continuance of any such partnership, leaving his said eldest son qualified to take his father's share in the said partnership concerns, such son should be entitled to succeed thereto, and become a partner with the other or others. But if Attwood should depart this life, leaving his eldest son him surviving, who should be disqualified for immediately taking his father's share, by reason only of minority, then that the executors of Attwood should be entitled to hold Attwood's share in the said partnership during such minority, allowing to Warner £100 per annum, out of their share of profits, as an equivalent for his personal attention, and should transfer the same share to such son on his attaining full age. Provided always that such son

of the said William Attwood should not be entitled to [496] become a partner, unless he should be of good character and competent ability, and that any party thereto might object to his admission as such partner, for want of such qualification, and might require a decision thereon to be made by arbitration. And in case Attwood should so die, leaving a widow, but not such son entitled to succeed to his share of the said co-partnership, or if any such son should become disqualified therefrom, or should die in the lifetime of his mother, then such widow of Attwood should be entitled to receive, not only during the remainder of the seven years, but also during such further term as the said trade should be carried on under the provisions of the deed, an annuity of £100, to be paid by quarterly payments by the party or parties carrying on the same trade, in proportion to their respective shares of profit, and to commence from the time when Attwood or his executors or his son, entitled as aforesaid, should cease to have any share in the profits of the said trade."

Provision was afterwards made for the event of the death of Wimble or Warner.

A lease for twenty-one years was at the same time granted by Attwood of some property to the three partners, in trust for the partnership.

Attwood died in November 1841, leaving his son a minor, and his widow alone proved his will. On her death, in May 1842, the Plaintiff proved his will, and gave notice to the surviving partners, that he declined to take the testator's share for the purpose of carrying on the trade for the benefit of his estate, or of his eldest son.

The surviving partners, however, continuing to carry on the trade as theretofore the executors of Attwood [497] filed this bill to have the partnership affairs wound up, and for a receiver and injunction. Warner insisted, that by the terms of the partnership, the surviving partners had a right to continue the capital of Attwood in the business; he stated that the widow, after proving the will, had continued the business with them, and had received her share of the profits of the permanent capital.

A motion was now made, on the part of the Plaintiff, for a receiver to get in the partnership property, and to sell the stock and effects belonging thereto, and for an injunction to restrain the surviving partners from carrying on the business in the name of the deceased partner.

Mr. Pemberton Leigh and Mr. Renshaw, in support of the motion. According to the true construction of the partnership deed, the son and executor of Attwood are entitled to an *option* of taking the share of Attwood in the business; but it is not obligatory on them to do so. Nothing has been done by the widow to bind the testator's estate by an adoption of the right. All she has done has been to receive monies on account. Supposing, however, that she had adopted it, that would not bind the present Plaintiff. He cannot be compelled to make himself personally responsible for the losses and liabilities of a partnership, in which he has no beneficial interest. There will be no limit to his liability if he enters into this partnership. Even if the testator had covenanted that his executor should carry on the business with the surviving partners after his death, the executor could not be compelled against his will, to perform that obligation of his testator.

The estate of Attwood is insolvent, and all his assets are required for payment of his debts: they cannot therefore be wholly retained by his surviving partners.

[498] The circumstances of this case require the appointment of a receiver for the protection of the testator's interests. Here there is a dissolution by the death of Attwood, and as to the rights of succeeding to the testator's share, *Kershaw v. Mathews* (2 Russ. 62) decides, that when a partner has a right to appoint a person to succeed upon his death, to his share in a business, and the person so appointed refuses to accept that share, or to comply with the stipulations, the partnership is dissolved. Here the Defendants, after dissolution, are continuing the trade with the testator's assets, and in the testator's name; this is a sufficient ground for the interposition of the Court; *Harding v. Glover* (18 Ves. 281). They also cited *Wilson v. Greenwell* (1 Swan. 481).

Mr. Teed and Mr. Goodeve, for Wimble, did not oppose the motion.

Mr. Kindersley and Mr. Turner, for the Defendant Warner. The terms of the partnership deed, and the conduct of the late executrix, entitle the surviving partners

to continue the business in the mode pointed out by the partnership deed. The Court will not grant a receiver, except in cases of misconduct or insolvency; neither of which exists here. The object of appointing a receiver is to keep matters *in statu quo* till the hearing, but to appoint one in the present case, would be to stop the business, and destroy the goodwill; and thus put it out of the power of the Court to determine in favour of the Defendants at the hearing, for the subject in dispute will be then destroyed. The rule of the Court is not to interfere, upon an interlocutory application, in a way to prevent the real question between the parties being discussed; *The Attorney-General v. The Corporation of Liverpool* (1 Myl. & Cr. p. 207); and it will not, on motion, decide the whole merits of the cause. (*The Skinnery Company v. The Irish Society*, 1 Myl. & Cr. p. 163.)

It is said that Attwood's estate is insolvent; but there is no evidence of that fact; and even supposing it to be true, that would not give to his personal representatives the right of putting an end to the partnership contract: it is binding on the deceased partner and his property; and it is not to be released on the ground of insolvency. The Defendants have entered into the partnership and embarked their own capital therein, on the faith that the stipulations on the part of Attwood would be performed; besides this, the executrix by adopting the option, bound Attwood's estate, and the present Plaintiff cannot now recede from it.

Mr. Pemberton Leigh, in reply.

Where a partnership is dissolved, it is impossible that matters can remain *in statu quo*. It must, of necessity, be wound up by a sale, and every application of the partnership property inconsistent with winding it up is improper. *Crawshaw v. Maule* (1 Swan. p. 507).

If the testator had covenanted that the business should be continued by his representatives after his death, and that his partners should retain the capital, still, if the executor or administrator refused to become a partner, the surviving partners could not insist on the performance of the stipulation. An action might be brought, and the assets might be liable, but no partnership could [500] exist without the assent of the executor, otherwise an executor or administrator might be compelled to join in a declining or insolvent concern, and subject himself, personally, to the gravest responsibility.

THE MASTER OF THE ROLLS [Lord Langdale]. It must be admitted, that when an application is made for a receiver in partnership cases, the Court is always placed in a position of very great difficulty; on the one hand, if it grants the motion, the effect of it is to put an end to the partnership, which one of the parties claims a right to have continued; and, on the other hand, if it refuses the motion, it leaves the Defendant at liberty to go on with the partnership business, at the risk, and probably at the great loss and prejudice, of the dissenting party. Between these difficulties it is not very easy to select the course which is best to be taken, but the Court is under the necessity of adopting some mode of proceeding, to protect, according to the best view it can take of the matter, the interests of both parties, and it has accordingly interfered in many such cases.

The rights of the parties now in question depend upon the deed. The case seems to be this, that there was to be a partnership continued between them for a certain term of years, that is, if they all lived during that period. A separate provision was made for the event of the death of any or either of them. Upon the death of Warner or Wimble, a provision was made for the disposition of their interests; but, upon the death of Attwood, a different sort of provision was made, for he wished to secure for his son the advantage of becoming a member of the partnership, and a particular stipulation was entered into for that purpose, which was to this effect. [His Lordship stated it.]

[501] Now nobody can doubt what was the object of this agreement; it was the intention of Attwood the father to secure to his son, if he should be qualified at the time of his father's death, the right to become a member of this partnership; and in case he should not then be qualified, by reason of his minority only, then to secure to his executors a right to continue the partnership until the son attained his age of twenty-one, and then to assign to him.

It is said, that because the executors and the son were to have this right, they were

therefore under an obligation to go on with the partnership, and undertake all the risks of it, under any circumstances whatever that might occur; and that the surviving partners, instead of being simply under the obligation of admitting them to be partners, were to have a right of compelling them to be partners, and to continue Attwood's property in the business. I cannot so construe the deed, and I do not think that this could be their meaning. It is not right for me now to put a final construction upon this deed, or to come to a final adjudication upon it, but, upon the consideration of two courses, both of which the Court would willingly avoid, as both must interfere with rights which may, by possibility, have to be hereafter determined still when the question is, which course I am to adopt, I think, upon the construction of this deed, and bearing in mind that Mr. Warner insists that he has a right to keep the property of this testator in this concern, and to subject it to all the partnership risks and responsibilities until the hearing, I ought to interfere to protect the property. I will not interfere rashly, and, after stating my opinion, I think I ought to take a course which I have pursued on former occasions with great advantage to the parties, namely, to allow the matter to stand over, to enable the parties to communicate and come to [502] some arrangement, by which these matters may be brought to a satisfactory conclusion without the interference of the Court. There would be for the mutual advantage of all parties. If necessary, however, I should appoint a receiver, but I will not take that step unless the parties make it absolutely necessary for me to do so.

It might be the most proper course, on this occasion, to refer it to the Master to determine what course would be for the common advantage of all parties concerned to adopt. It may be proper that the surviving partners should continue the business for the purpose of winding it up.

The parties had better avoid the interference of this Court if they can. If they cannot, I must act upon this, as I did on one or two former occasions, when this mode of proceeding was not successful—I must apply the power, which this Court has, of appointing a receiver, and take the matters out of the hands of both parties. I should be very sorry to do that, but it is my duty to do so, if the parties do not agree amongst themselves.

The parties afterwards referred the matters in difference to the arbitration of Mr. James Parker.

[503] PRITT v. CLAY. July 12, 13, 17, 21, 1843.

[See *Gething v. Keighley*, 1878, 9 Ch. D. 550.]

A party who, upon a compromise, had executed a general release, claimed relief on the ground of a large item in which he was interested, having, by mistake, been omitted in the account. Held, that he was entitled to relief, but that to obtain the release must be wholly set aside.

A. B., the representative of a deceased partner, having filed his bill against C. D., a surviving partner, for an account, A. B., in consideration of £500, released C. D. from all claims, and the bill was dismissed. By mutual error a debt of £30 owing to the partnership, but which was not then known to exist, was omitted in the consideration by both parties; C. D. afterwards received it. Held, that A. B., notwithstanding the release, was entitled to his share of the debt, but that to obtain it the whole account must be reopened.

Messrs. Pritt & Clay carried on business in partnership as solicitors. Pritt was entitled to two-thirds of the profits, and Clay to the remaining one-third.

In December 1831 Pritt died, leaving his partner surviving him; and in 1832 the representatives of Pritt filed their bill in this Court against Clay, for the purpose of having the partnership accounts taken, and for the ascertainment and payment of the share of Pritt. The Defendant put in his answer setting forth the accounts, but by an error, arising altogether from ignorance of the fact, and not from fraud, a claim

which the firm had against the Liverpool and Manchester Railway Company, was omitted. A negotiation took place for the compromise of the suit, and the Plaintiffs ultimately agreed to accept from the Defendant the sum of £500 "in full compromise, satisfaction, and discharge of and from all differences, claims, and demands." This sum was accordingly paid, and, in January 1840, the parties executed mutual releases from all actions, accounts, claims, &c., which they had or might have concerning the partnership, and the bill, by consent, was dismissed without costs.

The Defendant being afterwards called on by the railway company to make out all the bills of costs due [504] from them to the partnership, an examination of the books took place, and it was then discovered, to the surprise of the Defendant, that, though Pritt, who principally attended to the accounts, had sent in bills of costs against the company down to the summer of 1831, yet that he had omitted costs to the extent of £1998. This account was sent in and the amount paid to Clay the surviving partner. The representatives of Pritt then filed this bill, insisting that, notwithstanding the release, they were entitled to participate in this sum, the arrangement having taken place under the mutual error that no such claim as that against the company existed.

Mr. Pemberton Leigh and Mr. Rolt, for the Plaintiffs.

THE SOLICITOR-GENERAL (Sir W. W. Follett), Mr. Tinney, and Mr. Bazalgette, for the Defendant.

Harris v. Kemble (2 Dow & Cl. 463, and 5 Bli. 730) was referred to.

THE MASTER OF THE ROLLS was of opinion that this item had been excluded by a common error. That, notwithstanding the release, the Defendant was not entitled to keep the whole benefit for himself, and that the mistake ought to be set right.

A question then arose, whether the Plaintiffs were entitled to a decree at once for two-thirds of the £1998, or whether the whole accounts were to be opened, and this sum taken merely as an item in them.

[505] THE MASTER OF THE ROLLS, on this point, reserved his judgment.

July 21. THE MASTER OF THE ROLLS [Lord Langdale]. In this case I stated my opinion, that, notwithstanding the release which had been executed by the Plaintiffs, the Defendant was bound to account for the sum of £1998 which he had received subsequently to the date of the release. The remaining question is in what mode he is to account?

The Plaintiffs by their bill allege, that the sum in question ought to be treated as so much clear profit realised, on the behalf of the firm of Pritt & Clay, and ought to be divided and paid as such, upon the terms of the articles of partnership, thus giving two-third parts to the Plaintiffs, as representatives of Pritt, and leaving the remaining one-third part to the Defendant.

On the other hand, the Defendant insists, that in the event of his not being permitted to retain the whole sum for himself, it ought to be treated only as an item in the partnership accounts, which, in the same event, ought to be considered as entirely open.

I can have no doubt but that, at the time when the releases were given, both parties intended that all accounts and transactions relating to the partnership of Pritt & Clay should be closed. Neither of them anticipated that anything would occur to disturb the arrangement then concluded. The Defendant, thinking that he had satisfied the liabilities of the late firm, and expecting to receive no more than appeared probable from the result of his examination of the books and [506] accounts, which result he had stated in the schedule to his second answer in the former suit, did not anticipate that he would or could again be called upon by the Plaintiffs to account for any subsequent receipts, and in that faith, he executed the release which he gave to the Plaintiffs. It has happened that, under the circumstances which have occurred, the Plaintiffs appear to me to have a right to call upon the Defendant to account for a subsequent receipt, and in such a case, it is necessary to take care that injustice is not done to the Defendant, by holding him to an arrangement, from which, as to this sum, at least, the Plaintiffs are released.

It was argued, that the sum in question ought to be considered as entirely out of the agreement, and that the Plaintiffs' right to their share of it ought to be treated

as an entirely independent demand; but it does not appear to me that I ought so to consider it. If this sum had been known to both parties, it would have been treated as an item in the partnership accounts. I may presume, that if, with the item in their view, they had been desirous to compromise the suit, the Plaintiffs would have desired, and the Defendant might have been willing to give, a larger sum than was actually paid to the Plaintiffs; but what sum would have been required or given it is impossible for me to know, or even to conjecture. Various motives which induced the parties to compromise in the state of things which they supposed to be true might have operated differently, or with different force and effect, if the existence of this item had been known; and, giving to the Plaintiffs the benefit of the item in account, it appears to me just, that both parties should, as far as it is now practicable be restored to the situation in which they were before the agreement which is the disturbed was made. I am therefore of opinion, that an account of the partnership profits [507] must be taken, in the manner asked by the alternative prayer of the bill, except as to the two years, in respect of which I do not understand that the Plaintiffs' claim to an account is established.

[507] PRICE v. BLAKEMORE. July 26, 1843.

Trustees, with the consent of A. B., the tenant for life, had a power to sell the trust estate and invest the produce in other real estate. In 1810 A. B., with the concurrence of the trustees, sold the estate for £8440, and received the purchase-money. About the same time (but whether with the concurrence of the trustees was not proved), A. B. purchased another estate for £17,400. Of the £8440, £8124 was paid by A. B. in part payment for the second estate; the remainder was paid part out of A. B.'s monies, and partly by money raised by a mortgage of the estate. The estate was conveyed to A. B. in fee. No acknowledgment or declaration of trust was ever made by A. B., and he retained possession of the estate till thirty years after, when he became bankrupt. The Court, against A. B.'s assignees, presumed, under these circumstances, that the purchase had been made under the power for the benefit of the trust, and held that there had been no such adverse possession, and no such acquiescence on the part of the trustees, as to preclude the Court making a declaration that they had a lien on the estate to the extent of the trust monies invested in its purchase.

In 1810 an estate, which for distinction may be called the Eardiston estate, stood limited to the use of Mr. Edwards for life, with remainder to trustees secure a jointure to Mrs. Edwards, and to preserve contingent remainders, with remainder to their issue in tail male. There was a power for the trustees, with the consent in writing of Mr. Edwards, to sell the property, and with all convenient speed to invest the produce in the purchase of other fee-simple hereditaments, to be sold to the same uses.

In May 1810 Mr. Edwards, with the sanction of the trustees, but in his own name, entered into a contract for the sale of the trust estate to Mr. Kenyon for £8440. In September in the same year, he entered into a contract with Mr. Bishton for the purchase of another estate called the Hampton Hall estate for £17,400, but there was no evidence of his having done so with the sanction of the trustees. On the 7th of May 1811 Mr. [508] Kenyon paid £7000, part of his purchase-money, to Mr. Edwards by cheque, which cheque, together with £300 cash, belonging to Mr. Edwards, was, on the next day, paid over by Mr. Edwards to Mr. Bishton, in part payment of the purchase-money for the Hampton Hall estate. A further sum of £1123, received by Mr. Edwards from Mr. Kenyon, was proved to have been paid by him to Mr. Bishton in December, so that of the whole money derived from the sale of the trust estate (£8123) was traced into the Hampton Hall estate. The trustees executed a conveyance to Mr. Kenyon, and gave a receipt for the purchase-money, the whole of which was received by Mr. Edwards.

A suit for specific performance was afterwards instituted by Mr. Bishton against

Mr. Edwards; and he having borrowed £5000 to enable him to perfect the purchase, the Hampton Hall estate was, in January 1818, conveyed to Mr. Edwards *in fee*, who immediately mortgaged it by demise to secure the £5000. Edwards paid the remainder of the purchase-money, and afterwards charged the estate with the payment of £1300 to Mr. Wace. No acknowledgment or declaration of trust was ever executed by Edwards, shewing that the Hampton Hall estate was purchased with the trust property.

Mr. Edwards remained in possession till May 1841, when he became a bankrupt, and the estate was claimed by his assignees. This bill was filed by the surviving trustee, to establish a lien on the Hampton Hall estate, to the extent of the trust money employed in its purchase.

Mr. Pemberton Leigh and Mr. Glasse, for the Plaintiff. It is clear that Edwards acted as the agent of the [509] trustees, both in the sale of the one estate, and the purchase of the other. The trust money is traced into the Hampton Hall estate, which, though conveyed to him in fee, was still, to the extent of the trust money, held by him for the benefit of the trust.

Mr. G. Turner and Mr. Piggott, for the assignees. The object of this suit is to enforce, against the assignees of the legal owner in fee, a lien which, it is alleged, arose so long back as the year 1810, no admission or recognition of the title in the meantime being proved. After such a lapse of time and such *laches*, this Court would not interfere in enforcing the right, even if it were proved to have originally existed. In *Bonney v. Ridgard* (1 Cox, 145), which was a suit to set aside a fraudulent purchase from an executor, though the Court thought the Plaintiff would be entitled to relief, if the suit had been brought within proper time, yet the bill was dismissed, solely on the ground of the delay.

If the case be put on there being a trust, then it is merely a constructive trust, which will be barred by time. In *Beckford v. Wade* (17 Ves. 87), Sir William Grant said (page 96), "As our statute bars only legal remedies, of course it has no direct operation upon trusts, for which there was no remedy but in Courts of Equity. But Courts of Equity, by their own rules, independently of any Statutes of Limitation, give great effect to length of time; and they refer frequently to the Statutes of Limitation, for no other purpose than as furnishing a convenient measure, for the length of time that ought to operate as a bar, in equity, of any particular demand.

[510] "It is certainly true, that no time bars a direct trust as between *cestui que trust* and trustee; but if it is meant to be asserted, that a Court of Equity allows a man to make out a case of constructive trust, at any distance of time after the facts and circumstances happened out of which it arises, I am not aware that there is any ground for a doctrine so fatal to the security of property as that would be; so far from it, that not only in circumstances where the length of time would render it extremely difficult to ascertain the true state of the fact, but where the true state of the fact is easily ascertained, and where it is perfectly clear that relief would originally have been given upon the ground of constructive trust, it is refused to the party, who, after long acquiescence, comes into a Court of Equity to seek that relief."

Supposing, however, that the lapse of time is no bar, then the Plaintiff must adduce clear proof, first, that the produce of the trust estate was invested in the Hampton Hall estate: and, secondly, that it was so invested *on account of the trust*. We admit that to the extent of £7000, the produce of the Eardiston estate, was laid out in the purchase of the Hampton Hall estate; but there is not a tittle of proof, that Mr. Edwards acted as the agent of the trustees, or that the money was invested *on account of the trust*, or how the money happened to come into his hands. In favour of the legal title, it must be assumed, after the lapse of thirty-one years, that the money was placed in his hands by the trustees, and that he was liable as on a loan, or as agent. No authority of the trustees being shewn for its reinvestment in this estate, he must be considered liable only for the money, and the remedy against him is therefore barred.

[511] The Plaintiff has no lien upon the estate. In *Newcomb v. Burdon* (2 Anstr. 343), A. tenant for life, with remainder to B. in tail, by fraud, got B.'s authority to levy a fine; he sold the land, and invested the purchase-money in the funds, where it was clearly identified. It was held that B. had no lien on this money against the

other creditors of A.; and *Wilson v. Foreman* (3 Dickens, 593), as explained in 10 Ves. 519, affords no sanction for a contrary doctrine.

The estate was conveyed to Mr. Edwards absolutely; until his bankruptcy, he dealt with it as the absolute owner, both by mortgaging and charging it. It would not have been a due execution of the power to have purchased an equity of redemption, or an estate of which the tenant for life was absolutely entitled to an undivided portion.

The trustees concurred, and therefore have no right to come into equity, to have a breach of trust for which they are liable repaired by other parties.

Having regard to the long undisputed possession, the length of time, the *laches*, and the absence of proof of the material facts, the Plaintiff must come in under the bankruptcy.

Mr. Parry, for the infant tenant in tail.

Mr. Kindersley, Mr. Kenyon, and Mr. Craig, for other parties.

Mr. Pemberton Leigh, in reply. A tenant for life, as the agent for the trustees, sells the trust estate, and, the day after the receipt of the purchase-money, it is handed [512] over in payment for another estate. Can there be any reasonable doubt that he acted as the agent of the trustees in the purchase, or that the estate was purchased on account of the trust and in execution of the power?

This case cannot be affected by the length of time. There has been no adverse possession: the tenant for life was during his life entitled to the possession of the substituted estate; his enjoyment has been rightful in pursuance of the trust, and not adverse.

Trust money may always be followed; and in *Small v. Atwood* (Younge, 507) money was followed into an investment, under much slighter circumstances than in the present case. It was wrong in conveying to Edwards in fee; but it would not have been right to have conveyed the estate to the trustees, because Edwards, to the extent of the money contributed by him, had a lien on the estate.

THE MASTER OF THE ROLLS [Lord Langdale]. It appears to me that the assignees were perfectly right in having this matter investigated, and they would not have performed their duty, if they had not done so; but, upon investigation, the case does not seem to be attended with any difficulty.

The estate was vested in the trustees of the settlement; and the Plaintiff was one of those trustees for the benefit of a married woman and other parties. There was a power of sale, to be exercised only with the consent of the tenant for life; and there was a direction that the purchase-money should be laid out in the purchase of other lands, to be settled to similar uses; it was [513] only, therefore, for the purpose of reinvestment that the power of sale was to be exercised.

The simple facts are these, there was an authority given by the trustees to Mr. Edwards to sell the trust estate, and it was accordingly sold for £8440 in the year 1810. The purchase-money was received by Mr. Edwards, and it clearly appears that in this part of the transaction, namely, in the receipt of the purchase-money, Mr. Edwards was the agent of the trustees. He did not, it appears, pay over the purchase-money to the trustees. His assignees now request me to assume, that this was a simple loan of the money by the trustees to Mr. Edwards, and that the trustees had nothing but his personal security for replacing it; but it is in no way shewn, that the money was left in the hands of Mr. Edwards as a simple loan to him. Contemporaneously with the sale of the trust estate to Mr. Kenyon, there was a purchase of the Hampton Hall estate by Mr. Edwards from Mr. Bishton for £17,400. Of the sum of £8440 received for the purchase-money of the trust estate a sum of £7000 was, on the very day after, and by the very cheque for £7000 received from Kenyon, handed over to Bishton in part payment of the £17,400. If the Court was ever justified in acting on a presumption, it must, in this case, presume, that it was for the purpose of investment in the Hampton Hall estate that the Eardiston estate was sold. Considering the trusts, the person employed, the contemporaneous purchase, and the application of the portion of the purchase-money, nobody can believe otherwise than that this was one transaction, a sale of the trust estate, and a reinvestment of this part of the produce at least in another. In the course of a few months £2000 more was paid by Mr. Kenyon, of which £1123, 13s.

was paid over to Bishton, so that the whole purchase-money [514] of £8440, except about £316, is proved to have been applied in the purchase of the Hampton Hall estate. The whole of the purchase-money for that estate was not paid until some time after, in January 1818, there having been, as I understand, a suit instituted in which Edwards was called upon specifically to perform the agreement, and for that purpose it became necessary to borrow £5000. What happened then was extremely wrong; the conveyance was taken to Edwards in fee, and this was done, without anything to shew that any part of the purchase-money had arisen from the sale of the trust property, and not only was that fact not noticed in the conveyance, but there does not appear to have been any other deed executed.

Edwards entered into possession, without having made any acknowledgment that he held on any trust. It is to be observed that, he being one of the *cestuis que trust*, and entitled for life to the income of the trust property, there was no adverse title ever brought in question between these parties, no pretence that Edwards was entitled to hold this property as against the trustees; but being entitled as tenant for life, he remained in the apparent enjoyment of his life interest, and the question of a possession inconsistent with his title under the deed was never contemplated.

This differs from the cases where, by the acquiescence of the trustees, the right of redress becomes lost. Edwards was not performing his duty in taking the estate in the way he did, but there is not the slightest thing to shew that the trustees were cognizant of what had taken place or in any way acquiesced therein. If there had been the slightest ground for the supposition, I must assume that the assignees would have filed their cross-bill, and have brought the matter before the Court. [515] I cannot suppose that there are any such grounds, the assignees not having filed a cross-bill to establish their case.

I think, therefore, there is no objection arising from any length of time which has elapsed: that £8123, 19s. of the produce of the trust estate has been traced into the Hampton Hall estate, and that to this extent the Plaintiff is entitled to a declaration that he has a lien on the estate.

[515] OLDFIELD v. COBBETT. July 28, 1843.

After an estate has been fully administered in this Court, the executor will not be permitted without the leave of the Court, to prosecute an action to recover part of the testator's property from a party to the suit.

In May 1843 the Defendant Cobbett, the executor of his father, whose estate had been administered in this Court, brought three further actions against the Plaintiff, who had in this suit been found to be a creditor of the estate. The Court, upon the affidavits, considered that, substantially, those actions had been brought to recover property belonging to the testator.

Mr. Parker moved for an injunction to restrain the Defendant prosecuting the actions.

The Defendant, in person, *contra*.

THE MASTER OF THE ROLLS. Whether there are merits or not in this case, I certainly am not in a situation to determine, but I can determine this, that after the estate of the testator has been fully administered in this Court, and every opportunity given to the Defendant, the executor, to examine [516] every charge on the estate, and every particular constituting the estate, he cannot be permitted, without the leave of the Court, to commence an action to recover from the Plaintiff a portion of the testator's property.

Where parties conduct their own cause, one misfortune is, that they do not understand where the stress of the case is, and the consequence is, that the time of the Court is occupied in discussing that which is quite immaterial. It has been supposed that the order for a receiver, and the order to restrain the executor from getting in the estate, was the foundation for the order restraining the former action (5 Beavan, 132), but this really formed no part of the consideration.

Under the present circumstances I must grant the injunction. It appears to me

that these actions are substantially brought to recover property belonging to the testator, after the estate has been administered in this Court; this cannot be allowed without the leave of the Court. If there is any ground to justify the proceedings at law, it is open to Mr. Cobbett to make a proper application for leave, and then it will be seen whether there has been any such omission in the former proceedings, as to make it proper to commence fresh litigation.

Taking the matter as it now stands, and it appearing that the estate has been administered, and that three actions have been brought by the executor against the Plaintiff without the leave of the Court, I think it proper that they should be stayed. I must grant the application with costs.

See *Frank v. Basnett*, 2 Myl. & K. 618.

[517] GUIDICI v. KINTON. July 19, August 7, 1843.

Under a decree in a legatee's suit to take the usual accounts, A. B. went in and claimed the residue, which the Master found him entitled to; but the residue was not then ascertained, and no order was made in respect of it. Held, that A. B. was not precluded from afterwards asking relief against the executor, in respect of an alleged breach of trust, in a suit of his own, he not having, in the first suit, been in a situation to investigate the accounts of the executor, or to claim the relief which he asked in the second.

The facts of this case sufficiently appear in the judgment.

Mr. Turner and Mr. Haig, for the Plaintiff, cited *Shepherd v. Towgood* (Turn. Russ. 379).

Mr. Pemberton Leigh, Mr. Kindersley, and Mr. Dixon, for the Defendant.

THE MASTER OF THE ROLLS reserved his judgment.

August 7. THE MASTER OF THE ROLLS. This bill is filed by Gaetano Guidici one of the Italian executors of the late Mrs. Cosway, against Newbold Kinton, the executor of the same testatrix in England, and it prays, that the Defendant may account for all such parts of the personal estate of the testatrix as was situate in the United Kingdom of Great Britain and Ireland, at the time of her death, and may be charged with the loss occasioned by the investment of £7200 in Bank stock, as with interest upon such sums of money as should appear to have been lent by him at interest, or improperly retained in his hands.

After some objections, to the constitution of the suit and to the representation which had been taken out to Mrs. Cosway, had been taken, it appeared to me, that if [518] there was no other objection, the Defendant was bound to account to the Plaintiff in this suit for the English personal estate of Mrs. Cosway possessed by him. It was then shewn by the Plaintiff, that a part of the English personal estate of Mrs. Cosway consisted of £5000 Bank stock; that on the 17th of April 1839 the Defendant, having no immediate occasion for money for the purposes of the testatrix's estate, sold that Bank stock for £10,268; that on the same day, he lent £10,000 part of the purchase-money, to Messrs. Hulberts & Co.; that the money was repaid by them, at various times between the time when it was lent to the month of February 1839; and that on the 26th of February 1839 the Defendant reinvested the sum of £7200 in the purchase of £3500 Bank stock. The Defendant received the sum of £213, 4s. 1d. for interest on the loan to Messrs. Hulberts & Co. and now offers to allow that sum to be paid to the Plaintiff, but the Plaintiff claims to be entitled to charge the Defendant with so much Bank 3 per cent. annuities, might have been purchased with the £7200 at the time when that sum was invested in Bank stock, and with interest at 5 per cent. upon the money which he lent Messrs. Hulberts & Co. I am of opinion that he is entitled to some relief upon the transaction, if he be not precluded from asking any relief, in consequence of the proceedings in a former cause of *Prodon v. Kinton*.

As to this, the case is, that in the month of August 1839 Annette Prodon, legatee of £1000 under the will of Mrs. Cosway, filed her bill for an account of what was due to her upon her legacy, and for payment, or that the usual accounts might be taken. The Defendant answered that bill, and by an order dated the 25th of

of March 1840, it was referred to the Master to take an account of the personal estate of the testatrix come to [519] the hands of Mr. Kinton, and also an account of the debts, funeral expenses, and legacies of the testatrix.

Under this order, and on the 15th of July 1840, Gaetano Guidici, the Plaintiff in the present suit, claimed to be a creditor of the testatrix to the amount of £4000, with interest thereon from the day of the death of the testatrix, and this claim was allowed by the Master, and stated in his report, dated the 3d of February 1841. Under the same order, Guidici, by another state of facts, claimed to be entitled, as specific legatee, to receive, on trusts created by the testatrix, *the entire residue* of her personal estate and effects in England, and by the same report, the Master found him to be entitled, as specific legatee, to a sum of £2800 3 per cent. consolidated Bank annuities, or the residue thereof then remaining in the hands of the trustees of an indenture of the 11th of July 1832, and to the clear residue of the testatrix's estate and effects in England.

The Defendant took exceptions to the report, and Guidici and his two co-trustees presented a petition for payment of the debt of £4000 and interest, and the case coming on to be heard, upon the report, the exceptions and the petition, on the 26th of April 1841, it was ordered that the exceptions should be overruled, that the debt claimed by Guidici and his co-trustees should be paid to them, and that the legacy and interest found due to Annette Prodon should be paid to her. The Master was not directed to state what was the residue of the testatrix's estate, and no report or order was made in respect thereof.

I have read all the proceedings in the Master's office with which I have been furnished; and I am of opinion, that Guidici was not, in the cause of *Prodon v. Kinton*, [520] in a situation which enabled him to investigate the accounts of Mr. Kinton, or to claim the relief which he now asks, and that he is not precluded from asking the relief in a suit of his own.

From some difficulty, which there may have been, in determining what, under a proper construction of the testamentary papers, ought to have been done with the Bank stock, and from some evidence which is given that the Defendant acted under legal advice in reinvesting the £7200 in Bank stock, I think that I ought not to charge him with interest at 5 per cent. upon so much of the £10,268 purchase-money as remained unapplied for the purposes of the will, from the time when the Bank stock was sold, down to the 26th of February 1839; and that the account of the estate must be taken, with a declaration to that effect, and leave for the Master, if he shall think fit, to adopt the accounts in *Prodon v. Kinton*.

As the whole question raised in this cause has been occasioned by the sale of the Bank stock, when the proceeds were not required for the purposes of the estate, I think that Kinton must pay the costs of this suit up to and including the hearing of his cause.

And whatever may be found due, in respect of the residue, should be paid into Court to the credit of this cause, with liberty to apply.

[521] HOLMES v. BADDELEY. July 27, 1843.

[S. C. reversed on appeal, 1 Ph. 476; 41 E. R. 713; 14 L. J. Ch. 113; 9 Jur. 289; for subsequent proceedings, see 7 Beav. 69. See *Pearse v. Pearse*, 1846, 1 De G. & Sm. 27; *Pearse v. Foster*, 1885, 15 Q. B. D. 119.]

A. and B. claimed an estate adversely, as heirs *ex parte paterna*, and C. claimed the estate as heir *ex parte materna*. In a suit by A. against B. to set aside a compromise entered into between them, B. admitted he had in his possession cases submitted for the opinion of counsel after C.'s adverse claim, and in contemplation of legal proceedings. Held, that they were not privileged.

In the same case, the Defendant B. stated, that A. and C. had entered into some compromise to share the proceeds of the estate, and that he believed, that the suit was carried on by A. for the benefit and in concert with C. Held, that this did not relieve B. from the obligation to produce the cases.

The Plaintiff and the Defendants claimed an estate, adversely, as heirs at law *ex parte paterna* of Susannah Holmes, the younger, who died in 1838, the Defendants alleging that the Plaintiff was illegitimate.

The estate was also claimed by Mrs. Hemming, as heir *ex parte materna*.

In 1839 the Plaintiff entered into a compromise of his claim with the Defendants, by which the produce of the estate was to be divided between them in certain proportions, and in 1842 the Plaintiff, alleging that the transaction was tainted with fraud and misrepresentation, filed this bill to set it aside.

The Defendants, by their answer, stated the claims of the heir *ex parte materna*, and that in 1841 the legal estate in the property had improperly been conveyed to Elworthy, upon some trusts for the benefit of the Plaintiff and Mrs. Hemming, and to give effect to some compromise between them, to share the proceeds of the estate, and they stated as follows:—"And the Defendants believe this suit to be instituted and carried on, not only for the benefit of the said Complainant, but for the benefit and in concert with the said Mrs. Hemming, as well as the said Elworthy."

The Defendants admitted "that they had in their possession or power, certain letters and copies of letters [522] between their solicitors, as such solicitors, and various persons, of various dates subsequent to August 1838, and a case marked with the letter (A), on the behalf of the Defendants, laid before counsel in the month of November 1838, with his opinion thereon, and another case marked with the letter (B), on behalf of the Defendants, laid before counsel in the month of January 1839, with his opinion thereon, which cases were laid before counsel, and all of which letters were written and sent, after the Defendants were aware that a claim to the said estates, adverse to the title of the said Defendants, was about to be made on the part of the alleged heir to Susannah Holmes the younger, *ex parte materna*, and in contemplation of legal proceedings being taken by the said Defendants to enforce such title, and the greater number thereof, after the said claim had actually been made on the part of Mrs. Hemming, and occasioned by, and with reference to such claim, and with reference to the right and title of the said Defendants in issue in this cause, and was wholly independent of the compromise by the said Complainant's said bill sought to be set aside, and without any reference thereto. They said, that they were advised and insisted, that all the said documents and the said two cases and opinions, and the said letters and copies of letters were privileged communications, and that they were not bound to produce the same, or make any discovery in relation thereto."

A motion was now made for the production of these documents.

Mr. Pemberton Leigh, Mr. G. Turner, and Mr. Bird, in support of the motion.

Mr. Kindersley and Mr. G. Russell, *contra*.

[523] Mr. Pemberton Leigh, in reply.

Curling v. Perring (2 Myl. & K. 380), *Storey v. Lord George Lennox* (1 Myl. & K. 525), *Herring v. Cloberry* (1 Phillips, 91), and *Cholmondeley v. Clinton* (Turn. & R. p. 116; and see *Jones v. Pugh*, 1 Phillips, 96), were cited.

THE MASTER OF THE ROLLS [Lord Langdale]. The question in this case is whether the documents referred to ought to be produced. The bill is filed by a person who claims to be heir at law of Susannah Holmes, *ex parte paterna*, and unless he makes out his claim in that character, the suit cannot be maintained. Having filed his bill to set aside a deed of compromise, he moves on the answer that certain documents in the Defendants' possession may be produced. It appears that the Defendants in this case, are persons who also claim to be heirs at law of Susannah Holmes, *ex parte paterna*, so far, therefore as the question whether the heirs *ex parte paterna* or *ex parte materna*, ought to prevail, the Plaintiff and Defendants have similar interests. So far from anything adverse, they have precisely the same interest, and no question is raised in this case by the Plaintiff as to any right *ex parte materna*. Sometime after the death of the party in possession, claims *ex parte materna* were made, and the Defendants, claiming as heirs *ex parte paterna*, found it necessary to prepare to defend their right as heirs *ex parte paterna*, against the claim of the heirs *ex parte materna*. The contest on this occasion is as to the production of the documents which arose as a consequence. The Defendants state in their answer that the cases were laid before counsel, and the letters were written and sent after they were aware "that a claim [524] the said estates adverse to their title was about to be made on the part of the

alleged heir to the said Susannah Holmes the younger, *ex parte materna*, and in contemplation of legal proceedings being taken by the Defendants to enforce such title, and the greater number thereof after the said claim had actually been made on the part of Mrs. Hemming, and occasioned by and with reference to such claim, and with reference to the right and title of these Defendants in issue in this cause, and the said cross-cause, by the said Defendants instituted as aforesaid, and was wholly independent of the compromise by the said Complainant's said bill sought to be set aside, and without any reference thereto."

If it be true that the right of the Defendants as heirs *ex parte paterna* was in question between them and those claiming *ex parte materna*, the issue in this cause is something quite different from that which was then in question. Taking the record as it stands, the Plaintiff in this suit must stand or fall by establishing that he is heir *ex parte paterna*, there is nothing now in controversy between these parties which was then in issue. It is clear, that these documents originated before the suit between the Plaintiff and Defendants in this case arose or was in contemplation, it does not therefore appear to me that the Defendants are entitled to the protection which they have asked.

It is said that the letters passed between the Defendants and their solicitors, but the right to protection on that account fails on the words in the answer.

It is then contended that this bill, though the suit of the Plaintiff, is in effect, in some way or other, the suit of Mrs. Hemming, and that although the Plaintiff has so framed his bill as to stand or fall by his title of heir *ex* [525] *parte paterna*, yet that some arrangement has been made by the Plaintiff with the person claiming as heir *ex parte materna*, and that the Plaintiff is carrying on the suit in concert with her and for her benefit, and that as she would not have a right to production, therefore the Plaintiff ought not. I do not recollect having such a case as this attempted before.

It is also said that the Plaintiff having got a discovery might dismiss the bill, and then Mrs. Hemming might file a bill of her own and use the discovery obtained in this suit. I am of opinion, that speculations of this sort ought not to affect the rights of parties on the record. There is no possibility of knowing what may be the consequence of the production of documents which the Plaintiff in a cause may obtain. This Court cannot act on such speculations. I must look at this record as constructed in a particular form, and not speculate on the use which may be made of the discovery when obtained.

I think that the Plaintiff is entitled to the production of the letters and cases.

NOTE.—On appeal to the Lord Chancellor, this case was reversed on the 25th of November 1844.

[525] THE ATTORNEY-GENERAL v. THE GROCERS' COMPANY. (LAXTON'S CHARITY.)
Jan. 18, 20, 21, 1155.

[S. C. 12 L. J. Ch. 195; 8 Jur. 1155.]

A testator by his will founded a charity, towards which he directed certain and definite sums to be applied, and he devised estates to a company for that purpose. The will contained no express beneficial gift to the company. Held, however, under the circumstances, that the company was entitled to the increased rents of the property after making the fixed payments.

This information was filed by the Attorney-General, at the relation of several of the inhabitants of Oundle, and it sought to have the whole increased rents of property devised to the Grocers' Company, applied to the charitable purposes stated in the testator's will.

Sir W. Laxton by his will, dated the 17th of July 1556, after giving certain pecuniary legacies, devised as follows:—"The residue of all my manors, lands," &c., "I leave to descend, after the decease of Dame Johane my wife, to my cousin Johane Wanton, my right heir, and her heirs for ever, according to the order of the King and Queen's Majesties' lawes;" and he appointed his wife to be sole executrix of his will, and certain persons therein named to be overseers, who were to assist her.

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On the 22d of July 1556 the testator made a codicil, which was as follows:— After reciting that “he was fully minded to erect and found a free grammar school at Oundle, in the county of Northampton, to have continuance for ever, to be kept in the messuage, late called the Guyld or Fraternity House of Oundle aforesaid, which free school he willed, should be called the Free Grammar School of him, Sir William Laxton, Knight, Alderman of London.” And further reciting, “that his mind, will, and intent was, that the schoolmaster of the said free school, for the time being, should have for his stipend and wages yearly, £18, and the usher of the said school, yearly, £6, 13s. 4d. And that his whole [527] mind and intent was, to have seven poor men perpetually to be found at Oundle aforesaid, and to have each of them 8d. weekly, towards their maintenance and relief, and also convenient lodging and house-room and dwelling in the said messuage or tenement, then of late called Guyld or Fraternity House of Oundle. And that for the said godly intent and purpose, he had taken order, and that it was agreed between him and the Wardens of the Commonalty of the Mystery of the Grocers within the City of London; and that he had set out unto them, in particular, certain of his lands and tenements within the City of London, as well for the payment of the stipends aforesaid, appointed to the schoolmaster and usher, and for the poor men, as also for the reparation and maintenance of the said messuage or tenement, then of late called the Guyld or Fraternity House of Oundle; and that he, minding the accomplishment of all the premises, and to have the same take effect according to his full mind and intent, did by his said codicil, will, devise, give, and bequeath unto the Defendants, the Wardens and Commonalty of the Mystery of the Grocers within the City of London, and their successors for ever,” certain messuages, lands, tenements, &c., in his codicil specified: “to hold the same unto them and their successors for ever, upon the condition and intent thereafter expressed and declared; that is to say, that the wardens and commonalty, within as convenient time as they might or could, should make suit with his executors to the King and Queen’s Majesties, to obtain at the Highnesses’ hands, the said messuage or tenement, then of late called the Guyld or Fraternity House of Oundle aforesaid; and the said messuage or tenement being obtained, he willed the same to be employed and used for the schoolhouse aforesaid and for the habitation of the said seven poor men.” And he also willed that the Grocers’ Company [528] should, from time to time, for ever more, provide a schoolmaster and usher, and should yearly pay the schoolmaster “out of the issues, rents and reversions of the messuage, lands, and tenements aforesaid to them bequeathed for his stipend and wages yearly, £18, and to the usher £6, 13s. 4d.” And he also willed them, with the advice and consent of the Vicar, &c., of Oundle, to appoint seven poor men to be bedesmen for him, the said Sir William Laxton, in the said messuage to have their convenient lodging and dwelling therein freely, and that the company should, yearly, pay, “out of the issues and revenues of the aforesaid lands and tenements,” to every one of the said poor men 34s., which amounted weekly to the rate of 8d. a-piece;” and he further willed, that the Grocers’ Company should yearly, pay unto the Vicar, &c., of Oundle, 24s., to be employed in the reparation and maintenance of the said free school; and he further willed, that the said free school, schoolmaster, usher, and bedesmen should perpetually be named and called the free school, &c., of Sir William Laxton.

And he willed, “that for lack of convenient time further to explain and set out the erection aforesaid, that all other things necessarily touching the erection and continuance of the said free school, and other the premises, should be considered and done in such godly sort, as by the good discretion of his executrix and overseers in his last will and testament, or by their learned counsel, should be thought meet and convenient.”

The testator died shortly after (25th July 1556), and his will was proved by his widow on the 28th of August 1556. The [529] company accepted the property, and the guild having in some way which did not appear been obtained, they proceeded to establish the charity, after some disputes and litigation with the widow and the heirs at law. The particulars as to which appeared only from the following entries in the Defendants’ books.

16th November 1556.—“Mr. Alderman Lodge declared at this court, that Sir

William Laxton, Knight, did will, by his last will and testament, certain lands in London to this company, for the founding of a free school and maintaining of certain poor persons, as by his will may appear; whereunto, the whole assistants are well willing to receive the same, with thanksgiving for his genteel remembrance."

7th December 1556.—"It is agreed, that Mr. Wardens shall betake a copy of Sir William Laxton's will, so much as shall concern and belong to the erection and finding of a free school as he has devised, and also that the said Mr. Wardens shall view the lands given for the same, and to know what years is granted of the same lands, and when the same shall be expired."

23d December 1556.—"Whereas Sir William Laxton, Knight, deceased, by his last will and testament, devised certain lands and tenements within the City of London, for the erection of a free school and maintenance of certain poor persons in Oundle, in the county of Northampton, and further willed that this company should have the order, rule, and disposition thereof, and forasmuch as it has been sundry times moved to this house, whether they would take upon them to have the said lands to the intent aforesaid or not; at this court, the whole assistants, with thanksgiving, is well willing, pleased, and contented to receive the same, and [530] thereupon have appointed Mr. Wardens, Mr. Tathill, and Mr. Grafton, to speak with Mr. Southcott to travaile with them, in drawing a plot and form in what manner the same may be done, and that finished, to certify the house thereof at the next court."

17th May 1557.—"At this court there was a letter sent from the Earl of Bedford to this company, which read, the effect was, that this company should further the agency of Mr. Laxton for the erection of a free school at Oundle, in Northamptonshire; whereupon it is agreed it shall be moved at the next court."

6th July 1557.—"It is also agreed that Mr. Wardens, Mr. Mills, and Mr. Grafton shall travaile with Mr. Southcott, for a draft to be made of the free school at Oundle, of the late gift of Sir William Laxton, Knight, deceased; and all such money as Mr. Wardens shall lay out for the same, or for anything thereunto appertaining, shall be of the common goods of this house, and this court be a sufficient warranty for them."

12th November 1557.—"At this court, Mr. Alderman Lodge, in open Court, did declare, that the Lady Laxton is minded to make assurance to this company of all such lands as Sir William Laxton, by his last will and testament, did give to this company after her decease, to the intent and upon condition, that the said wardens should employ the same to such uses and purposes as he in his last will and testament hath declared; at which court Mr. Southcott was required to know, what assurance was necessary for the company, who declared that the will of Sir William Laxton, being inrolled in the hustings of London, shall be sufficient assurance to this company; yet the said Mr. Southcott thought it [531] necessary to have a release from Mr. Wanton and his wife, to put all things out of doubt; whereupon, Mr. Wanton being then present, was required to do the same, who answered that for his part he would ever hinder that good work which Mr. Laxton had devised to be done, notwithstanding he would that his heirs should take such benefit as the law will give them, if the company should chance to break the said Mr. Laxton's will; and thereupon the said fr. Wanton desired that Mr. Southcott and Mr. Gilbert might talk therein."

1st March 1558.—"It is agreed that Mr. Wardens, Mr. Grafton, and Mr. Ramsey shall commune and talk with Mr. Thomas Wanton and his wife, for and about a release, from them twain, of Mr. Laxton's lands, which he gave to this company for finding and maintaining of a school at Oundle in Northamptonshire; and they, the persons aforesaid, to require Mr. Recorder and an alderman to go to Mr. Wanton for to take knowledge of the said release."

9th October 1560.—"Whereas Mr. Thomas Lodge, alderman, declared, at a court of assistants holden on the 16th day of November 1556, that Sir William Laxton, knight and alderman of London, did give and bequeath to this company, by his last will and testament, certain lands and tenements in London, for finding of a free school and poor men at Oundle in Northamptonshire; and thereupon, the whole court at that time received the same with thanksgiving, and now, at this court, the said gift concerning the" [here was a short obliteration in the entry] "was revived and had in memory, wherefore the assistants above written are and will be well willing to receive the same lands so bequeathed, and so to per-[532]-form the will of

the said Sir William Laxton. And furthermore it was agreed that Mr. Wardens shall retain counsel learned in the laws of this realm, to have an assurance from the Lady Laxton, widow, late wife of the same Sir William Laxton, for to convey the interest of the same lands to this company."

14th October 1566.—"Item—Touching Sir W. Laxton's will, Mr. Wardens are requested to speak with the Lady Laxton and to know her pleasure therein, which they have promised to do."

11th August 1570.—"Item—A motion was made now touching Sir William Laxton's will for the schoolhouse at Oundle, but the taking any order therein was deferred until another time."

27th July 1571.—"Touching Sir W. Laxton's good devise for the maintenance of a free school and other things, communication was now had, and in the end, Mr. Wardens were called to take pains therein, and to take good counsel, what ways were left to bring the same to good effect; and such charges as shall arise about the same, to be borne of the goods of this house, and their order to be a discharge sufficient for the same."

1571.—It appeared, from a bill of costs, that in this year, counsel's opinion was taken, "touching the force of the codicil, which he said was as good as any part of the will;" and that the company exhibited their bill in Chancery against Lady Laxton and Mrs. Wanton respecting the devise, which was carried to a hearing. The pleadings in the suit were not, however, produced.

[533] 18th October 1572.—"Communication was had concerning the free school at Oundle, which Sir William Laxton did, by his will, appoint to be erected and continued by this company; and the matter between the Wantons and the company being yesterday heard in the Court of Chancery, where the Lord Keeper took order, that Mr. Wardens shall speak with Mrs. Wanton, being next heir to Sir William Laxton, and propose to agree with her for some reasonable sum of money to clearly release her title, that she and her heirs may hereafter have in the lands appointed for the maintenance of the said school; whereupon, it was thought good, that Mr. Warden Young, Mr. John Riche, and Mr. Richard Young shall go to Mrs. Wanton, to speak with her, which was so done, and upon their answer, it was agreed, that her counsel and ours shall meet with Mr. Wardens this afternoon at the Temple, in Mr. Solicitor, his chambers, and there to have conference for an agreement. There was conference but no agreement."

24th October 1572.—"This Court was informed what had been done in the suit for the lands appointed for this company for the maintenance of Sir William Laxton's school in Oundle, which hath been a chargeable suit: and there was now read an order made by the Lord Keeper, wherein is included an offer made by Mrs. Johane Wanton, and also a dismission out of the Chancery. Whereupon, it was thought good to send to the Lady Laxton presently, to know her pleasure, whether she would be content to part from the houses for her lifetime, and to let the company possess the same, that with the rents, they may erect and maintain the school, according to Sir William Laxton's will; and there were now sent unto her Mr. Alderman Boxe, Mr. Warden Young, Mr. Francis Bowyer, Mr. Richard Young, and Mr. Thomas Norton, which brought word, [534] that the said Lady Laxton is content to part from the said houses out of her hand, so that the company will, with the rents of the same, perform and fulfil the will of the said Sir William Laxton touching the maintenance of the said free school and poor men at Oundle. And there were now requested to assist Mr. Wardens in the said business, Mr. Alderman Boxe, Mr. Richard Thornhill, Mr. Nicholas Backhouse, and Mr. William Owenshawe."

19th December 1572.—"At the said court, motion made, for the naming of certain persons of this company to be feoffees of trust to receive the lands of the Lady Laxton, which Sir William Laxton bequeathed to them for the maintenance of a free school in Oundle in Northamptonshire, from the which lands the Lady Laxton is content presently to depart, having estate in the same for the term of her life. And it was agreed that Sir J—— White and others shall be feoffees to receive the said lands to the use aforesaid."

13th March 1572.—"At the aforesaid court, motion was made, of request made by the Lady Laxton, to grant Sir Thomas Lodge a lease of a house, wherein he

dwelleth in Cornhill for twenty-one years, upon consideration that she will presently release the lands to this company for maintenance of a free school in Oundle in the county of Northampton, wherein she is entitled for the term of her life; and at this instant, came Sir Thomas Lodge himself and brought the book which was drawn between the said Lady Laxton and the company, declaring that my lady is content that the book shall pass, and that the company shall, from the Annunciation of Our Lady next, enjoy the lands appointed to them by the will of Sir William Laxton, and be charged, within as convenient time as the com-[535]-pany may, to erect, establish, and maintain the said school and seven poor almsmen, and all other things, according to the tenor and true meaning of the same Sir William Laxton his will. And after he had delivered the said book, he declared, that forasmuch as he hath already received friendship at this company's hands, he is ashamed to receive anything of the same; nevertheless, if it would please them, at the request of the said Dame Johane Laxton, to grant him a lease of the house he dwelleth in, he would take it very thankfully at their hands, and think himself much bound to them for the good-wills therein; whose suit being heard, and consideration thereof had, he was answered, that he needeth not to have any mistrust in the company, for they do not mind to put him out of the house, though his lease was expired, and other answer they were not determined to make therein, and as for the book, they do agree and order that it shall be engrossed and sealed, and the company, by the feoffees, seized of the lands, according to the tenor of the said book, that Mr. Wardens shall, as conveniently and as speedily as they can, settle the school and almsmen, in such order as is limited in the will of Sir William Laxton."

12th June 1573.—"First, at this court, was read the proceedings and order taken by Mr. Wardens at Oundle, concerning the establishing of the schoolhouse, schoolmaster, usher, and seven poor men there, viz.:—Upon the 3d day of June last, possession was taken by Mr. Owenshaw and Mr. Hawke, being two of the feoffees thereunto appointed, of the schoolhouse, a house for the schoolmaster and another for the usher, according to a deed of feoffment made by Dame Johane Laxton, which was done in the presence of a great number of the town of Oundle, both old and young; and there was given to forty-eight scholars a penny a-[536]-piece, to the intent they should the better remember Mr. Wardens being at Oundle about the said possession. And there was also given to five poor women there, before now placed by the Lady Laxton and now removed to place men there, to each of them, twelvepence."

The expences to which the company were put about these matters were, apparently, paid by them out of their private monies.

When the company took possession of the property in 1573, the rental amounted to about £50 per annum. The sums specified in the testator's codicil amounted to £38 which was paid by the company, and the surplus, from the commencement of the charity, was retained by them. In 1577 John Wanton (who was assumed to be the then heir), made some claim to the property. He represented to the company, that he was entitled, as his counsel did declare unto him, to the lands, &c.; yet, to avoid suit in law, he proposed that four councillors, two to be chosen by each party, should declare their opinions on the same. What became of this claim did not appear, but in the following year (1578), the company increased the salaries of the schoolmaster and usher by "benevolences" of £6, 3s. 4d. and £3, 6s. 8d. each respectively. The company continued to receive the increased rents, and after making payments to the charity with some augmentation, retained the surplus.

At the great fire of London in 1666, this together with other property of the company, was destroyed, and they became considerably indebted.

By a decree of charitable uses issued under the 43 Eliz. c. 4, after reciting an inquisition whereby the [537] jurors found amongst others, the particulars of this property which was charged by Sir William Laxton with the charitable payments amounting to £38, and that the company did think fit to augment during their pleasure (shewing the payments to amount to £102, 16s., and that they were willing in future to pay £82, 16s.), and that their whole estate should be charged with the arrears of this and the other charities; it was ordered, that all the real estate of the company should stand charged with all the growing charitable uses and the arrears,

and should be conveyed to trustees for that purpose, and in consideration of the impoverished state of the company, twenty years was given them for the payment of the arrears.

Their whole estate, including that of Sir William Laxton, was accordingly conveyed to trustees to pay the charities mentioned in the schedule. In the schedule the rental of the Laxton estates then appeared to be £167, and the payments directed to be made were £82, 16s. only.

The estate had since come back to the company, and the gross rental had increased to £1500 a year, and the company had also a sum of £8645 consols, which had arisen from the sale of part of the charity estate under the London Bridge Act.

Of the present income, the company applied about £300 a year only to the purposes of the charity, and retained the remainder.

This information sought a declaration that the whole income of the property was applicable to the purposes of the charity, and for a scheme, having a more extended system of education, under the 3 & 4 Vict. c. 77.

[538] The Defendants, by their answer, claimed to be entitled to appropriate the surplus income beyond the payments made by them, to their own use.

Mr. G. Turner and Mr. Collins, in support of the information. The rule of the Court, as laid down in *The Attorney-General v. The Drapers' Company* (2 Beav. p. 511) in conformity with the prior decisions, is this, that in every case where the general purpose of a gift or conveyance is declared to be a charity, and the particular payments do not exhaust the whole fund any surplus will belong to the charity, unless there are other circumstances, from which a contrary intention of the testator can be collected." (2 Beav. p. 511.)

So in *The Attorney-General v. The Coopers' Company* (3 Beav. p. 34), the rule again thus stated, "that if the testator clearly declares an intention of devoting the whole income of a property to charitable purposes, then, although he does not specifically directing the application of portions of it, exhaust the whole income, at the general intention that the whole shall be applied to charitable purposes will prevail; and on the other hand, although he does not make any such general declaration of devoting the whole to charity, but gives each and every portion of the whole income at the time, to some charitable purposes, and by that means exhausts the whole, then, if the income should afterwards increase, the increase will also be applicable to charitable purposes."

The whole intention of the testator was charity, and there is not, upon the evidence, the slightest trace of an [539] intention to benefit the Grocers' Company. The testator says, he was "fully minded to erect and found a grammar school," and that the schoolmaster and usher should have a particular stipend, and his "whole mind and intent was to have seven poor men perpetually to be found," &c.; and he recites that for the said godly intent, he had taken order and agreed with the Grocers' Company, and that he had set out unto them certain lands; but for what purpose? "As well for the payment of the stipends aforesaid appointed to the said schoolmaster and usher, and of the poor men, and also for the reparation and maintenance of the guild, and then he, "minding the accomplishment of all the premises, and have the same take effect according to his full mind and intent," devises, &c., to the Defendants upon condition and intent, &c. In this there is no trace of any declaration of giving a benefit to the company, but merely an intention to provide for the maintenance, in perpetuity, of the different objects of his charity.

The words "upon condition and to the intent," import no beneficial gift, as in *The Attorney-General v. The Cordwainers' Company* (3 Myl. & K. 534), but a mere trust; for the payments were to be, "out of the rents and reversions" of the premises, and not out of the Defendants' own revenues, and the words "upon condition" were used in *The Attorney-General v. The Coopers' Company* (3 Beav. 30), although there was a gift over, still the Court did not consider the Coopers' Company entitled to the whole increased rents.

The loss of the patronage of the school and charity, is a penalty sufficient to answer the "condition." The [540] testator authorises his executrix and overseers to do all things necessary "touching the erection and continuance of the said free school." Again; from the circumstances and especially the accounts, the reasonable

presumption is, that the specified payments exhausted the whole income at the time.

The entries in the Defendants' books shew no claim of any beneficial interest, but that they took the property merely for the purposes of the charity.

The decrees did not, and could not alter the rights of the charity, which was not represented; the whole object of those proceedings was to give time for the payment of the arrears. The Commissioners had no authority to alter the foundation, and if the decree did make an alteration, it must now be reviewed. *The Attorney-General v. The Grocers' Company* (1 Keen, 506), *Hynshaw v. The Corporation of Morpeth* (Duke's Charitable Uses, 242). Usage, however large, cannot alter the rights of the charity apparent on the codicil, for trustees cannot acquire a right against the charity by a continued wrongful application of charity property.

The Attorney-General v. Wilson (3 Myl. & K. 362), *The Attorney-General v. The Skimmers' Company* (2 Russ. 407), *The Attorney-General v. The Painter Stainers' Company* (2 Cox. 51), were also referred to during the argument.

Mr. Pemberton Leigh, Mr. Kindersley and Mr. Bacon, *contra*. First, upon the codicil alone, there appears no devotion of the whole rents to the charity, but an intention that the specified fixed payments should be made. The [541] devise is not "in trust" as in *The Attorney-General v. The Drapers' Company* (2 Beav. 508), but "upon condition," an obligation was therefore imposed on the Grocers' Company to make the specified payments, and which was to be enforced by the "condition," rendering them liable to a forfeiture on the non-performance of the "mind, will, and intent" of the testator, to have the specified payments made to the several objects pointed out by him. In *The Attorney-General v. The Cordwainers' Company* (3 Myl. & K. 534) a condition, giving over the property on non-performance of his will by making certain fixed payments, was considered as implying a benefit to the Cordwainers' Company, who were held entitled to the surplus. Sir John Leach, in giving judgment in that case says, "The imposition of a penalty for non-performance of the condition, implies a benefit if the condition be performed, and is inconsistent with any other intention, than that the testator meant to give a beneficial interest to the company upon the terms of complying with the directions contained in his will. There is, therefore, no trust either express or implied for charitable purposes further than to the extent of the special charge imposed; and, upon all the principles applied in this Court to such a case, this information must be dismissed." It does not appear that the fixed payments exhausted the whole rents, the surplus was therefore intended for the benefit of the Grocers' Company for their pains and trouble, and to whom nothing else was given by the will of the testator. *The Attorney-General v. The Corporation of Bristol* (2 Jac. & W. p. 319), *The Attorney-General v. Brazen Nose College* (8 Bli. 377; 2 Cl. & Fin. 295).

[542] Secondly. It is clear that the codicil is not the origin and foundation of the charity. It is plain, from the codicil, that there had been some previous arrangement and bargain between the testator and the Grocers' Company. He says, "And whereas, for the said godly intent and purpose, I have taken order, and it is agreed between me and the wardens, &c., of grocers, and have set out unto them in particular, certain lands," &c. If, at this distance of time the terms cannot be proved, they must be collected from the continued usage since the death of the testator.

The entries in the Defendants' books shew, that from the death of the testator the company considered they had a beneficial interest in the property. Immediately after the testator's death, it was moved "whether they would take upon themselves the said lands, to the intent aforesaid or not;" they directed them to be viewed, and an inquiry of "what years were granted of the same lands, and when the same shall expire." They declare themselves willing to receive the same, "and perform the will" and "received the same, with thanksgiving for his genteel remembrance;" and they direct all the expences relating thereto, and to the litigation with the heir to be paid out of the "goods of the house."

Thirdly. The continued usage adopted from the very commencement, shews distinctly the terms on which the company undertook the management of the charity. Long usage has always been considered as affording evidence of the terms on which

charity estates are held. *The Attorney-General v. Catherine Hall* (Jacob, 381), *The Attorney-General v. Caius College* (2 Keen, 150), *The Attorney-General v. Brazen Nose College* (2 Cl. & Fin. 295). Here from the hour the De-[543]-fendants took possession, the payments have never corresponded with the rental; the expenses and deficiencies have been supplied from their private funds, and the surplus has, from that day to the present, been appropriated by the Defendants to their own use, notwithstanding the adverse claims of the heir and the litigation which ensued.

Fourthly, the rights have been determined by the decree of the Commissioners and this Court has no authority to alter or reverse it.

Mr. Lloyd, for the schoolmaster.

Mr. Turner, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. The sums directed to be applied are, beyond all doubt, certain and definite sums; however, in support of the information, it is contended, that the testator, by his codicil, intended the whole revenue of the property to be applied to the charitable purposes mentioned in the codicil, while, on behalf of the Grocers' Company it is argued, that there is no such general intention to be collected from the documents, and that he intended these particular sums only to be applied to the charitable purposes.

It is perfectly clear that this codicil was made after previous consideration by the testator. For effectuating his purpose, he was desirous of obtaining from the Crown a particular house, in which he wished the school to be established, and the poor bedesmen to dwell. It further appears, that he must have had some previous communication with the company respecting this matter, because he mentions in his codicil that it had been [544] agreed to the effect there stated, and that for the purpose of his intended bounty, he had set out certain property for the payments of the stipends, &c.

It appears from the evidence, that from the time the company obtained possession of the property down to the present time, they have never, at any period (unless it were at the period immediately following the great fire of London), applied the whole of the income derived from this property for the purposes of that charity.

I quite agree, that where a charitable trust has been established, a departure from that trust, continued for a great length of time, is not, merely from the length of time, to be considered as legally justified, but length of time is nevertheless a circumstance which is always very material to be taken into consideration, and may have different weight attached to it, according to the circumstances which have taken place. As public bodies of this nature are under no obligation to accept trusts of this kind, something which may be very material may take place at the time of the acceptance of the trust. It was so considered by Lord Eldon on more than one occasion. (See Jacob, 381; and see *ante*, p. 386.) On the other hand, the circumstances may shew, that although the strict directions of the trust have never been properly observed, yet that there never has been a sufficient cause or warrant for deviating from it. In that case, length of time cannot be used as any foundation for an adverse right.

In this case, however, taking simply the fact, that there never has been an application of the rents to this charity, conformable to the allegation made in this information, that the whole rent belonged to the charity, [545] we must look narrowly to the terms of the codicil, and also to the circumstances which took place at the time when the company obtained possession of the trust.

The circumstances which then took place are involved in a great degree of obscurity. The disputes which took place immediately after the death of the testator shew, that the proceedings of the company were noticed and watched by persons who had an interest to do so, by Lady Laxton, who was giving up her life interest for the purposes of the charity, by the heir at law of the testator, who claimed adversely to the company, and also by the officers of the Crown, from whom the schoolhouse was to be obtained. Under these circumstances we find the company apply less than the full amount of the rents for the purposes of this charity. I do not certainly mean to say that this would, of itself, be sufficient to shew the title of the company, if the words of the codicil were clearly the other way.

Let us consider what is the rule of the Court under these circumstances, and how

does that rule apply? It is one fortunate result from the number of these cases which have recently come before the Court, that there is now no dispute as to the general rule. It is now clearly admitted, that if the will be so expressed as to attach a charitable trust to the whole property, then, however deficient may be the appropriation of the whole amount of the rent, still the whole income will be subject to the charity, because it is to be applied according to a trust which extends to the whole of the property.

It comes therefore to this, does this codicil, by the words of it, attach a trust to the whole property? The cases which have been cited have been something to this effect:—The property has been given “on the trusts [546] after mentioned” or “to the intent” that the devisees do so and so. Some general words have occurred, either in the beginning of the will, before the charitable purposes are stated, or, as in a case which was referred to (I think before Lord Thurlow), where certain specific sums are directed to be applied, and then general words follow, shewing it was the intention of the testator to apply the whole to charitable purposes. In such cases, whatever may be the amount of the rents or revenues of the property, and however they may exceed the particular stated applications directed by the will, the whole must be applied to charity.

I do not find in this codicil any statement that the whole of this property is to be applied to the purposes of the charity. What I find is, that the testator intended to establish a school and to have an establishment for his bedesmen. He intended to establish a school for ever, to be called Sir William Laxton's Free Grammar School; his “mind, will, and intent” was that the schoolmaster should have for his stipend £18 a year, and the usher £6, 13s. 4d. a year; his “mind, will, and intent” was that the seven poor men should have each of them 8d. weekly towards their maintenance and relief, and also lodging and dwelling. Those were the things which he was minded to do. After speaking of his agreement with the company, he says that he had set out certain of his lands. Why? “As well for the payment of the stipends aforesaid appropriated to the said schoolmaster and usher, and for the poor men, as also for the repairs and maintenance of the said messuage or tenement.” So that the messuage or tenement was to be obtained from the Crown, to be used for the school and bedesmen; and then he has set out these lands, as well for the payment of these stipends, as for the reparation of the messuage to be obtained from the Crown. He then makes [547] the devise, “upon the condition and intent” that they should apply for the house, and then they were to provide a schoolmaster and usher, and make payment of the particular sums to them and to the seven poor men. I confess I do not think, amongst the various cases which have been before the Court at different periods, in which it has been argued, from the words of the bequest, that there was a charitable purpose applying to the whole property, there has been any case which has been so deficient of proper words for that purpose as the present. The purpose he had in view was a school and seven almsmen: to effect that purpose he provided fixed salaries, and provided a certain sum for repairs; and then he seems to have done with the matter, with the exception of something else which occurs at the end of this codicil.

I cannot take into my consideration, that if it had been suggested to the testator, at the time he was making his codicil, that the time might very likely come when the revenues would greatly increase, and when the fixed salary would be insufficient for the maintenance of the schoolmaster, he would have made provision for these cases. I have no right to do so. All I can do is to look at the words of his will for the purpose of seeing what is the intention there declared, and if I find the intention there declared to be such as not to affect the whole of the property, but to direct the application of particular sums only to the charity, I cannot extend it.

It is said (and so it would appear from the time when the will was afterwards proved) that the testator was dying, and that he had very little time fully to explain the matter. He says, “I will that for lack of convenient time further to explain,” &c. Now he had fixed the sums, and he had fixed the place. If he had desired [548] all these matters to be left open, everything to be left open, he would have said, “I leave this property for the purpose; I have not time to settle what ought to be done with particular parts of it, or what expenses ought to be allowed. I must

leave that to be settled by my executrix and overseers." Many such wills have been before the Court, where charitable dispositions have been made at a time when a scheme could not be settled, and it has been left to the Court to devise a scheme for the purpose, which it has often been under the necessity of doing: but here he says the purpose is a school, and the means of maintaining the school is to provide that building, and to provide these specified salaries. If there be any other thing, which other thing must mean the regulations of the school, those are to be settled afterwards.

Upon the best consideration I can give to this case, I am of opinion, that there is not in this codicil, a general devotion of the whole property to the charitable purpose in question; and I do not think there was an error in the non-application of the whole of this revenue, from time to time, to the purposes of the charity.

It seems that after the foundation of the charity the company did, from time to time, augment the salaries. In that they did what appears to me to have been perfectly right; but I cannot agree with the argument which has been suggested to me, that this ought to be considered as evidence that they thought themselves under an obligation to do it. Though there was no legal obligation, still there was what may be called a moral obligation upon them. Having received property which has turned out of a much greater value than was expected by this testator, and the purpose for which he gave it to them being, that they should maintain this [549] charity in the way he had pointed out, it certainly may be considered as a moral duty on their part, when they found the revenues greatly increased, and the fixed payments had become manifestly insufficient to keep up the charity in an effectual manner, to make a fit and proper augmentation. It was quite right in them so to do; but I cannot consider the fact of their having done so, as evidence that they considered themselves to be, and still less as evidence that they were, subject to a legal obligation to do it.

I do not think that the decree of the Commissioners of Charitable Uses amounts to a declaration of right; it does seem to me to assume that which I think was right, and takes for granted that the Grocers' Company were entitled to the property, subject to the fixed payments. That is found by the jurors before whom the inquiry was taken, and the decree seems to me to assume it, though it does not, after investigation and discussion, declare the right.

It is material to observe, that before the Commissioners, the company professed themselves to be willing to pay a larger sum than that which by the codicil they were bound to pay, and time was thereupon given to them to pay the arrears. I think I ought to consider the company bound to pay those increased sums, because it was by the submission to pay those sums that they got an extension of time.

This information asks, that whatever sum may be found to belong to this school, some directions should be given for a scheme by which a larger instruction may be given to those boys who are entitled to the benefit of this school; and it is said that the Grammar School Act makes it proper so to do.

[550] The argument, which certainly was conducted with very great ingenuity, has taken this shape. It is said the charity may not be entitled to the whole of this fund; yet it turns out that the present fixed payments are not sufficient to maintain a proper school, or to pay the salaries of the schoolmaster and usher of a grammar school: then, as it was, clearly, the primary intention of the testator that a grammar school should be maintained, that purpose ought not to fail, by the accident of these fixed salaries turning out, in the course of time, to be insufficient for the purpose. That the Court may therefore consider, in the first instance, what would be a proper sum to pay for the maintenance of such a grammar school as would effectually answer the intention which the testator had in view, and that may be a sum very considerably larger than that which he allowed, and that sum being ascertained, then, by the authority of the Grammar School Act, it may be applied in the maintenance of a school affording the general instruction pointed out by that Act.

This might be very well, provided you were not encroaching upon a revenue, which, according to the construction which, it appears to me, ought to be put on this codicil, belongs, as private property, to this company. If the testator has fixed on certain salaries which fail to provide for the fulfilment of his intention, no doubt

it is very much to be regretted : but you cannot, at the expense of the company, to whom the testator has given a beneficial interest, take that interest from them, upon the notion that the testator, if he had thought better of the matter, would have assigned a larger sum to the charity, or upon the notion that the Legislature has interfered as against the interest of that party to provide a school where there may be a larger instruction.

[551] I apprehend that the Grammar School Act can have no application to any case whatever, except where there are certain revenues appropriated to the instruction there pointed out. If there be a certain amount of revenue devoted to a school, and that school has, by the testator, been called a grammar school, and you cannot apply that fund beneficially for the instruction of boys in grammar, in consequence of the situation in which the school is placed, the change of circumstances, and so on, the Court may then apply that amount to a more general subject of education ; but it cannot obtain a further fund for the purposes of general education by encroaching on the private right of another party.

I do not therefore at present quite see my way towards making any order on that subject ; I do not think I can make any order.

The information must be dismissed, with costs.

[552] TYLEE v. WEBB. June 27, 28, July 8, 1843.

[See *Hewitt v. Loosemore*, 1851, 9 Hare, 457.]

A. mortgaged copyholds to B. by a deposit of a copy of his admission. A. died, and his heir mortgaged them to C. by a deposit of a copy of his own admission. C. afterwards sold and conveyed the estate to D. D. had notice of B.'s security. Held, that it was unnecessary to determine whether C. took with notice of B.'s incumbrance, as by the deposit he could take only such interest as the heir could give, namely, his interest subject to the equitable charge of the ancestor ; and, secondly, that the conveyance to D. was void as against B.

In 1829 A. was admitted to a copyhold, and in 1832 he deposited the copy of his admission with B. as a security. In 1837 A.'s heir, after admission, attempted to sell the property without effect. C. acted therein as his attorney, and D. as the clerk of C. On the 20th of July 1837 A.'s heir mortgaged the property to C., by deposit of his own admission. In this transaction D. acted as the agent and clerk of C., and as the agent of the heir. It appeared that in November 1835 D. had notice of B.'s incumbrance, and that on the 19th of July 1837 D. knew that the produce of the sale was to be applied in discharge of B.'s demand. Held, that the knowledge which D. possessed in November 1835 could not be imputed to C. in 1837. Secondly, that D.'s knowledge in July 1837 that the proceeds of the sale were to be applied in discharge of B.'s demand, did not clearly shew, that even he, at that time, recollected or knew that which he had known in November 1835 ; and thirdly, *semble*, that C., who knew that the party from whom he took it had been admitted only as heir and that the ancestor had been admitted under copy of court roll, dated in 1829, must be deemed that the ancestor, having the copy of court roll, might have created an equitable mortgage by deposit, and consequently that C. ought to have required its production before he advanced his money.

The facts of this case are fully stated in the judgment ; it is therefore unnecessary further to repeat them.

Mr. Kindersley and Mr. Schomberg, for the Plaintiffs.

Mr. Bagshawe, for Mr. Webb.

Mr. Pemberton Leigh and Mr. Elderton, for Mr. Hinton.

Mr. Hallett, for Wilson.

Mr. Kindersley, in reply.

The following cases were cited : *Dryden v. Frost* (3 Myl. & Cr. 670), *Kennedy v. Green* (3 Myl. & K. 699), *Ferrars v. Cherry* (2 Vernon, 383), *Coppin v. Fernyhough* (2 Bro. C. C. 291), *Hall v. Smith* (14 Ves. 426), *Daniels v. Davison* (16 Ves. 249), *Allen*

v. *Anthony* (1 Mer. 282), *Jackson v. Rowe* (2 Sim. & St. 472), *Whitbread v. Jordan* (1 Y. & Col. (Exch.) 303), *Brace v. Duchess of Marlborough* (2 P. Wms. 491), *Beckett v. Cordley* (1 Bro. C. C. 353), *Jones v. Jones* (8 Sim. 633), *Morret v. Paske* (2 Atk. 52), *Barnett v. Weston* (12 Ves. 130), *Frere v. Moore* (8 Price, 475), *Hiern v. Mill* (13 Ves. 114), *How v. Weldon* (2 Ves. sen. 516), *Meux v. Seager* (1 Mont. Deac. & De Gex, 396), *Ex parte Pollard* (Mont. & Chitty, 239), *Smith v. Chichester* (2 Dr. & War. 393, 3 Sugden Vend. & Pur. 10th ed. p. 453), *Le Neve v. La Neve* (3 Atk. 646), *Hargreaves v. Rothwell* (1 Keen, 154).

July 8. THE MASTER OF THE ROLLS [Lord Langdale]. This is a bill filed by equitable mortgagees for a foreclosure of the mortgaged estate, against another equitable mortgagee, a purchaser who obtained the legal estate, and a legal mortgagee under the purchaser.

In the month of December 1829 Robert Webb, being about to purchase a copyhold estate, borrowed the sum of £150, and as a security for the repayment, gave to the Plaintiffs a promissory note, and signed an agreement for the deposit, of what was called the deeds of the premises, as soon as the same should be made out and in his lawful possession.

Robert Webb, having been admitted tenant of the premises, received a copy of the court rolls of the [554] manor of which the premises were held. The copy was dated the 18th of December 1829, and on the 12th of July 1832 he placed it in the hands of the Plaintiffs, with a declaration in writing signed by him, and which was in these words:—

“Bristol, July 12th, 1832.—I do hereby declare, that the deeds annexed hereto left in the possession of Messrs. J. & T. Tylee, are as a security for an amount of £150, which I am indebted to said firm for cash advanced, and for which, interest at 5 per cent. per annum I agree to pay; and they are duly authorised to hold the same until the said amount of £150 and interest shall be fully paid.

“ROBERT WEBB.”

Under these circumstances, the Plaintiffs became equitable mortgagees of the copyhold estate in question.

Robert Webb died intestate on the 13th of October 1832, leaving the Defendant Thomas Webb, his customary heir, and, as such, entitled to the estate, subject to the Plaintiffs' equitable mortgage; and on the 7th of November 1833 Thomas Webb, as the heir of Robert, procured himself to be admitted tenant of the estate, and a new copy of court roll was granted to him. He paid the interest of £150 to the Plaintiffs up to October 1834; and if it be true, as has been said, that he thought he was paying interest on £150 secured by a promissory note, and was not, at first, aware of the equitable mortgage, the fact becomes immaterial, because it is proved that on the 10th of April 1837 he had distinct notice of the mortgage. He had the legal estate, the copy of the roll shewing his own admittance, and notice that the copy of the roll shewing the admittance [555] of his father, as whose heir he claimed, was in the hands of the Plaintiffs as equitable mortgagees.

Thomas Webb made an attempt to sell the estate by auction in the month of July 1837. The Defendant Mr. Hinton was the solicitor employed to effect the sale, and his clerk Battiscombe took an active part in the business; a sale was not effected, and consequently Thomas Webb was desirous to raise an additional sum by way of loan, and Mr. Hinton was induced to lend him £50 on a deposit of a copy of court roll and his own admittance.

A question is raised, whether, at the time of this advance, Mr. Hinton had, or ought to be deemed to have had, notice of the Plaintiffs' equitable mortgage.

It appears, by a letter which was written by Battiscombe to Kelly (an agent of the Plaintiffs) on the 30th of November 1835, that Battiscombe then knew, from the information of Webb, that the Plaintiffs had a security on the premises; and further, by a letter which was written by Battiscombe to Webb on the 19th of July 1837, that Battiscombe then knew that the proceeds of the then intended sale were to be applied in discharge of the Plaintiffs' demand, and on the occasion of Hinton's loan, Battiscombe acted not only as his agent and clerk, but also as the agent of Webb, of

whom he seems to have been a particular friend; and for the security of Hinton, Battiscombe sent to Webb for his signature, a memorandum of agreement, dated the 20th of July 1837, and which Webb afterwards signed, whereby it was stated, that Webb had deposited with Hinton, a copy of court roll, dated the 7th of November 1833, stating that at a court held on that day, he, as the only son and heir of Robert Webb, who held, by virtue of a copy of [556] court roll, dated the 18th of December 1829, the estate in question, to which Thomas Webb claimed to be entitled as only son and heir of Robert, and that he was admitted tenant of the estate, and had deposited the copy of court roll as security for the £50 advanced by Hinton, and interest.

It does not appear to me that the knowledge which Battiscombe possessed in November 1835 can be imputed to Hinton in 1837, or that Battiscombe's knowledge, in July 1837, that the proceeds of the sale were intended to be applied in discharge of the Plaintiffs' demand, clearly shews, that even he, at that time, recollected or knew that which he had known in November 1835; and though I incline to think that Hinton, who knew that Thomas Webb had been admitted only in his character of heir of Robert Webb, and that Robert Webb had been admitted under copy of court roll, dated the 18th of December 1829, must be deemed to have known that Robert Webb, having that copy of court roll, might have deposited it so as to create an equitable charge upon the estate, and, consequently, ought to have required its production before he advanced his money, yet it does not appear to me to be necessary to determine whether Hinton had, or ought to be deemed to have had, at that time, notice of the Plaintiffs' right, for I think that under the circumstances, and by mere deposit of the son's copy of court roll, he could take only that which Webb the son could give, which was the interest he was entitled to as his father's heir, subject to the charge which his father had made: and however this may be, it is proved that in the early part of February 1838 Mr. Hinton had direct and distinct notice of the Plaintiffs' claim; and upon the evidence which is given, I am of opinion that the other Defendants, Wilson and Lloyd, must, throughout the transactions in which they are concerned, be deemed to [557] have had all the notice of the Plaintiffs' claim which Hinton had.

The estate having been sold to Wilson, whose mortgagee Lloyd is, and the purchase-money being now in the hands of Hinton, the Plaintiffs have, at the Bar, claimed to have the purchase-money applied, as far as it will extend, in satisfaction of their claims, and a right to proceed to foreclose the estate, if the residue of what may be due to them shall not be paid by the Defendants personally. No such claim is made by the bill, nor could it have been sustained. The Plaintiffs cannot have security upon both the estate itself, and the purchase-money which represents its value.

On the other hand, it has been objected, that the Plaintiffs have unnecessarily made some of the Defendants parties to the cause; but considering this as a bill of foreclosure, I think that every one of the Defendants was a necessary party, because each of them had a right to redeem.

On the whole, I am of opinion, that the Plaintiffs are entitled to have the ordinary decree for foreclosure of the equitable mortgage to which they are entitled.

I shall make the decree, unless the parties agree to confirm the sale, and to go against the purchase-money.

NOTE.—An appeal to the Lord Chancellor is pending.

[558] MARSHALL v. MELLERSH. March 25, 30, 1843.

A Plaintiff may call for information of a very minute character, which the Defendant is bound in duty to afford, yet he may do it in such a way as to amount to what is called impertinence, or prolixity amounting to impertinence.

Where a party is required to set forth information, and he refers to a book containing all that information, it will be impertinent for him afterwards to repeat the information contained in that book.

This case came before the Court upon exceptions for impertinence.

Henry Marshall and Thomas Mellersh carried on business as solicitors in partnership, under articles dated in 1817, and which expired in 1828. This bill was filed for taking an account of the partnership transactions. It alleged that many matters of business had been omitted in the books of account, and that the matters entered therein had not been fairly made out. The bill called upon the Defendant, in the most extensive terms, to set out a full, true, and particular account of the several accounts, receipts, matters, and things relating to the partnership.

The bill was not of any excessive length, but the second answer, which was put in after exceptions had been taken to the first, contained schedules comprising the several items of account, &c., of a very minute character, in consequence of which the answer exceeded 1400 folios in length.

Exceptions having been taken thereto, they were allowed by the Master, and the case now came before the Court upon exceptions to the Master's report. The circumstances, so far as they are necessary to explain the principle of the decision, are sufficiently detailed in the judgment of the Court.

The case was argued by

[559] Mr. Turner and Mr. Freeling, for the Defendant; and by Mr. Pemberton Leigh and Mr. Dixon, for the Plaintiff.

The following cases were cited:—*Tench v. Cheese* (1 Beavan, 571), *Byde v. Mademan* (Cr. & Ph. p. 268), *Alsager v. Johnson* (4 Ves. 217), *Norway v. Rowe* (1 Mer. 347), *Beaumont v. Beaumont* (5 Mad. 51).

THE MASTER OF THE ROLLS [Lord Langdale]. I cannot look at this case without feeling the greatest regret that this species of litigation should be carried on between these parties, in a case, in which, after all, the question is merely one of partnership account.

The Plaintiff is in possession, and, it would appear, has been in possession, if not of the whole, at least of a very great part of the information in respect of which he has, by this bill, sought very minute and detailed discovery. It seems that he is in possession of partnership books, which contain the entries relating to all those matters. Alleging, however, on his part, that those books do not contain all the entries relating to these matters, and alleging also, in substance, that some of the entries relating to those matters are not fairly made in the books, he calls upon the Defendant to set forth, minutely and particularly, the detailed accounts of the several things as to which he seeks discovery. He does not call upon the Defendant to set forth in what respect the accounts stated in the books are erroneous, but to set forth particularly all and every the particular items. Why he thought fit to adopt that course of proceeding, it is [560] certainly very difficult to conjecture. He possibly had some reason for it, and some reason for presenting his interrogatory in that very unlimited form.

The question for me to consider, upon these several exceptions, is, in the first place, whether the Plaintiff has called for the minute information which is given in these schedules, and if he has, then whether the Defendant has afforded it in a proper manner; because it may happen that a Plaintiff may call for information of a very minute character, which the Defendant is bound, in duty, to afford, yet he may do in such a way as to amount to what is here called impertinence, or prolixity amounting to impertinence.

The first exception before me relates to small expenses incurred by the Defendant and to receipts and payments made by him out of the partnership monies in respect of those expenses. The Master has sanctioned several parts of the information afforded by the Defendant in that respect, but he has not sanctioned that part which is not excepted to. Now if that part had been no more than a mere copy of so many folios of a particular book, where all the information was collected, it would have been subject to a consideration which the other exceptions may be subjected to; but, as I understand the case, the Defendant, in obtaining the information afforded by this schedule, has had to investigate several of the partnership books, for the purpose of collecting thereout the several items relating to this particular subject of inquiry. He has certainly done that with great minuteness. He has set forth a great number of very small sums: it might be, and I think it is called for by the words of the

bill; it might be, and I think it is, from the nature of them, necessary for the case of the Defendant, that those particulars should be set forth; [561] and after all the argument which has occurred upon this subject, I cannot find that that part of the first schedule here referred to, is liable to the charge of impertinence, if it be not liable in respect of the constant repetition of the words "cash expenses."

I cannot help thinking that this might, by possibility, have been avoided. I think that, if some more pains and trouble had been bestowed upon the form of the schedule, it might have afforded to the Plaintiff all the information which he asked, and it might have afforded to the Defendant all the defence and protection which he was entitled to, if it had been shortened by some few words in the schedule; but I am by no means of opinion that I can or ought to consider the addition of these words, from time to time, in every line, was intended for oppression. I think that the words are unnecessary, but I do not think them irrelevant. They belong to the subject, and therefore I cannot allow that exception.

With regard to the second exception, which relates to the bankers' books, it appears that the Defendant is called upon to set forth, not merely the balances which are required in one of these interrogatories, but also what sums of money were, from time to time, paid into the bank, and by whom paid in, from time to time. The Defendant has, in one instance in his answer, referred to the bankers' pass-book, as containing the information which is required by that part of the bill, and has, for that purpose and by reference to it, made it a part of his answer. I think that if, after doing that, he had not been called upon, in another part of the bill, to give more information than is contained in the pass-book, he ought again to have referred to it, without setting forth the minute details. But if, as I understand it, he was, in the subsequent part [562] of the bill, called upon to set forth some information relating to those payments which was not in the pass-book, then, in addition to the reference to the pass-book, he was required to set forth something more to meet that subsequent requisition. Now with regard to that, it seems, that the pass-book contains no information as to the persons by whom the money was paid in for the first ten years of the account, and that the answer contains no more information than that which is in the pass-book, which in the previous part of the answer had been made a part of the answer. But in the subsequent part of the schedule, during the remaining ten or eleven years more, during which this partnership lasted, there are several items in the account, of sums paid in and out of the bank, with the names of the persons by whom they were paid in, that is, with information in addition to that which is contained in the pass-book, and which information therefore could not be afforded to the Plaintiff, who had required it, by a reference to the pass-book, and by making it a portion of the answer. It does appear to me, therefore, that this schedule is in part relevant, and necessary, and, therefore, not impertinent; but as to the other parts, that it is wholly unnecessary, in consequence of that book having been made a part of the answer. I must refer that part back to the Master to consider and review his report.

Upon the other exceptions, which relate to the bills of costs, the matter certainly does rest in a most strange position. These gentlemen were carrying on business as solicitors, and the charge is, that the business of the firm done by one partner has not been properly charged for, and, consequently, that the partnership has not had the benefit which it ought to have received, by a due remuneration given for the services done and performed by one of the parties. The bill books being [563] all in the hands of the Plaintiff, he had every means of knowing what charges were there made, and whether they were right or not. He had not, perhaps, the means of knowing, without inquiry of the Defendant, whether all the business which had been done by the Defendant had been brought into the account. That was a matter which might have been very properly inquired after, but that is not the discovery sought for by this interrogatory; for the bill, instead of charging and inquiring for that which was not contained in the bill books, and not contained in the partnership books, calls upon the Defendant to set forth a number of most minute particulars. It charges "that the Defendant ought to set forth a full, true, and particular account of all and every the purchases and sales of property, by or on behalf of Thomas Mellersh, which have been conducted and transacted by the partnership or at the

partnership offices, or at the partnership expense; and all deeds, indentures, bonds, contracts, agreements, and other documents, prepared and engrossed by the partnership, or in the partnership offices, or at the partnership expense, for or on account of Thomas Mellersh, and on his private or separate account; and also of all actions, suits, indictments, and other proceedings at law and in equity, which have been had, commenced, prosecuted, defended, or conducted by the partnership, or at the partnership offices, or at the partnership expense; and the full, true, and utmost amount and value of all such business, matters, and things so done and performed, according to the usual rates of charge to the clients generally of the partnership; and of all entries made in all, or any, or either of the books of the partnership, or of James Limbert or of Thomas Mellersh, of or relating to such last-mentioned business, and in what instances, and for what reasons, any such entries were omitted to be made;” it seems to be an account of all entries [564] which were made, and the reasons why any such entries were omitted to be made, and whether Thomas Mellersh has ever paid or been charged with any and what sums for such business, or any and what part thereof, and if not, why not. The Defendant is called upon in the interrogatory very nearly in the same words, to set forth the full, true, and utmost amount and value of all such business, matters, and things so done and performed, according to the usual rates of charge to the clients generally of the partnership, and of all entries made in all, or any, or either of the books of the partnership, or of James Limbert, or of Thomas Mellersh, of or relating to such last-mentioned business, and in what instances, and for what reasons, any such entries were omitted to be made (which means, of course, any entries relating to such business which were omitted to be made). I am quite persuaded that this was not done upon a careful consideration of the matter, but words seem to have been thrown in, in such a way as to make it extremely difficult for the Defendant to deal with them.

In the answer to this interrogatory, the Defendant has set forth an exact copy of all the bills of costs which have been incurred in the several matters which are here referred to. He has stated the matters of business which were done, and then he has set forth an exact copy of all the bills of costs which relate to them. Now, however this interrogatory may be framed, that is not what is asked for: the Defendant was not asked for a copy of the bills of costs, but for a statement of business, matters, and things done and performed, and the utmost value of such several matters and things, according to the usual rates of charge. I confess I cannot find he was asked for an account of each item of all those matters. I therefore think that I shall be obliged to overrule those four exceptions.

[565] VANDALEUR v. BLAGRAVE. *June, 29, 30, July 1, Nov. 6, 1843.*

[S. C. affirmed on appeal, 17 L. J. Ch. 45; 11 Jur. 935.]

Double agency.

Grantor of an annuity entrusted Y. with a sum of money for the purpose of redeeming it. Y., without paying the money, obtained from the grantee a deed of release of the annuity. Y., who acted in some respects as agent of both parties, afterwards died insolvent. Held, under the particular circumstances, that the loss must be borne by the grantor.

The Defendant, through the agency of one Yates, granted to the Plaintiff an annuity, redeemable on six months' notice. In May 1830 notice was given to repurchase in November, and in August 1830 the Defendant entrusted Yates with the money for the repurchase. In October Yates prevailed on the Plaintiff to execute the deed of reassignment, dated in November and indorsed on the annuity deed, without receiving the repurchase-money, but the Plaintiff did not sign any receipt for the money. Yates afterwards produced the deed to the son of the Defendant, to satisfy him of the payment, and it was handed back to Yates to be kept by him with the Defendant's other documents. Yates acted in the transaction as agent of both parties. He retained the money, and to deceive both, continued the payment of the annuity, but afterwards died insolvent. The Defendant subsequently

obtained possession of the deed. Held, under the circumstances, that the Defendant was not discharged, but was bound to pay to the Plaintiff the repurchase-money, with interest from November 1830, the Plaintiff accounting for the subsequent receipts of the annuity.

Mr. Pemberton Leigh, Mr. Kindersley, and Mr. Romilly, for the Plaintiff.

THE SOLICITOR-GENERAL, Mr. Tinney, and Mr. Tripp, for the principal Defendant.

Mr. Paynter, for a trustee.

Parnther v. Gaiskell (13 East, 432), *Barker v. Greenwood* (2 Y. & Col. 414), *Stewart v. Aberdeen* (4 Mee. & W. p. 218), *Preston on Abstracts* (vol. i. page 299). *Kennedy v. Green* (3 Myl. & K. 699), *Johnson v. Baker* (4 B. & Ald. 440), were cited.

Nov. 6. THE MASTER OF THE ROLLS [Lord Langdale]. This bill prays, that an indenture of release and reassignment, dated the 16th of November 1830, may be declared to be fraudulent and void, and may be deli-[566]-vered up to be cancelled; and that the Defendant Mrs. Blagrove may be ordered to pay to the Plaintiff the sum of £2500, for the repurchase of the annuity of £500 in the pleadings mentioned, together with the arrears of the annuity, accrued or to accrue, till the time of the repurchase thereof; or that Mrs. Blagrove may pay to the Plaintiff all arrears and future payments of the same annuity, the Plaintiff offering to do what may be required of him in either case.

The annuity in question was granted by Mrs. Blagrove to the Plaintiff by indenture dated the 16th of November 1827. It was made payable to the Plaintiff during the life of Mrs. Blagrove, out of an annual rent charge of £800 to which she was entitled; and for the purpose of securing the payment of the annuity, the rent charge was assigned to the Plaintiff. Covenants for further assurance were entered into, and Mrs. Blagrove covenanted to do all reasonable acts to enable the Plaintiff to insure her life in respect of the annuity, and that a judgment, to be entered on record against Mrs. Blagrove at the suit of the Plaintiff, should be a further security.

It was further provided, that if the Defendant were desirous to repurchase the annuity, and should give six calendar months' previous notice, in writing, of her intention to the Plaintiff, or in lieu thereof, tender him £2500, the Plaintiff would, at the expiration of the six calendar months, and on receiving all arrears and costs, accept £2500 in full for the repurchase of the annuity, and would, thereupon, release or assign the same, and the rent charge of £800, and all other securities for the same, to Mrs. Blagrove, or as she should appoint, and would acknowledge satisfaction of the judgment, and would, on receiving from her a proportionable [567] part of any premiums paid, assign to her any policy of insurance effected upon her life in respect of the annuity.

A memorial of the deed was duly inrolled in this Court; and in pursuance of a warrant of attorney executed by Mrs. Blagrove, judgment was duly entered up against her, at the suit of the Plaintiff, in the Court of Queen's Bench, for the sum of £5000, and a policy of insurance in the Pelican Life Insurance Company was effected on her life, in the name of the Plaintiff, and on his behalf, for the sum of £2800.

In the year 1830 Mrs. Blagrove intended to redeem the annuity, and, for that purpose, to pay what was due to the Plaintiff, and at the same time, as it appears to me, the Plaintiff intended to receive what was due to him, and thereupon to release the annuity, and reassign the rent charge to Mrs. Blagrove.

The parties themselves acted in good faith, but Thomas Cooksey Yates, who acted as agent for them both, in the treaty for the annuity and on various other occasions, committed a gross fraud. Being intrusted with money belonging to Mrs. Blagrove sufficient to redeem the annuity, he was directed to redeem it; and having the money in his hands, but concealing that fact, he prevailed on the Plaintiff to execute a deed of release and reassignment, without receiving the money, but in the expectation of receiving it on a future day, and thus he contrived to keep the money in his own hands for his own purposes.

The money has in fact never been paid, but the deed which was executed by the Plaintiff has come into the hands of Mrs. Blagrove, and she now claims the benefit [568] of it. The questions in the cause are, whether the deed is valid and binding to any and what extent; whether the Plaintiff is to lose his annuity, although he has

never received any consideration for its redemption, or whether Mrs. Blagrove is to continue subject to the annuity, although she directed her money in the hands of Yates to be applied for its redemption, or whether, in the result of the transaction, it ought to be held that there was a valid contract for the redemption of the annuity, which ought now to be carried into effect by payment of the redemption money and interest.

We must consider the relation between the parties and Mr. Yates, and their respective acts.

Mr. Yates was, or soon after the commencement of these transactions became, a barrister. He had been acquainted with and employed by the Plaintiff before the year 1827. In September 1827 he was first introduced by Mrs. Blagrove and her son Anthony, in whom she appears to have placed, and still to place, implicit confidence, and being then informed that Mrs. Blagrove was in want of money, he informed her, that the Plaintiff would probably assist her with a loan of £2500. This communication led to the treaty for the grant of the annuity, and Mr. Yates was intrusted by both parties with the management of the transaction.

From the date of the deed in November 1827 till December 1832, the Defendant employed Mr. Yates in various transactions: he advised her as a lawyer, he received and paid money for her, as her agent, to a very large amount, and her deeds, securities, and papers were placed in his hands.

[569] And the Plaintiff instructed him to hold the deed of the 16th of November 1827 on his behalf, to receive the annuity for him, and to pay the premiums of insurance thereout, and also employed him in some other transactions, and, as it appears, placed great confidence in him.

Till the month of May 1830, the annuity was paid to the Plaintiff by Mrs. Blagrove through Yates, who having thereout paid the premiums of insurance, together with any other sums which the Plaintiff might have authorised, accounted with the Plaintiff for the surplus.

In the month of May 1830 Mrs. Blagrove, expecting to receive money with which the annuity might be redeemed, it is said (and as the Plaintiff states it in his bill, I must, as against him, take the fact so to be), that Yates, as her agent, and on her behalf, gave notice to the Plaintiff, that it was her intention to repurchase the annuity in the following month of November; and before the time of redemption arrived, viz., in July 1830, Mrs. Blagrove's son, Anthony, who acted for her, inquired of Yates what sum would be necessary for the redemption of the annuity, and for some other purposes, and having ascertained the amount, he says that he paid the same to Yates for the express purpose, amongst other things, of releasing the annuity.

Yates having the money, or having money belonging to Mrs. Blagrove sufficient for the purpose, and having in his possession the deed of the 16th of November 1827, caused to be indorsed upon that deed a deed purporting to bear date the 16th of November 1830. This is the deed now in question, and it purports to witness, that in consideration of £2500 then paid, the Plaintiff [570] released the annuity of £500, and reassigned the rent charge of £800 to Mrs. Blagrove, and assigned to her the policy of insurance.

On the 11th of October 1830 the Plaintiff was at Carass in Ireland, and Yates came to him there with the indorsed deed so prepared. The Plaintiff now alleges, that Yates, so far from stating that he had received the redemption money from Mrs. Blagrove, pretended that he had not; that she had, indeed, meant to redeem the annuity by money to be raised by the sale of stock, but as the price of stocks had fallen, she wished for some delay, in the hope that the price would rise again; and that, thereupon, Yates assured the Plaintiff, that if he would execute the deed of reassignment, Yates would retain it in his own custody, until the £2500 should be paid to him by Mrs. Blagrove, for the Plaintiff; and that the Plaintiff, relying on the integrity of Yates, did accordingly execute and deliver to him the deed of reassignment, but that as no money was then paid, the Plaintiff did not assign any receipt for the £2500.

It appears from the evidence of Sir David Roche, who was present during the interviews between the Plaintiff and Yates on the 11th of October 1830, that Yates at first said, that he had come to pay off the money and to redeem the annuity, and

that the Plaintiff then complained of having so large a sum of money thrown upon his hands, without notice of paying it off, and asked the advice of the witness as to how he should act; and that the witness thereupon asked Yates, whether he had the money with him, or why he was in such haste; to which Yates answered, that he had not the money, but that it was in the English funds, and that Mrs. Blagrove was getting only $3\frac{1}{2}$ per cent. besides in-[571]-surance, and would not continue to do so. The witness then advised the Plaintiff to insist on six months' notice; to which Yates objected, and said, that notice was mere matter of courtesy; that he had brought over the deeds of assignment to get the annuity reconveyed, and that, as soon as he took them back, the money would be sent over.

It is to be observed, on this evidence, that the Plaintiff appears to have insisted, that he had received no notice of Mrs. Blagrove's intention to redeem the annuity. By his bill he states that notice was given in May. Mr. Anthony Blagrove, in his evidence for the Defendant, says, that the notice was given by a letter which he wrote to Yates, requesting him to give notice to the Plaintiff, and that, as he best recollects, the notice was given in July.

There is thus some obscurity about the notice, for notice in July to redeem in November would not have been valid; but admitting, because the bill so states it, that a valid notice was given in May, the time for redemption did not arrive till November. It was not till the 16th of November that the Plaintiff, if not offered interest in anticipation (of which there is no evidence), was bound to receive the principal sum and release the annuity; and, therefore, having regard to the notice now admitted, the Plaintiff might reasonably complain, that he was asked to take the money too soon; and, further, it is to be observed, that the deed which was executed in October, was made to bear date on the 16th of November, and was acknowledged to be executed, in consideration of money paid at or before the sealing and delivery thereof. This was false; the deed was executed, but no money was paid, no receipt was signed, [572] and in this state of things, the deed was placed in the hands of Yates.

Yates, having the money of Mrs. Blagrove, ought to have paid it to the Plaintiff, upon the execution of the deed at the proper time; and having got the executed deed into his hands, he ought not to have parted with it till the Plaintiff had received the money.

Anthony Blagrove states, in his evidence, that he had an interview with Yates at Bristol, immediately after Yates returned from a visit to the Plaintiff in Ireland; that Yates then told him that he had paid £2750 for the repurchase of the annuity, and produced to him the deed of release, and, to the best of his recollection, a warrant of attorney; that these instruments were produced, for the purpose of satisfying him (the witness) that Yates had repurchased the annuity; and that the deed having been delivered to him, he gave it back to Yates, to be kept by him with the other documents of Mrs. Blagrove.

After the occurrence to which this evidence relates, we find, on the one side, that the Plaintiff fully expected the money to be paid; for on the 17th of November 1830 he wrote to Yates, desiring him to invest it in Irish 3 per cent. consols; but Yates afterwards represented to him, that the money was not paid, and that the annuity was still on foot; and Yates, pretending himself to be the agent of Mrs. Blagrove in that respect, affected to treat the notice as withdrawn; and in the course of the correspondence, the Plaintiff, either not recollecting what had passed, or perhaps confused between his own recollection and the statement of Yates, in whom he greatly confided, appears to have acquiesced in statements (such as that of an actual tender) which are in-[573]-consistent with the evidence; but upon pretence of the notice being withdrawn, Yates continued to pay or account to the Plaintiff, for the sums which would have become due upon the annuity if subsisting.

On the other side, Mrs. Blagrove and her agent were satisfied that the annuity was redeemed; the redemption money was charged to Mrs. Blagrove by Yates in account; and accounts were afterwards settled between Yates and Mrs. Blagrove, on the footing of the payment for the redemption having actually been made.

The annuity was paid to the Plaintiff till November 1836, and the insurance was kept up, in the Plaintiff's name, till November 1834, but afterwards in the name of

Mrs. Blagrave. Yates absconded soon after November 1836; not long after that, he died in insolvent circumstances; and Mr. Anthony Blagrave, having become his legal personal representative, obtained possession of the document in his possession.

After the departure of Yates, the Plaintiff demanded payment of the annuity from Mrs. Blagrave, and this suit is the consequence of her refusal to pay.

It does not appear to me, that after the year 1830 there was, on either side, any *laches* or neglect, of which the other had any just right to complain. I think that the decision of the case must depend on the relation between the parties and their respective acts and omissions in the year 1830.

It appears to me, from the evidence, that on the 11th of August 1830, when Mrs. Blagrave, by the agency of her son Anthony, gave to Yates a cheque for £11,496, 3s., which he afterwards received, she intended [574] and directed, that a sufficient part of that sum should be applied in redeeming the annuity which she had granted to the Plaintiff. She says, and there is no reason to doubt her statement, that neither she nor her son ever saw the notice for redemption, or any copy of it, and that they were not aware that the annuity could not be redeemed till November. Thinking that the annuity might be redeemed at once, they trusted to Yates to procure the proper releases. As it is stated in the answer, they considered, that Yates was the person through whom the redemption money was to be paid to the Plaintiff, and they expected that he would procure from the Plaintiff such instruments as were necessary to extinguish the annuity, and convey to Mrs. Blagrave the premises on which the same was secured.

Anthony Blagrave says, that he wrote a letter, and requested Yates to give notice to the Plaintiff of Mrs. Blagrave's intention to redeem the annuity. This request was to be complied with by Yates, as the agent of Mrs. Blagrave. The letter containing it cannot be, itself, taken as a notice given to the Plaintiff through Yates as his agent. But Yates, as the agent of Mrs. Blagrave, was to give the notice; and the notice being, as the bill admits, given in May, was for payment in November, and a knowledge of the contents must, notwithstanding the real ignorance which may have existed, be imputed to Mrs. Blagrave. I cannot, under the circumstances of this case, act as if Mrs. Blagrave did not know, and was not to be bound by, what was done by her agent on her behalf according to her instructions.

Again, considering that the sum of £11,496, 3s. was given to Yates on the 11th of August 1830 for the purpose of thereout paying what was due to the Plaintiff, [575] I am of opinion, that the money cannot be considered as so paid to Yates, on behalf of the Plaintiff or as his agent. Yates did not receive the redemption money separately, but as part of an aggregate sum, which he was to divide and apply for the purposes of Mrs. Blagrave. In executing these purposes, it seems plain, that he was to act as her agent; and as to the part of the aggregate sum which was to be applied in redeeming the annuity, he must be deemed to have held it as her agent, for the purpose of that application. It was not payable to the Plaintiff till November. In the meantime, Yates was responsible to her only for its employment; and her direction being to redeem the annuity, it was his duty to her to retain it for her, till he had also, as her agent, obtained for her, releases from the Plaintiff.

Under these circumstances, I conceive, that Yates, when he saw the Plaintiff in Ireland, acted as the agent of Mrs. Blagrave. Whatever mistake may have been made by the Plaintiff in respect to any notice having been given to him, it is plain, that under the notice as admitted in the bill, and on which the Defendant is entitled to rely, there was no obligation, on the part of the Plaintiff, to receive the money in October, or at any time before the 16th of November; and under these circumstances, the Plaintiff having in October executed the deed, which was post-dated the 16th of November, and the warrants of attorney, which were not dated at all, but not having received the money, the nature of the transaction appears to me to shew, that the Plaintiff intrusted Yates as his agent, to hold these deeds till the money was paid to him. It would, I think, be absurd to suppose that the Plaintiff delivered these instruments without consideration to Yates, as the agent of Mrs. Blagrave, and this is scarcely alleged on her behalf; but it is argued, that Yates, having the deeds as the agent [576] of the Plaintiff, on his return to Bristol, delivered them in his character of such agent to Anthony Blagrave, as the agent of Mrs. Blagrave, who

relied thereon as evidence of the payment, and that the Plaintiff, although he had received no consideration, was and is bound by such delivery.

If the money had not been previously paid to Yates, but Yates, having the annuity deed and the executed deed of release in his possession, had offered them to Anthony Blagrove in exchange for the money, and if Anthony Blagrove had been thereby induced to give credit to Yates, and had, under such inducement, paid the money to Yates, who had afterwards applied the money to his own use, the transaction might have been binding on the Plaintiff; because his act in giving Yates possession of the deeds, and thereby enabling him to produce them, might have been deemed to be the cause of Anthony Blagrove's misplaced confidence, and of the fraud of Yates which thence ensued, and in the transaction, as so supposed, Yates would have been acting solely as the agent of the Plaintiff, and Anthony Blagrove as the agent of the Defendant.

But in the transaction, as it really occurred, Yates was the agent of Mrs. Blagrove for the payment of the money, both before the deed was executed by the Plaintiff and afterwards. Being her agent (and he was not the less so because he was also agent for the Plaintiff), and whilst he continued to be, and acted as such agent, he was endeavouring to commit, or acquiring the power to commit, a fraud upon the Plaintiff, first, in procuring the deed to be executed at a time when the money was not paid or payable; and, secondly, in producing the deed to Anthony Blagrove, although the money had not been paid. In withholding the money [577] when the deed was executed, and in thus producing the deed, he was also acquiring a power to commit a fraud upon Mrs. Blagrove; and whilst Yates was acquiring this power, and was deceiving both parties, it appears that Mrs. Blagrove was not induced, by the Plaintiff's deed, to intrust Yates with the money, and that the Plaintiff was not induced, by the Defendant's payment to Yates (of which he was ignorant), to intrust Yates with the executed deed.

But the agency for the redemption began with the Defendant. Whilst the money remained in the hands of Yates, he was her agent for its due application, viz., for its payment to the Plaintiff. By giving him the money beforehand, she afforded him the means, perhaps presented to him the temptation, to commit the fraud; and Anthony Blagrove, her agent, being totally unconscious of the fraud which he was enabling Yates to commit, and well knowing that by her the money had been honestly supplied to Yates, in whom she had confidence, for the purpose of payment, may not have examined the proof of payment as carefully as he would have done, if the money had been to be paid on production of the deed.

The complication of the case arises from the double agency of Yates, and from the undue confidence placed in him by the Plaintiff in respect of the deed, as well as by the Defendant in respect of the money; but in the result, the Plaintiff executed the deed without any consideration paid to him. The Defendant's agent had the money on her behalf, with instructions to pay it; he never discharged that duty, never paid the money, as he ought to have done; the duty remained unperformed, and the agency in respect of it continued. It is very clear that in fact the money was not paid. The [578] case of the Defendant is, that she had reason to believe that it was paid, and that the reason being founded on the act of the Plaintiff in executing the deed and leaving it in the hands of Yates, he must be bound by it.

According to the statement of Mr. Anthony Blagrove, he required proof that the consideration was paid; it certainly was his duty to do so: it was to be shewn that the money which, after the 11th of August, was in the hands of Yates as the agent of Mrs. Blagrove, had become the money of the Plaintiff, or a debt due from Yates to the Plaintiff. Under the circumstances of this case, the mere possession of the deed cannot be relied on as affording conclusive evidence; and the proof with which Anthony Blagrove was satisfied, consisted of the information of Yates, and the production of the deed, and of certain warrants of attorney without date or description of the parties named as attorneys.

It appears to me that in a defence founded upon an allegation that the Plaintiff has released or assigned his rights for a pecuniary consideration paid to him, it is incumbent on the Defendant to prove that the consideration was, in fact, paid, and

that in this case the proof has failed. It is not shewn that the money ever was in the hands of Yates, as agent for or on behalf of the Plaintiff.

It is to be regretted that the time when Yates returned from Ireland to Bristol, and the day on which his interview with Anthony Blagrove took place, do not distinctly appear. It is sometimes stated that Yates was a fortnight in Ireland; Mrs. Blagrove speaks of the interview, vaguely, as taking place in or soon after November: Anthony Blagrove (who might have been expected to state the day accurately) says that it was in [579] November, immediately after the return of Yates, but he does not specify the day; and I have, in vain, looked through the papers in the hope of finding some clear evidence of the day. Mrs. Blagrove, in her cross-bill, says that, on the 3d day of November, Yates left Ireland and returned to Bristol; but I think that it would not be right to bind her by that statement; and if I had thought it necessary for the decision of this case to ascertain the day accurately, I must have directed an inquiry on the subject. The circumstances, however, are such that I think Anthony Blagrove must have known that the deed was executed by the Plaintiff before the day on which it was dated; and, assuming nothing with respect to the day on which the deed was produced, we have this state of things, that Anthony Blagrove, as the agent of his mother, in the month of August, confided to Yates a certain amount of her money to be applied for her benefit on a future day, viz., on the 16th of the month of November following, that a deed is produced to him, executed by the Plaintiff previously, but dated on the 11th day of November, and acknowledging, in the present tense, the receipt of the money on or before the execution of the deed. The deed, being post-dated, could not be a plain expression of the truth on the day of execution. If the deed was produced to Anthony Blagrove before the 16th of November, it could not express the truth at the time of the production; but, passing that over as not being proved, there was not, as in the absence of payment there could not have been, any money receipt cotemporaneous with the execution of the deed, and no other was required. How it was that Mr. Anthony Blagrove overlooked circumstances so well calculated to excite suspicion, it would be vain to conjecture. Whether, as Mrs. Blagrove says, he was ignorant that the annuity could not be redeemed at any time, or whether he so [580] far trusted to Yates, as to think it immaterial when the deed was executed or when it bore date, and to take no notice of the want of date in the powers of attorney, or of the absence of any receipt except the acknowledgment in the deed, does not appear. It is plain that he must have trusted, in a great measure, to the mere word or statement of Yates, and that he was content with evidence that was not only insufficient, but was of such a nature as to excite very strong suspicion of the truth of the fact which ought to have been established; and, on the whole, I am of opinion, that, after the production and alleged delivery of the deed of release to Anthony Blagrove, the redemption money remained in the hands of Yates, or due from him, as the agent of Mrs. Blagrove and at her risk.

It therefore appears to me that the Plaintiff is entitled to relief; but, proceeding upon his statement of the notice, it is plain that Mrs. Blagrove intended to redeem and was entitled to redeem, the annuity on the 16th day of November 1830, and that the Plaintiff had consented to such redemption. He was entitled to the redemption money on that day; Yates had it as agent of the Defendant, and fraudulently withheld it. The Defendant is, I think, answerable for that—she cannot derive any benefit from the fraud of her own agent; but I do not think that she is answerable for the withdrawal of the notice which Yates affected to make, or that the Plaintiff is entitled to the benefit of such withdrawal.

I think therefore, on the whole, that the Plaintiff is entitled to the £2750 which was due to him in respect of the annuity on the 16th day of November 1830, and that, in accounting for the money received by him from Yates in respect of the pretended continuance of the [581] annuity, he is entitled to interest on the sum of £2750 at 5 per cent. If the parties differ, an account must be taken; and I think that the Plaintiff is entitled to the costs of this suit, and that, paying the costs of Sir Richard Godin Simeon, he is entitled to have them over against the Defendant Mrs. Blagrove.

[581] TARBUCK v. WOODCOCK. Nov. 24, Dec. 13, 1843.

A suit was prosecuted through a solicitor, and as the Plaintiffs alleged, without their authority. The Defendant gave notice of motion to dismiss the bill for want of prosecution, which being served on the solicitor, he requested the Plaintiffs to name a new solicitor, which they refused to do. The solicitor then moved that he might be dismissed as solicitor. Held, that no such order could be made, but personal service on the Plaintiffs of the notice of motion to dismiss was ordered. The Plaintiffs took no step to relieve themselves from their liability. Held, that the Defendant was entitled to have the bill dismissed, with costs to be paid by the Plaintiffs, leaving them to obtain, as against the solicitor, any remedy they might have.

THE MASTER OF THE ROLLS [Lord Langdale]. This suit has been prosecuted in the name of the Plaintiffs, by a solicitor whose name is on the proceedings in the usual course.

Services upon the solicitor whose name is on the proceedings are, by General Order (19th Order, 26th October 1842; Ord. Can. 214), deemed to be good upon the party.

The Plaintiffs have denied that they ever gave the solicitor authority to institute or prosecute the proceedings on their behalf (see 6 Beav. 134); and in this state of things the Defendant, being in a situation to move to dismiss the bill for want of prosecution, serves the notice of his mo-[582]-tion on the solicitor for the Plaintiffs, whose name is on the proceedings, but whose authority is denied.

The solicitor being thus served, requests the Plaintiffs to appoint another solicitor to act for them; and this the Plaintiffs refuse to do, alleging, that as they never authorised the institution of the suit, they have no concern with it, and will not intervene.

On the motion to dismiss coming on to be heard, the solicitor, acting as such for the Plaintiffs, stated the fact, and the motion stood over, to give him the means of considering what steps he should adopt for his own protection.

He now moves that he may be dismissed as the solicitor for the Plaintiffs; and I am of opinion that no such order can be made.

At present it is not known whether the solicitor has acted under the authority of the Plaintiffs or not.

If he has, the Plaintiffs are bound by the service on them, and the Defendant is entitled to an order on his motion.

If he has acted without authority, he is bound to indemnify the Plaintiffs; and he is, or may be, liable to the Defendant for the costs of the suit.

And in this state of things I can do nothing to relieve him from his liability.

The Plaintiffs ought to take the necessary steps to be relieved from their responsibility. If they will not, I [583] must consider the case of the Defendant; and for his better security and protection, I think that I might order that services should be made, not as usual on the solicitor whose name is on the proceedings, but on the Plaintiffs personally, without prejudice to the question by whom any additional costs occasioned by the personal service should be borne.

Dec. 13. Notice having been served on the Plaintiffs personally,

Mr. Pemberton Leigh now moved to dismiss the bill for want of prosecution, with costs.

Mr. Prior submitted that the dismissal should be made without costs as against the Plaintiff Mrs. Hannah Tarbuck, her name having been used without her sanction.

THE MASTER OF THE ROLLS [Lord Langdale]. Having denied the solicitor's authority, notice of this motion was served on her personally: nothing has been done, and the bill must be dismissed on the usual terms. She must obtain from the solicitor any remedy she may be entitled to.(1)

(1) See *Wade v. Stanley*, 1 Jac. & W. p. 675; *Hood v. Phillips*, 6 Beavan, 176; *Ward v. Ward*, 6 Beavan, 251; *Martindale v. Martindale*, cited 1 Smith's Pr. 172 (3d edit.).

[584] ST. VICTOR v. DEVEREUX. Nov. 13, 1843.

[S. C. reversed on appeal, 9 Jur. 519.]

An application for an order of course should state all the material facts. If there be any suppression, the order will be discharged, and the Court will not, on the application to discharge it, support it on the special merits then, for the first time, appearing.

A Plaintiff claiming partly under the heirs of a French subject, and, through an instrument of doubtful construction, obtained an order of course at the Rolls to sue *in formâ pauperis*, upon the simple allegation of his poverty: Held, that the order was irregular, on the ground of the suppression of the facts, which ought to have been presented for the consideration of the Court upon the application.

On an application to the Master of the Rolls in a Vice-Chancellor's cause, to discharge an order of course obtained at the Rolls, the Court will not enter into the merits further than is necessary to determine whether the order was regularly obtained.

This was an application to discharge an order to sue *in formâ pauperis*, which had been obtained *ex parte* by the Plaintiff.

It appeared that three French ladies, named Francault, De Montmignon and Golleville, were entitled to charges on an estate in France belonging to Fanning, the son, an English subject. The estate had been confiscated by the Revolutionary Government, and the Plaintiff, who claimed under Mesdames de Montmignon and Golleville, and under the heirs of Madame Francault, sought, by this bill, to obtain payment of the charges out of a portion of the compensation fund, provided by the Treaty of Paris for the indemnity of British objects, who, in contravention of the Treaty of Commerce of 1786, had suffered by confiscation of their property (see 59 G. 3, c. 31), and which had been awarded to the Defendant.

The title of the Plaintiff depended on a French instrument, dated the 9th of May 1834, which, as set out in the bill, was to the following effect. (NOTE.—The translation was afterwards found to be inaccurate):—

"We, the undersigned creditors, by mortgage of James R. T. Fanning, the son," &c., "and we, the heirs [585] and heiresses of our deceased sister, aunt and great-aunt, M. F. C. H. L. D. de Francault, also a creditor by mortgage of Mr. James R. T. Fanning, the son, declare altogether to have yielded to Mr. J. B. St. Victor our lawful power of procuration (he intervening and accepting) first, the third of the sum of 63,575 livres tournois, or francs, which we have lent to the said Mr. Fanning by our four contracts of the 19th of October 1791, and 4th of June 1792. Secondly, and moreover all interest which shall be recovered by him in the Court of Chancery in London. This cession is made to him, as well to indemnify him against the expenses he has already made to attain the recovery of the sums due to us by the said Monsieur Fanning, as to recompense him, on account of his long devotedness and his sacrifices for our late sister. We add, that even in case of death of one or several amongst us, we will, that Mr. B. St. Victor shall dispose, as of things belonging to him, of the sums we abandon to him, but subject to the charge of his making, or causing to be made, the advances deemed necessary to obtain the recovery thereof, our formal intention being, that nothing be demanded of us on that account. It is understood that we reserve to ourselves only the two-thirds of the capital of 63,575 francs above mentioned, or the two-thirds of the capital which shall have been reserved in the Court of Chancery in London. The present declaration has for its object to confirm those made previously by us, and which are deposited in the office of Mr. Toullandier, ancient attorney, 18 St. Benoit Street, in Paris, and also to enable Mr. Bourlon St. Victor to procure, in London, upon the sums we abandon to him, upon those due to us by the estate of Mr. Fanning the son, the means which shall be necessary."

The cause was attached to the Court of the Vice-Chancellor of England.

[586] The Plaintiff, upon an *ex parte* petition addressed to the Master of the Rolls,

which stated merely, in the usual form, that he had filed his bill, and was a pauper, obtained from the Under Secretary an order to sue *in formâ pauperis*.

Mr. Pemberton Leigh and Mr. Beavan now moved to discharge the order. They argued that the instrument was a mere power of attorney, authorising the Plaintiff to sue for other parties, he undertaking to pay the costs. That if it were considered an assignment, it was an assignment, partly from the representatives of Mad. Francault deceased, so that the Plaintiff, whether prosecuting the claim as attorney or assignee, was suing in a representative character, and was not, therefore, entitled to sue *in formâ pauperis*; *Oldfield v. Cobbett* (2 Beav. 444, and 3 Beav. 432), *Paradice v. Sheppard*.⁽¹⁾ Secondly, that even if he was suing in a mixed character, a special, and not an *ex parte* application ought to have been made; *Thompson v. [587] Thompson* (1 Turn. & Ven. Ch. Pr. (6th ed.), 513, cited 1 Daniell's Practice, 42). That, at all events, the special circumstances ought to have been stated for the consideration of the Court on the Plaintiff's petition, and that the suppression alone was a sufficient ground to discharge the order.

[Mr. G. Turner, as *amicus curiæ*, stated a case in the Exchequer, wherein he had been concerned for the Plaintiff, in which the assignee from a clergyman of Easter offerings had instituted a suit for their recovery; having obtained an order to sue *in formâ pauperis*, the Chief Baron Alexander, on the motion of Mr. Hayter, discharged it.]

Mr. W. Lee, *contrâ*, argued that the Plaintiff was suing in his own right as assignee of a chose in action and not in a representative character; that the Defendant had been guilty of such delay in making this application that it ought to prevent the discharge of this order.

THE MASTER OF THE ROLLS [Lord Langdale]. I can only attend to the question of regularity or irregularity. It is stated that this order was obtained on the common statement and affidavit. In order to obtain it regularly there ought to have been a statement of the special circumstances. If they had been stated, the Plaintiff would not have obtained the order of course, but would have been obliged to make a special application, not here, but to the Vice-Chancellor of England, to whose Court the cause is attached. The question to consider is, whether the order obtained on the common affidavit, and without a statement of the special circumstances, is regular. That depends on the [588] construction of the instrument, which I may look at, in order to see whether there is a question or not, and for the purpose only of deciding whether the order was regularly obtained. (6th Order of 9th May 1839; Ord. Can. 137.) I cannot determine whether, upon the full statement of the circumstances, the Plaintiff is entitled to sue *in formâ pauperis*. That question does not belong to

(1) 1 Dick. 136, and Beames on Costs, 252 (2d edit.).

The following note of the case of *Paradice v. Sheppard* is taken from the Deaves MSS. at the Rolls, page 99:—

Paradice v. Sheppard, 3d December 1745.

An administrator having been admitted at the Rolls to sue *in formâ pauperis*, the order was discharged by Lord Hardwicke.

The Master of the Rolls had admitted the Plaintiff, who was an administrator, to sue *in formâ pauperis*. On motion, the Lord Chancellor discharged the order, and dispaupered him—

1st. Because the stat. 11 H. 7, c. 12, which authorises the Court to admit parties to sue *in formâ pauperis*, is penned much in the same words with the statutes concerning costs, which have been held not to extend to actions by executors or administrators *in autre droit*.

2dly. On search, no precedent could be found, either in Chancery or in the Courts of Common Law, of admitting an executor or administrator to sue or defend *in formâ pauperis*.

3dly. The form of the affidavit usually made is not applied to this case, for the party may with truth swear that he is not worth £5 over and above what will pay all his just debts, and yet may have considerable assets of his testator's or intestate's, out of which he may be entitled to retain or be allowed the costs of suit.

Administrator dispaupered.

me, but to the Vice-Chancellor of England. (See *Robinson v. Milner*, 5 Beav. 49, and *Hooper v. Paver*, ante, p. 173.) If I should hold this order of course irregular, it will then become necessary for the Plaintiff to get the proper and regular order from the Vice-Chancellor of England.

Mr. Lee. Even if this order be irregular as of course, still the facts, as they now appear, fully warrant the order, and it may therefore be sustained on the merits.

THE MASTER OF THE ROLLS. I cannot agree with you in that. There are few things more important than that parties who apply for orders of course should fairly state all the circumstances which really ought to be considered. It is upon the allegations made upon petitions for orders of course that such orders are made, and if those allegations omit anything material, and which ought to be taken into consideration, the order so obtained is an irregular order.

In this case the order was obtained on the simple and common allegation of the poverty of this Plaintiff, and nothing more; if this had been a case where he was suing in his own right, the order would have been quite regularly obtained; but if he was suing in a character which required the special consideration of [589] the Court, whether, under the circumstances, he was entitled to sue *in formâ pauperis* or not, then those matters ought to have been adverted to in his application. If that had been done, then, beyond all doubt, the order would have been refused in the Secretary's office, and it would have required a special application to the Court, on which the merits would have been taken into consideration; if he then appeared entitled to sue as a pauper, the proper order would have been made to admit him to sue *in formâ pauperis*.

Lord Cottenham laid down the rule, that when an application was made to discharge an order of course for irregularity, he would not, under any circumstances, support it as a special order, but would discharge such order of course, giving the party the opportunity of regularly obtaining an order, upon a proper application for the purpose; such has ever since been the practice of this Court. (See *Harris v. Start*, 4 Myl. & C. 261; *Grove v. Sansom*, 1 Beav. 297, and *Brooks v. Parton*, 4 Beav. 494.)

If the real merits of the case, or any questions arising on instruments or on the nature of the Plaintiff's interest, are to be determined, that must be done in the Court to which the cause is attached. Certainly I have no authority, in a cause not attached to this Court, to take those matters into my consideration, further than for the purpose of ascertaining whether such a question arises upon them, as to make it material to have the special matter considered, before granting an order to admit a party to sue *in formâ pauperis*.

I think that, in this case, the special circumstances ought to have been alluded to upon the application for [590] the pauper order, and not having been mentioned, it appears to me that this order was irregular. To discharge an order for irregularity would discharge it with costs, but it may be material to consider what has happened since the order was obtained.

Mr. Pemberton Leigh. We do not ask for costs.

THE MASTER OF THE ROLLS. The circumstances are such, that I think I must have refused them. I must discharge the order without costs, and it will be quite open to the Plaintiff to apply to the Vice-Chancellor of England on the merits.

[590] PATERSON v. LONG. Nov. 19, 1843.

[S. C. 13 L. J. Ch. 1; 7 Jur. 1049; reported on another point, 5 Beav. 186.]

Two houses, held under one lease, were sold separately to A. and B. The lease was produced and inspected at the sale by the purchasers' solicitors. The conditions of sale provided for the apportionment of the rent between the two purchasers, but did not notice covenants to insure, &c., and a proviso for re-entry on non-performance, contained in the lease. Held, that though A. might be evicted by the default of B., still he was, under the circumstances, bound to complete.

Observations on special conditions of sale.

Two houses were held under one lease from the Marquis of Westminster, at a ground rent of £8. The lease contained covenants to pay the rent, to keep insured, &c., and a proviso for re-entry on non-performance of any of the covenants.

The property having become vested in the Plaintiff, as executor, he put the two leasehold houses up for sale in separate lots. The particulars of sale, after stating [591] the property as "a leasehold estate held under the Marquis of Westminster for a term of years, at a ground rent," and, after describing Lot 1, proceeded, "Held on lease from the Marquis of Westminster, with Lot 2, for a term of ninety-one years from Lady Day 1832, at a ground rent of £8. This lot will be sold subject to the payment of £4 per annum."

The particulars, after describing Lot 2, as similar to Lot 1, proceeded, "Held on lease with Lot 1, as above. This lot will be sold subject to the payment of £4 per annum." The particulars also stated as follows: "The original lease, or abstracts thereof," &c, "will be produced at the time of sale."

The seventh condition provided that the production of the last receipt for rents should be accepted "as evidence of the due performance of all the covenants, clauses, and agreements contained in the original lease."

The eighth condition of sale provided that the purchasers of the two lots (unless one purchaser should purchase both lots), should be parties to each other's assignment, and covenant to pay the proportion of rent allotted to each and to indemnify each other against the same; and also gave mutual powers of distress and entry upon and over the premises purchased by each, as an indemnity against the payment of more than the due proportion of the original rent of £8, payable by each purchaser; and that such last-mentioned purchaser or purchasers should, at his or her own expense, execute a bond, in the penalty of £1000, to the vendor, to indemnify him and the estate of his testator against the rent and covenants in the original lease, as is usual in such cases.

[592] The two lots were sold to different purchasers, and the Defendant Long became the purchaser of Lot 1. He objected to the title, on the ground that the two houses, being held under one lease, he would be liable to eviction by the ground landlord, upon any default being made by the purchaser of the other lot in performing the covenants of the original lease.

The Plaintiff filed his bill for specific performance, alleging that the Defendant had notice, and must be presumed to have had notice, of the stipulations contained in the original lease, and had purchased Lot No. 1 subject thereto.

The Defendant, by his answer, admitted that the lease had been produced at the sale, and had been inspected by his solicitor, but he denied save as aforesaid, that he had, and he submitted whether he was to be considered as thereby having, or must thereby or otherwise be presumed to have had, notice of the stipulations contained in the original lease from the Marquis of Westminster.

By the decree made at the original hearing, it was referred to the Master to inquire, whether a good title could be made to the premises in question in this cause purchased by the Defendant (having regard to the particulars and conditions of sale).

The Master reported that a good title could not be made; and in his written opinion he said, he thought that the Defendant had a right to be indemnified against the consequence that might ensue from a breach of those covenants by the owner of the premises in Lot 2, and that the notice that the premises in Lots 1 and 2 [593] were held under the same lease was not sufficient to release the vendor from giving the indemnity. The Master added, that whether the purchaser had, by reading the original lease and therefore ascertaining to what covenants the original lessee was liable, waived or abandoned his right to be indemnified, was a question for the Court and not for him to decide.

The Plaintiff excepted to this report, and the cause was also brought on for further directions.

Mr. Pemberton Leigh and Mr. Beavan, for the Plaintiff. The Defendant had both constructive and actual notice of the contents of the lease when he became the purchaser. Notice to a purchaser of a lease is notice of its contents; *Hall v. Smith*. (1)

(1) 14 Ves. 426, and see *Taylor v. Stibbert*, 2 Ves. jun. 437, 441, and *Daniels v. Davison*, 16 Ves. 249, and 17 Ves. 433.

This case is precisely similar to *Walter v. Maunde* (1 Jac. & W. 181), in which it was decided, "that a person contracting to purchase leasehold property is held to contract with notice of the clauses in the lease." The principle has been followed in the subsequent cases. In *Cosser v. Collinge* (3 Myl. & K. 283) Sir C. C. Pepys says, "*Prima facie* a man who agrees to take an under-lease must know that he is to be bound by all the covenants contained in the original lease." In that case Mr. Watson, the solicitor of a party who had agreed to take an under-lease, had "cursorily examined" the original lease; and on this the late Master of the Rolls observed, "I am clearly of opinion that Mr. Watson had either actual or constructive notice, because the deeds were brought to him, for the purpose of ascertaining what, if he had used due diligence, he must have [594] discovered. The Plaintiff, therefore, is entitled to the specific performance which he asks; and as I think Mr. Watson might, with due diligence, have discovered what the covenants in the leases were, he is entitled to that specific performance with costs." Again, in *Pope v. Garland* (4 Y. & Coll. (Exch.) 394) it was held, that upon the sale of leasehold property it is the duty of the purchaser to inquire into the covenants and stipulations of the original lease.

In this case, however, it is unnecessary to refer to the doctrine of constructive notice. Here it is admitted that the lease was produced, and that the Defendant's solicitor inspected it; the Defendant, therefore, had notice of the whole contents, and became aware of the nature of the several covenants and the means reserved by the ground landlord for enforcing them.

If the two purchasers are entitled to an indemnity, it must be an indemnity implied by law, as between themselves, in the same way, as a purchaser of an equity of redemption is under an implied obligation to indemnify the vendor against the payment of the mortgage, (1) or as the purchaser of a leasehold is bound to indemnify the vendor against the payment of rent and performance of covenants. (*Staines v. Morris*, 1 Ves & B. 8.) This, then, would be matter of conveyance and not of title.

Mr. Turner and Mr. Follett, *contra*. The Plaintiff has not shewn a good title to this property. The purchaser is entitled to a secure title for the term which he has contracted to purchase; but if he be compelled to accept this title, he will be liable to eviction without any [595] default of his own, in case the purchaser of the other lot should neglect to perform the covenants to insure, &c. These being covenants against fire, &c., against the consequences of a non-performance of which this Court will not relieve (see *White v. Warner*, 2 Mer. 459), a forfeiture might take place the very day after the purchase, through the default of the purchaser of Lot 2. In *Filder v. Hooker* (2 Mer. 424, and 3 Mad. 193) the Plaintiff had agreed to grant a lease for twenty-one years; it turned out that the Plaintiff himself held under a lease, and was subject to a proviso for re-entry upon non-performance of the covenants, and therefore could not give to the Defendant a secure lease for the term of his contract; it was decided that he could not compel the Defendant to take the title, even with an indemnity.

In *Flight v. Booth* (1 Bing. N. C. 370) the particulars stated that no *offensive* trade was to be carried on upon the premises; but the original lease appeared to prohibit other trades, which were not offensive, and it was held that, on account of the discrepancy between the particulars and the lease, the purchaser was entitled to rescind the contract.

The Plaintiff has acted with such a degree of carelessness as to disqualify himself from enforcing this contract. He was well aware of the objection to the title, and making a provision as to the severance of the rent, he wholly omitted all mention of the proviso for re-entry. The Plaintiff, therefore, was justified in assuming, and did assume, either that there were no other objections to the title than those specially provided for, or that the ground landlord would join and sever the joint liability. The Courts will not assist a party who has, [596] even inadvertently or by negligence, misled a purchaser, and they require that special conditions of sale should be expressed in the most clear and unambiguous terms; *Southby v. Hutt* (2 Myl. & Cr. 207), *Symons v. James* (1 Y. & C. (C. C.) 487), *Taylor v. Martindale* (*Id.* 658). "If there is misrepresentation, so that the acuteness and industry of the purchaser is

(1) *Waring v. Ward*, 7 Ves. p. 336, and *Jones v. Kearney*, 1 Dr. & War. 134.

set to sleep, and he is induced to believe the contrary of what is the real state of the case, the vendor in such case is bound by that misrepresentation;" *Pope v. Garland* (4 Y. & C. (Exc.) p. 401).

Mr. Pemberton Leigh, in reply. It is impossible that a purchaser could have believed that the Marquis of Westminster, who was no party to the contract, would have joined in the conveyance; such is not the usual course. The provision for giving to the vendor a bond for the due performance of the covenants, shews that there were other covenants, and that they were to continue. The real intention was to apportion the permanent charge, viz., the rent, between the purchasers, and to leave the contingent liabilities as they were.

Fildes v. Hooker does not apply; that was not a case of a contract to sell a leasehold interest as it existed, but an unrestricted agreement to grant a valid lease for twenty-one years. Here the Plaintiff has not contracted to make out a title for ninety-nine years, but to sell the leasehold interest which he is entitled to, together with another house, under one lease from the Marquis of Westminster.

THE MASTER OF THE ROLLS [Lord Langdale]. Many inconveniences necessarily arise, when leaseholds consisting of several houses held under the same [597] lease are sold in several lots to distinct purchasers; for if the lease, as must be expected, contains covenants affecting the whole, and a proviso that on breach of any covenant, the landlord is to have a right to re-enter, it is evident that the purchaser of one lot may be evicted, without any default of his own part, but solely through the default of another purchaser. This is certainly a very inconvenient state of circumstances, and the question whether a purchaser is to be compelled to complete his purchase depends upon the nature of the contract, what he has agreed to buy, and under what circumstances.

This was an agreement to purchase an existing leasehold interest; and the distinction is important, that it was not an agreement to purchase an absolute interest to endure for a certain number of years, but to purchase "a leasehold estate held under the Marquis of Westminster for a term of years." The leasehold interest was to be sold in two lots, though held under one lease. It is expressly stated in the particulars of sale, that Lot 1 was "held on lease from the Marquis of Westminster with Lot 2," and that Lot 2 was "held on lease with Lot 1 as above," and at the foot of the particulars it was stated, "that the original lease would be produced at the time of the sale."

The lease was produced, and was inspected by the solicitor of the gentleman about to purchase. This is admitted. The whole interest possessed being the whole subject of the sale described, there could not, after the inspection, be the slightest doubt of what was intended. The Defendant purchased the leasehold interest; and he now says that there is in the particulars and conditions, expressions which operate as a misrepresentation. It is not imputed that there is any fraud, [598] but it is said that the purchaser was deluded and lulled by these conditions of sale; that the leaseholds were held under one rent, and were subject to covenants of a special nature, as covenants to insure, not to permit noisome trades to be carried on upon the premises, &c., and on breach of any of which covenants, a right of re-entry was reserved to the lessor, yet it was merely stated that Lot 1 was to be sold subject to a ground rent of £4.

The whole being held under a rent of £8, it was necessary to make an arrangement for the apportionment, and it was provided for by the conditions. Again, it was necessary to shew that there was then a good title, which would not have been the case if there had been a breach of covenant, and a right of re-entry had accrued to the landlord, and provision was made for that, for the seventh condition provides that the production of the receipts should be evidence of the performance of all the covenants. This therefore is guarded against.

The eighth contains this, "that the purchaser shall execute a bond in the penalty of £1000 to the vendor, to indemnify him and the estate of his testator against the rent and covenants in the original lease, as is usual in such cases." Surely, if, on the sale of the leasehold interest, the lease was produced, and the purchasers were told that they must indemnify each other as against the apportioned rent, and the landlord as against "rent and covenants," it cannot be said either that the party was not aware

of what he was doing, or that it was intended that the landlord was to release the covenants. This condition implies unavoidably that the covenants were to be continued in force.

In this state of things the purchaser says, I ought to be indemnified, because I had a right to assume that [599] the landlord would join in releasing or in apportioning the covenants. I do not think there is any ground for that assumption; there may be great inconvenience, but the purchaser contracted subject to it. I may also observe that the purchaser of Lot 2 has as great an interest in preventing a forfeiture as the purchaser of Lot 1.

The exception must be allowed, and there must be a decree for specific performance with costs.

I quite agree with the observations which have been made on special conditions of sale; and I think that equity, nay, common honesty, requires, that conditions of sale should fairly represent the real situation of the property. (See *Hyde v. Dallas*, 4 Beav. p. 608, and the cases there cited.)

[600] WEDGWOOD v. ADAMS. Nov. 23, 24, 1843.

[S. C. 8 Beav. 103.]

In cases of specific performance, Courts of Equity exercise a discretion. In cases of great hardship, they will not interfere, but will leave the Plaintiff to his remedy by recovery of damages at law.

Trustees joined their *cestui que trust* in a contract for sale, and personally agreed to exonerate the estate from any incumbrances thereon. There were considerable incumbrances, and it did not appear whether the purchase-money would be sufficient to discharge them, or what would be the extent of the deficiency. The Court refused to decree a specific performance against the trustees, so as to compel them to exonerate the estate, but left the purchaser to his remedy by action for damages.

This was a bill filed by a purchaser for the specific performance of a contract.

In February 1838 Ann Parry and William Edwards Parry, being entitled to some real estate, which was then subject to certain incumbrances, conveyed it to three trustees, Adams, Leach and Paynter, on trust to sell, and apply the produce in payment of the mortgages and incumbrances thereon, and then in payment of the scheduled debts of the grantors, due on judgment, bond, and otherwise, and afterwards of the costs, charges, and expenses of the trustees, and then to pay off all sums of money raised and advanced under the powers contained in the settlement made on the marriage of William Edwards Parry and Martha his wife; and also in payment to the said Ann Parry of such sum as would be sufficient to purchase an annuity or clear yearly sum of £100 for the life of the said Ann Parry, and then upon trust, to pay the residue or surplus of the monies to arise from the intended sale or sales unto Ann Parry and William Edwards Parry, in such proportions as Adams, Leach and Paynter should appoint and determine.

In May 1838 the three trustees and Ann Parry and William Edwards Parry entered into a contract in writing, for the sale to the Plaintiff, Colonel Wedgwood, of part of the property. The agreement was expressed to be [601] made between Adams, Leach and Paynter (as trustees for Ann Parry and William Edwards Parry), and Ann Parry and William Edwards Parry on the one part, and the Plaintiff of the other part, and thereby, the former agreed to sell to the latter the property in question for £5600; and the parties of the first part agreed, on receipt of the purchase-money, that they, and all other persons having any estate or interest therein, would convey the property to the Plaintiff. The agreement then proceeded as follows:—"And it is hereby agreed, that if any part of the said premises be subject to an incumbrance, the same shall, if required by the said T. J. Wedgwood, be exonerated by the said J. Adams, Francis G. Leach, W. E. Paynter, Ann Parry,

and William E. Parry, and the estate vested in them, previously to the surrender or other conveyance to the said T. J. Wedgwood."

The property was, at the time, subject to certain incumbrances, the amount of which had not, at the original hearing, been ascertained. All the Defendants appeared and answered the bill; but the two Parrys and Paynter having made default in appearing at the hearing, the Plaintiff took a decree against them by default, and it was referred to the Master to ascertain the value of the property comprised in the indenture of February 1838, and the incumbrances thereon.

By the Master's report, it appeared that the monies receivable from the whole of the property, if sold, would be less than the amount of the existing incumbrances thereon, and the amount of the deficiency was a subject of dispute between the parties. Adams and Leach had not had notice of some of the incumbrances till after the institution of the suit.

[602] The cause having come on for further directions,

Mr. Kindersley and Mr. Parry, for the Plaintiff, asked for a decree against the trustees for the specific performance of the contract entered into by them, and a direction for them to exonerate the estate according to the express terms of the contract.

Mr. Pemberton Leigh, Mr. Turner, and Mr. Edgar Montagu, for the Defendants, the trustees. In cases of specific performances, the Courts of Equity exercise a discretion, and will not interfere if the circumstances of the case make it unreasonable so to do. They will not execute a contract which unfairly presses on one of the parties. Thus a mortgagor who contracts to grant a lease, will not be decreed to pay off the mortgage, in order to enable him to complete the contract; *Costigan v. Hastler* (2 Sch. & Lef. 160), the lessee will be left to his remedy at law. So where a tenant for life, who, upon the settlement by him of lands of equal value, was absolutely entitled to the settled estates, entered into a contract for the sale of them, the Court declined ordering him to procure and settle lands of equal value, in order to complete his contract, *Howell v. George* (1 Mad. 1); and in *Malins v. Freeman* (2 Keen, 25), the Court declined to interfere, where, by mistake, a party had, at an auction, bid for and purchased the wrong lot. Here the trustees, having no personal interest, have, improvidently and without knowing the state of the incumbrances, contracted to exonerate the estate from them: there is no knowing the extent of their liability if they are compelled specifically to perform the contract. This is a proper case for damages at law.

[603] Mr. Kindersley, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. The question is simply this, whether the trustees, who entered into this contract, are personally liable to exonerate the purchased estate from the incumbrances which affect it, and whether they are to be compelled specifically to perform the contract which they have entered into.

The first question argued is as to the meaning of the contract. It appears that Ann Parry and W. E. Parry, the owners of the estate in question, were indebted apparently to a large amount, and they conveyed the estate to three trustees, in order that it might be sold. The contract was entered into by the three trustees and by the two persons beneficially interested in the estate. The duties to be performed by the trustees and the beneficial owners were, as in all ordinary cases, very distinct. The trustees were to perform the duties belonging to their trust, and the beneficial owners were to perform every duty attached to the property. This being the situation of the parties, it is, in the commencement of the contract, carefully stated that the three trustees were trustees of the estates of the other parties to the contract, and it is also expressly stated that they entered into the contract *as trustees*. In the course, however, of the same contract, the trustees and the beneficial owners are joined together in the same agreement, that is, they all agree, without any distinction, that there shall be a clear title made out at their expense, that the estate shall be conveyed or surrendered free from incumbrance, and that there shall be covenants for quiet enjoyment, and so on; and then follows another and distinct agreement, that if there shall be [604] any incumbrance on the property, it shall be exonerated by the five persons named, viz., by the trustees and

the beneficial owners, and that the estate shall be vested in them prior to the conveyance.

On the construction of the contract, I am inclined to think that its effect is to create a personal obligation in the trustees, but I can hardly believe that this effect could have been known to the parties at the time. It is to me extraordinary, that trustees who had no interest whatever in the matter, should knowingly enter into a personal obligation to exonerate the trust estate from every incumbrance that might affect it. It seems to me equally extraordinary, that a purchaser who intended to rely on the personal liability of the trustees should not have taken care to have that distinctly stated, and to distinguish the trustees from the persons beneficially interested, and not confound them in the same agreement, as seems to have been done here.

I conceive this to be an ill-drawn contract: the effect may however be that contended for by the Plaintiff. Suppose it to be so, the question then arises, whether, under the circumstances, it is a fit contract to be specifically performed. One of the questions raised is, that the obligation is not formally enough insisted upon in the pleadings; but I think that a Plaintiff is not obliged to state each particular portion of the contract which he calls upon the party to perform, and that when he asks for a specific performance, a specific performance of every thing in the contract is implied.

That being so, the question is, whether the contract is of such a nature, as, under the circumstances, the Court will decree a specific performance? Now I would rather, before I decide that question, look at the [606] cases which have been cited on the subject; but with reference to the last argument used, viz., the difficulty of determining what sum would be unreasonable to compel the trustees to pay, and at what amount the Court would stop; I conceive the doctrine of the Court to be this, that the Court exercises a discretion, in cases of specific performance, and directs a specific performance unless it should be what is called highly unreasonable to do so. What is more or less reasonable, is not a thing that you can define, it must depend on the circumstances of each particular case. The Court, therefore, must always have regard to the circumstances of each case, and see whether it is reasonable that it should, by its extraordinary jurisdiction, interfere and order a specific performance, knowing at the time that if it abstains from so doing, a measure of damages may be found and awarded in another Court. Though you cannot define what may be considered unreasonable, by way of general rule, you may very well, in a particular case, come to a balance of inconvenience, and determine the propriety of leaving the Plaintiff to his legal remedy by recovery of damages.

There would be great inconvenience either way in this case. By this contract, Colonel Wedgwood was to have possession of the estate five years ago. He has had possession, and certainly cannot now be deprived of the benefit of this contract without very great inconvenience. On the other hand, if these Defendants are called on to perform the contract in the way here asked, what means have I of measuring the inconvenience to which they will be subject? I have statements on both sides as to the accounts and charges, but I can form no opinion whatever as to what may be the result from the Master's report, on which, I find it in great controversy between the parties, whether the whole purchase-money of the estate will or will not discharge the incumbrances. I must, therefore, look at it in this light, that it may not be sufficient; and if so, I have no measure of the extent to which the purchase-money may be deficient. It may be £200, £300, or £500, and for anything I know, it may be £5000.

I will not decide the question at this moment, as I wish to look at the cases: I will mention it again.

Nov. 24. THE MASTER OF THE ROLLS [Lord Langdale]. In this case, I have looked over the papers, and I think that the contract is not at all less extraordinary than the trust deed, which is a deed for the payment of every sort of claim before even the costs and expenses of the deed.

However, after consideration, I think I cannot order a specific performance of that agreement; and with regard to its being a mere money objection, I could not, when this case was argued, call distinctly to my mind a case of that sort, of which

I had some recollection, and which came before Lord Hardwicke. It is a case not actually reported, but it is cited in the argument. (In *Ramsden v. Hylton*, 2 Ves. sen. p. 307.) There, a person being entitled to a small estate under the will of his father, on condition that if he sold it within twenty-five years, half the purchase-money should go to his brother, sold it within the time, and the question was whether that agreement should be specifically performed; Lord Hardwicke thought not, because, by the specific performance of it he would lose half the purchase-[607]-money. I think that came very nearly to a case of mere pecuniary objection.

I cannot decree a specific performance, and it is for the Plaintiff therefore to consider what he will do.

NOTE.—The bill was afterwards dismissed without costs, November 1844. See *post*.

[607] JACKLIN v. WILKINS. Dec. 18, 1843.

A Plaintiff cannot, before appearance, serve a notice of motion on the Defendant, without first obtaining the special leave of the Court; and the notice of motion should state that such leave has been given.

After the Defendant had been served with a *subpoena*, but before he had appeared and before the time for appearance had expired, the Plaintiff, without any special leave of the Court, gave the Defendant notice of motion for an injunction.

The Defendant did not appear upon the motion.

THE MASTER OF THE ROLLS having intimated that he thought the proceeding irregular.

Mr. Schomberg, in support of the motion, argued as follows:—Formerly it was necessary to serve the Six Clerk with all notices of motion; until appearance the Defendant had not appointed one, and it was therefore of necessity that the Court should be applied to for the purpose of allowing the notice to be served personally; but the office of Six Clerk has been abolished, and now by the [608] New Orders of October 1842 (Ord. Can. 214, 215), the parties themselves and their attorneys may be served with notice of all applications; it is therefore no longer necessary to obtain special leave to serve them.

THE MASTER OF THE ROLLS said there had been no alteration in the practice in this respect. That special leave ought to have been obtained, and that the fact should have been stated in the notice of motion. (*Hill v. Rimell*, 8 Sim. 632.)

Mr. Schomberg then proposed to move *ex parte*; but

THE MASTER OF THE ROLLS [Lord Langdale] said that, after the delay which had taken place, such a course could not be permitted. (NOTE.—See *Ramsbottom v. Freeman*, 4 Beavan, 145.)

Reports of CASES in CHANCERY ARGUED and DETERMINED in the ROLLS COURT during the time of LORD LANGDALE, Master of the Rolls. 1843, 1844. By CHARLES BEAVAN, Esqr., M.A., Barrister-at-Law. Vol. VII. 1846.

[1] THE MARQUIS OF HERTFORD v. LORD LOWTHER. (COUNTESS ZICHY'S CASE)
June 12, Dec. 14, 1843.

[See *In re Prater*, 1887, 36 Ch. D. 476, the effect of which case on the older authorities is stated in *In re Robson* [1891], 2 Ch. 559. A note in the Addenda states that this case was affirmed by the Lord Chancellor on Dec. 20, 1845.]

Generally, choses in action do not pass by a bequest of "goods and chattels," in a particular locality.

Bequest of "all the goods and chattels, plate, linen, money at the bankers, or stock in the Monte de Milano, linen, horses, carriages, &c., I may die possessed of at M." Held, not to pass Polish certificates and Neapolitan bordereaux (being Government obligations), there situate, entitling the bearers to receive the interest and capital at a future time. Held, also, that such securities could not be considered as money or cash; and, 3dly, that not having their locality at M., they did not pass under the words *et cetera* at M.

By a codicil to his will, dated the 3d of May 1827, the late Marquis of Hertford bequeathed as follows:—

"I give and bequeath to Charlotte Leopoldina, now Countess Emanuel de Zichy, over all other bequests and legacies, *all the goods and chattels, plate, linen, money at the bankers or stock in the Monte de Milano, linen, horses, carriages, &c., I may die possessed of at Milan, or in Lombardy*, on condition she gives £3000 sterling to the Cassa d'Assicurazione, to make an annuity for the life of Angelica Felicite Borel (late of Milan, No. 1246 Contrada di Monte, and of No. 3 Rue Provence at Paris), [2] and that her husband gives her power to hold this as her own separate property. A codicil."

"HERTFORD."

The testator, at the time of his death, was the owner of property at Milan of various descriptions and of considerable value, the particulars of which the Master set forth in a schedule to his report, and amongst them he included the following particulars:—

600 Polish certificates A, of 300 florins each, with 5 per cent. interest, payable 1st January and 1st July; in total, 180,000 florins.

1259 Polish certificates B, of 200 florins each, without interest; in total, 251,800 florins.

Four certificates of the Vienna Loan, to be reimbursed 1st January 1843, of 370 florins each; in total 1480 florins.

Seventeen certificates of the Vienna Loan, 1831, of 500 florins each, nominal capital, without interest; in total, 8500 florins.

Eight *bordereaux*, each bearing 10 coupons of six months' interest of 12 ducats and 50 grains, relative to the Neapolitan State obligations.

The Master found that, together with other property of various kinds, these certificates and *bordereaux* passed to the Countess Zichy, by the codicil of the 3d day of May 1827.

The Plaintiff took exceptions to this report, which now came on for argument.

[3] The precise nature of the certificates and *bordereaux* did not appear upon the report; but the Master had treated them as negotiable securities which passed by delivery. Previous to judgment being delivered, authenticated translations were obtained, from which the Court considered that they "constituted the bearers the persons entitled to receive, at future times, the interest and capital to which the instruments respectively were the evidence of title."

Mr. Kindersley and Mr. Schomberg, in support of the exceptions. The certificates and *bordereaux* do not pass by the codicil. There are two rules of construction which determine this question. First, where there is a gift of certain enumerated descriptions of personal property, followed by general words, as "all other goods and chattels," the operation of the latter words is limited to things *ejusdem generis*, as those enumerated, and they will not be extended to the general personal estate. Thus, in *Trafford v. Berrige* (1 Eq. Ca. Ab. 201), money was held not to pass by the words "all goods, chattels, household stuff, furniture, and other things" in the testator's house; the reason given is this:—"For by the words *other things*, shall be intended things of the like nature and species with those before mentioned." The general rule was admitted in *Hotham v. Sutton* (15 Ves. 326). So in *Timewell v. Perkins* (2 Atk. 103) it was held that a devise of plate, jewels, linen, household goods, and coach and horses, will be confined to things of the same nature; and that goldsmiths' notes and bank bills do not pass by those words. (See *Sutton v. Sharp*, 1 Russ. 146.)

These certificates, therefore, not being in the nature of "goods, chattels," &c., will not pass under this bequest. [4] Secondly, where there is a gift of personal property in a given locality, choses in action, which have no locality, will not pass, although the securities may be there-situate: the only exception is that of Bank of England notes, which are considered money. In *Chapman v. Hart* (1 Ves. sen. 271. And see *Belt's Supplement*, 146) there was a gift of all the testator's "goods and chattels in his house and on board the 'Warwick'" (a man-of-war). Lord Hardwicke said, "Undoubtedly no goods and chattels in the house can pass but such as were properly in possession, not choses in action, except bank notes, which the Court considers as cash; for these words may certainly extend farther than to bare furniture: and if any ready money in the house (if not an extraordinary sum, and just received) that would pass. In the *Countess of Aylesbury's case* (Amb. 68), I was of opinion, that by devise of all things in a house, money and bank notes passed to the testator's wife, and that the testator meant to consider the notes as cash: but bonds do not pass, not admitting of a locality, except as to the probate of wills," &c.

In *Green v. Symonds* (1 Bro. C. C. 129, n.) B. bequeathed to C. all his goods, &c., in his study, except his books and writings. He gave to D. all his books at his chambers in the Temple. At the testator's death, there were in his study a considerable sum of ready money, securities for money and plate; but he had removed the books into the country. One of the questions was, whether C. should take the money, securities, &c., which were in the study, or the furniture only. And the Lord Chancellor held, the money and plate to pass, but not the securities for money, as they were choses in action.

[5] In *Moore v. Moore* (1 B. C. C. 127) Lord Thurlow held that, under a bequest of "all in Suffolk to R. M.," a bond, which happened to be at the testator's house in Suffolk, did not pass. And in *Brooke v. Turner* (7 Simons, 671), under a bequest, of "all the property over which the testatrix had a disposing power in and about her dwelling-house," was held to pass Bank of England notes, but not country bank notes, or promissory notes. A bequest of "all my property, of whatever nature, &c.,

in Duke Street, except a bond of F. M.," was held not to pass a bond from G. C.; *Fleming v. Brook* (1 Sch. & Lef. 318. And see *Collier v. Squire* 3 Russ. 467).

Mr. G. Turner and Mr. Tripp, *contra*. This is purely a question of intention. The words "goods, chattels, &c.," are quite sufficient to carry the property in question, and there is no intention by the specific description of particular property to limit the operation of these general words. The particular enumeration of property was introduced, not for the purpose of diminishing the extent of gift, but from an anxiety that the legatee should take all property whatever at Milan; the words *et cetera* extend the gift to every species of property at that place.

The bequest is not confined to things *ejusdem generis*. In *Kendall v. Kendall* (4 Russ. 360) it was held, that a bequest of "all monies, goods, chattels, clothing &c., the testator's property which might remain after paying his funeral charges and debts," will pass the testator's interest in stock and money. And in *Arnold v. Arnold* (2 Myl. & K. 365) a bequest of "my wines and property in England" was held to pass the testator's property in England of every [6] description, including money in the funds and at his bankers, debts, and arrears of pension, and that it was not confined to property *ejusdem generis* with wines; and in *Parker v. Marchant* (1 Y. & C. (C. C.), 290, and 1 Phillips, 356) a balance at the bankers was held to pass under the words "ready money." Supposing, however, the operation of the general words to be limited to property *ejusdem generis*, then these certificates are of the same nature as the "money at the bankers, and stock in the Monte de Milano."

Secondly, the certificates, which of themselves give a title to the holder, have a locality; the legatee is entitled to those certificates, and having rightful possession of those documents, she will become entitled to the money payable on them. Here the legatee has a condition imposed on her of paying £3000, and it does not appear whether the other property given by this codicil will be sufficient for that purpose; this therefore is a strong reason for extending the operation of the words of gift, if that be necessary. (See the cases, 2 Jarman on Wills, 171.)

Mr. Kindersley, in reply.

THE MASTER OF THE ROLLS reserved his judgment.

Dec. 14. THE MASTER OF THE ROLLS [Lord Langdale]. After the arguments were concluded, I was requested to suspend my judgment until the parties had obtained authenticated translations of the instruments in question.

Such translations have since been supplied to me; the documents appear to me to be evidences of ob-[7]ligations entered into by the Governments established in Poland, Austria, and Naples respectively; and they appear to be so expressed as to constitute the bearers the persons entitled to receive, at future times, the interests and the capitals of the title to which the instruments respectively are the evidence. The Master has treated them as negotiable securities which pass by delivery.

The question is, whether they pass by the words of the bequest.

The Master has considered that they are comprehended within the true meaning of the words "goods and chattels," and that the extensive meaning of these words is not reduced by the effect of the words, "I may die possessed of at Milan or in Lombardy," which follow after the enumeration of many particulars which he has distinctly named.

From the words which are used, it appears to me so probable that the testator intended to give this lady all which he had at Milan, that, independently of authority, I should have concurred in the Master's opinion.

But in *Green v. Symonds* (1 Bro. C. C. 129, n.) Lord King held that a gift of all the testator's goods and moveables whatsoever in his study, except books and writing, did pass money and plate found there, but did not pass securities for money, they being choses in action.

In *Lady Aylesbury's case* (Ambler, 68, 11 Ves. 662) Lord Hardwicke held, that a gift of the testator's house and all that should be in it at his death, though it passed cash and bank notes, did not pass promissory notes and securities, as they were evidence of title to things out of the house, and not to things in it.

[8] In *Chapman v. Hart* (1 Ves. sen. 271) the same Judge declared, that no securities for money, nor other choses in action, passed by a bequest of all goods and

chattels in the testator's house, or on board the ship "Warwick." Bank notes might pass, because the Court considered them as cash.

In *Moore v. Moore* (1 Bro. C. C. 127) Lord Thurlow (as Lord Redesdale says on a view of all preceding cases on the subject) decided, that a legacy of "all the testator's goods and chattels in Suffolk" did not pass a bond which was in the testator's house there.

In the case of *Fleming v. Brook* (1 Sch. & Lefroy, 318) Lord Redesdale held, that bonds and bankers' receipts did not pass by a gift of "all the testator's property, of whatever nature or kind the same might be" in a particular house.

And in *Brooke v. Turner* (7 Sim. 671) the Vice-Chancellor of England held, that country bank notes, promissory notes, and accountable memoranda did not pass under the description of "property of every sort and kind, over which the testatrix had a disposing power, in or about a dwelling-house."

It does not appear to me that the effect of these authorities is altered by the cases of *Kendall v. Kendall* (4 Russ. 360), and *Arnold v. Arnold* (2 Myl. & K. 365), which were cited. In *Kendall v. Kendall* the gift was not confined to property in any particular place; and in *Arnold v. Arnold* the gift was of all wines and property in England, and the particulars claimed by the legatees were found to be the testator's property in England at the time of his decease.

[9] In the cases to which I have referred, the securities were held not to be property in the places where the securities were, but choses in action and evidences of property existing elsewhere; and the distinction attempted to be made in this case, between securities which pass by delivery and those which require something more than delivery, has not been observed. Lord Eldon (11 Ves. 662) said, that he did not know why, in these cases, bank notes were considered as cash, for he thought them just in the same situation as promissory notes and securities, which were the evidences of title to things out of the place. Perhaps the reason might be found in the common habit of men to speak of bank notes as cash, and the manifest defeat of their testamentary intentions, which would be the effect of the Court not so considering them; but be this as it may, I consider myself bound by authority, and that choses in action do not pass under the words "goods and chattels" in a particular locality.

I do not think that the securities can be considered as money or cash, and the words "*et cetera*" which were relied on in argument can only be extended to things which the testator was possessed of at Milan, or in Lombardy; and the authorities determine that, in such cases, choses in action (except bank notes) are not considered as having the locality of the places where the securities are. Being of opinion that, in that sense, the certificates and bordereaux are choses in action—evidences of title to property elsewhere—I think that they did not pass by the codicil, and that the exception to the Master's report must be allowed.

NOTE.—The parties appealed to the Lord Chancellor.

[10] YOUNG v. ENGLISH. Nov. 6, Dec. 22, 1843.

[S. C. 13 L. J. Ch. 76.]

A Plaintiff examined a Defendant as a witness in the cause. Held, that such Defendant was, on that account, entitled to his costs of suit.

A. B., an equitable mortgagee, lent the title-deeds to C. D., the mortgagor, to enable him to arrange a sale of the property. C. D. was indebted to A. B., both on the mortgage and on a trade account. C. D. paid to A. B. a part of the produce of the sale; but there was no evidence of his having made any express appropriation of that payment. Held, that it must be understood that the payment was made on the mortgage account, and that A. B. had no right to appropriate it to the trade account.

A mortgagor, who had borrowed the title-deeds from an equitable mortgagee, to

enable him to sell the property, handed them to his solicitor, in order to complete. The mortgagee acquiesced in the sale. Held, that the solicitor had a lien on the deeds for his costs of the transaction only, but not for his other claims for costs against the mortgagor.

In the year 1835 the Defendant English, who was entitled to a leasehold house and premises in St. James's Street, borrowed £800 from the Plaintiff Young, on the security of certain promissory notes, a warrant of attorney to confess judgment, and an agreement that English would, at a future time, deliver up to him the lease and other deeds belonging to the premises. Pursuant to the agreement, the lease and deeds were actually delivered to the Plaintiff in the year 1837, and £200, part of the debt, being afterwards paid, the Plaintiff remained equitable mortgagee of the premises for the sum of £600 and interest.

The Defendant English carried on the business of an hotelkeeper upon the premises, and the Plaintiff, being a wine and spirit merchant, supplied English with goods, in respect of which, a debt became due to him in addition to the mortgage. In 1840 the Plaintiff having the lease and other deeds as equitable mortgagee for £600 and interest, and being also a creditor of English for goods sold and delivered, the trustees for the Conservative Club, who were Defendants, by their solicitors, applied to English to dispose of his interest in the lease, and give up his business as an hotelkeeper, in order that the house might be converted into a club house; [11] and after some treaty, English agreed to this, in consideration of the sum of £1150 to be paid him.

Upon the terms being agreed to, English desired the Defendant Mr. Henry Walker, whom he employed on other occasions as his solicitor, to act for him in completing the sale. Mr. Walker stated that he should want the lease and title-deeds; English undertook to procure them, and he accordingly applied to Mr. Farrell, an agent of the Plaintiff, in whose possession the deeds were, for a loan of them for two or three days; and the Plaintiff having consented to lend them on terms, they were, on the 3d day of November 1840, placed in the hands of English, upon his signing and delivering to Farrell a memorandum dated on the same day, and in these words:—"I hereby acknowledge to have received from you the different deeds hereafter specified, relating to my house the St. James's Royal Hotel, 88 St. James's Street, which I undertake to return safe, on or before Friday next, the 6th of the present November." At the foot of the memorandum was a list of the deeds, and to the list was subjoined this note:—"The whole of the above documents being in deposit with Mr. Young (the Plaintiff), as securities for monies advanced to me (English), and yet remaining unpaid."

English having thus obtained the deeds, carried them to Walker, and gave him instructions to do what was necessary for carrying the sale into effect.

Mr. Walker, by his answer, which had not been replied to, said positively, that at the time when the deeds were so delivered to him, English did not inform him, nor did he know, or in any way suspect, that the Plaintiff, or any other person, had any equitable or other mortgage on [12] the premises, or any lien or claim on the deeds relating thereto.

Mr. Walker prepared the abstract of title from the deeds, communicated with the solicitors of the purchasers, and on the 16th day of November 1840 the agreement in writing for the sale was settled and approved.

In the meantime, English had not performed his undertaking to return the deeds to the Plaintiff; and having stated (when he was applied to on the subject) that he had delivered them to Walker, the Plaintiff became alarmed, and on the 13th of November Messrs. Wood & Ellis, his solicitors, wrote to Walker as follows:—"We find that Mr. Young has allowed Mr. English of the St. James's Hotel, to have the deeds of that house, for the purpose of enabling you, as his solicitor, to prepare and settle an agreement for the disposition of the residue of the term therein. Under these circumstances, it is right that Mr. Young should have your acknowledgment that you hold them for him, subject to immediate return to him on demand, in order that no doubt or difficulty may hereafter arise, by reason of the special accommodation so offered to Mr. English. We shall be obliged, therefore, by the

receipt of such acknowledgment and undertaking in due form, at your earliest convenience."

Mr. Walker did not, upon the receipt of the letter, appear to have made immediate enquiries into the foundation of the Plaintiff's claim. If he had done so, he would then, at least, have known that the Plaintiff was clearly entitled as equitable mortgagee, and that the purchase-money ought to be applied in satisfaction of his debt.

[13] Instead of making any such enquiry, Mr. Walker returned a very unsatisfactory answer to the letter of Wood & Ellis. English misrepresented the real facts of the case, and apparently misled Mr. Walker as well as the Plaintiff, by telling the former that he had satisfied the latter. Mr. Walker, notwithstanding the letter of the 13th of November, and another letter, dated the 16th of November, which he received from Wood & Ellis, proceeded to the completion of the agreement with the trustees of the Conservative Club, without paying any regard to the claim of the Plaintiff. The agreement was engrossed; it was executed by English; the sum of £300 was paid to English in part of the purchase-money, and the purchasers were let into possession on the 18th day of November. By the agreement, the sum of £300, further part of the purchase-money, was to be paid on the 20th of January 1841, and the remainder being £550, on the 29th of September 1841, and Mr. Walker signed an undertaking to deliver up the title-deeds on the execution of the assignment. English, notwithstanding his having misrepresented some of the facts, called on the Plaintiff and paid him the £300 which he had received as the first instalment of the purchase-money; but on the 23d of January 1841 English received the second instalment of £300 and then absconded.

This bill was filed on the 2d of March 1841, and prayed that the Plaintiff might be declared to have a lien upon the unpaid purchase-money, for the amount of what is due to him; and that he might be declared to have been entitled to apply £300 (part of the purchase-money which had been paid to him) towards the discharge of a book debt; that accounts might be taken of the purchase-money unpaid, and of what remained due to him; that the purchasers might be declared not to be entitled to a sum of £67, 2s. 5d., which they claimed in [14] respect of rent; and that as against the Plaintiff's claim, the Defendant, Mr. Walker had not any lien on the lease and title-deeds, for his general bill of costs against Mr. English. Walker, as before stated, by his answer, denied all notice of the Plaintiff's claim, and he thereby claimed such a lien as the Court should consider him entitled to. A replication was filed to his answer, which was afterwards withdrawn, and he was examined as a witness on behalf of the Plaintiff.

In January 1842 English became bankrupt, and his assignees were brought before the Court by supplemental bill.

Mr. Pemberton Leigh and Mr. Bagshawe, for the Plaintiff. The Defendant, Walker, who claims merely an equity, is entitled to such interest only as English himself had; English had expressly undertaken to return the deeds, which in equity both he and his solicitor are bound to perform. Walker therefore has no lien whatever.

As no appropriation was made by English of the £300 paid by him, the Plaintiff has a right to attribute it to the trade account, thus leaving the equitable mortgage undischarged. (See *Devaynes v. Noble* (Clayton's case), 1 Mer. 605, 606.)

Mr. Goodeve, for Walker. There being no replication to this Defendant's answer, it must be taken to be true in all its parts, and the Plaintiff having examined him as a witness, can have no decree against him, and must pay his costs of suit. (2 Daniel's Practice, 451; *Carter v. Hawley*, cited in Ambler, 583.)

[15] In *Bernard v. Drought* (1 Molloy, 38; but see *Smith v. Chichester*, 2 Dr. & War. 393), it was held that an incumbrancer negligently leaving title-deeds in the grantor's possession, a lien may be obtained on them by the grantor delivering them to a solicitor. Here Walker has obtained a lien, not only for the costs of completing this purchase, but for his other general business transacted for English.

Mr. G. Turner, for the trustees of the Conservative Club, claimed to be entitled to deduct from the purchase-money £67, 2s. 5d., being such portion of the ground rent due at Lady Day 1841, as accrued due before possession was given up.

Mr. Kindersley, for the assignees, claimed to be entitled to the unpaid purchase-money, on the ground that the deeds were in the order and disposition of the bankrupt; secondly, that the Plaintiff had no right to make the appropriation of the £300 which he contended for, as that sum formed part of the produce of the mortgaged premises, and must be taken to have been paid in part discharge of the mortgage thereon; thirdly, that a great portion of the purchase-money was the consideration for the goodwill of the business, on which neither the Plaintiff nor Walker could have any claim.

Mr. Pemberton Leigh, in reply. It is not true that you cannot have a decree against a Defendant whom you examine as a witness. The rule is, that you cannot have a decree as to those matters alone as to which you have examined him. *Nightingale v. Dodd* (Ambler, 583), *Murray v. Shadwell* (2 Ves. & B. 401), *Ellis v. Doane* (3 Molloy, 53); besides this, [16] the Defendant himself requires a declaration of right in order to obtain the benefit of his alleged lien. *Hutton v. Sands* (Younge, 602).

If Walker has a lien, it is limited only to the costs of the purchase. *Blundell v. Desart* (2 Dr. & War. 405).

Dec. 22. THE MASTER OF THE ROLLS [Lord Langdale]. Four questions are made.

First. The assignees claim to be entitled to the remaining purchase-money, on the ground that the deeds were in the order and disposition of the bankrupt. For this claim there is no foundation.

Secondly. The Plaintiff, being creditor in respect of his mortgage debt, and also in respect of a book debt, claims to be entitled to the sum of £300, which he received on the 19th of November 1840, in satisfaction of the book debt. In support of his claim, in that respect, he alleges, that nothing was said as to the application of the money which he received, and he insists, that in the absence of express direction, he has a right to make the application most beneficial to himself. But it appears to me, from the nature of the transaction, that English paid this money only in respect of the Plaintiff's right to the mortgage, and that it must, from the circumstances, be understood, that English meant the payment to be applied towards satisfaction of the mortgage.

Thirdly. The purchasers claim to be entitled to deduct from the purchase-money the sum of £67, 2s. 5d., being such portion of the ground rent due at Lady Day [17] 1841, as accrued due before possession was given up. The agreement however affords no foundation for this claim, and I am of opinion that it cannot be sustained.

Fourthly. Mr. Walker claims to have a lien on the deeds, not only for the costs of completing the purchase, but also for a general bill of costs, which he states that he has against English.

The replication to his answer was withdrawn, and the Plaintiff has examined him as a witness. The consequence of which is, that his answer must be taken to be true, and the Plaintiff must pay him his costs of the cause. He has further contended, that he is entitled to have his claim allowed to its fullest extent; but any question on the subject is, in this case, precluded by the form of the answer, in which Mr. Walker says that he claims such a lien as the Court shall consider him entitled to; and having considered what he is entitled to, I am of opinion that his lien extends only to the costs incurred in completing the purchase for which the deeds were placed in his hands.

The Plaintiff is now seeking the benefit of the purchase in which he acquiesced from the beginning, and he cannot have the remaining purchase-money without paying to Mr. Walker the proper costs of the transaction by which it was made available; but to extend the lien further, would be to allow Mr. Walker to profit by the fraud of his own client, and that, in a case where a little proper attention on his own part, would have procured him full information of all the circumstances. I think that Mr. Walker is entitled to his costs of the suit, only because the Plaintiff has thought proper to examine him as a witness.

[18] Mr. Walker alleging that the purchase-money to be paid by the club was in part for the relinquishment by English of his business as an hotel-keeper, has endeavoured to resist the Plaintiff's claim, on the ground that his lien extends only

to so much of the purchase-money as ought to be attributed to the leasehold interest in the premises; but in the circumstances of this case, I am of opinion that no such distinction can be maintained.

An account must be taken of what remains due to the Plaintiff on his mortgage; and in taking the account credit must be given for the sum of £300 paid on the 19th of November 1840. An account must also be taken of what remains due from the trustees of the Conservative Club for the purchase-money. The costs of the suit and the costs of Mr. Walker in completing the purchase must be taxed: what is due to the trustees and Mr. Walker must be paid; the residue must be paid to the Plaintiff towards satisfaction of his mortgage; and on such payment, Mr. Walker must deliver up the deeds to the trustees of the club.

[19] THE BARNSELEY CANAL COMPANY v. TWIBELL. May 11, Nov. 17, 18, 1843;
Jan. 18, 1844.

[S. C. 13 L. J. Ch. 434.]

A canal company was authorised, by its Act, to purchase the coal, which the safety of the canal required to be left unworked. The purchase of part was delayed many years, and in the meantime a lease had been granted by the owner to a coal worker. The company purchased the interest of the owner. Held, that the coal worker was also entitled to compensation.

No equity can be founded on an allegation that a Court legally constituted is not properly competent to decide questions within its jurisdiction; and where the Legislature has given jurisdiction to a Court provided by the Act, and has made its decision final, if any inconvenience arises from the legal exercise of the jurisdiction, the Legislature alone can supply a remedy.

A Canal Act provided, that in case the company and the coal owner could not agree as to the amount of compensation for the coal taken for the purposes of the canal, it should be settled by a jury summoned by the Commissioners, whose verdict was "to be conclusive, and should not be removed, by *certiorari* or other process whatever, into any of the Courts of Record at Westminster, or any other Court." A bill was filed, praying an injunction to restrain proceedings before a jury, on the ground that the Defendant was entitled to no compensation, and that the special jurisdiction provided by the Act was not so constituted as to be likely to come to a just conclusion. Held, that the Plaintiffs were not entitled to an injunction if the Defendant was entitled to any compensation, the amount of which had to be ascertained; but whether this Court had any jurisdiction to interfere in the matter, if it had clearly appeared that the Defendant was entitled to no compensation, *quære*.

Where a Plaintiff obtains an injunction of affidavits, the Defendant is not wrong in meeting the case by affidavits on a motion to dissolve, although the point might be determined shortly by filing a demurrer.

The case came twice before the Court: in the first instance, to obtain, and on the second to dissolve, an injunction to restrain the Defendant, his solicitor, &c., from appearing or producing any evidence before a jury which had been summoned, under a Canal Act, to assess the compensation for the coal which was required to be left unworked for the safety of the canal.

By an Act passed in the thirty-third year of the reign of George III. (33 G. 3, c. 110), the company were incorporated, for the purpose of making a canal from the river Calder to or near to the town of Barnsley, in Yorkshire, with the usual powers to take and hold land; and, in order to fix the price which was to be paid by the company for any lands which they should require, in case the company and the owners should not agree as to the amount of purchase-money, Commissioners were appointed, who were to call a meeting and decide all such differences, [20] upon being requested to do so either by the company or by the owners of the land; and, if either of the parties refused to submit to the decision of the Commissioners, they

were empowered to issue a warrant to the Sheriff of the county of York, commanding him to empanel a jury to assess the amount of compensation to be paid by the company; and it was declared that *the verdict of the jury should be conclusive, and should not be removed, by certiorari or other process whatever, into any of the Courts of Record at Westminster, or any other Court.* By the fortieth section it was declared, that the Act was not to prejudice or affect the right of the lord of any manor, or any other owner, to the minerals under any of the land taken by the company; but that it should be lawful for them (subject to the restrictions thereafter contained) to work and get the minerals, not thereby injuring, prejudicing, or obstructing the said canal.

The Plaintiffs were to be at liberty to inspect the workings: and it was further enacted, that "if the owner or worker, owners or workers of any coal or other mine or mines should, in pursuing such mine or mines, work so near, in the opinion of the said company of proprietors, to the said intended canal, as to endanger or damage the same, or, in the opinion of the said owner or worker, owners or workers of the said mine or mines, to endanger or damage the further working thereof, then, it should be lawful for the said company of proprietors to treat and agree with the owner or worker, owners or workers, for all such coal or other minerals as might be near or under the said intended canal, as should be thought proper to be left for the security or preservation of the said intended canal, or other works, or mine or mines as aforesaid." And in case the company and the worker of any such mine could not agree as to the amount of compensation, it [21] was to be settled by a jury, as before mentioned; and, upon payment of the money, the owner or worker of such mine was to be perpetually restrained from working such mine within those limits.

The canal had been long completed, and passed for 495 yards through the estate of Mr. Beaumont, in the township of Barugh. The land itself under which it passed was purchased by the Plaintiffs many years ago; but by the Canal Act above referred to, the coal mines and the coals under the canal were reserved to the owners, their heirs and assigns, who were to be at liberty to work the mines so as not to injure the canal.

The Plaintiffs did not point out what quantity of coal they required to be left for the safety of the canal, nor did they take any steps to ascertain the compensation payable in respect thereof.

In this state of things, in the year 1830, Mr. Beaumont, the then owner of the coal in this place, agreed to let to Frank Burton and the Defendant all the coal on the north and south sides of the canal, on the one side up to the canal, and on the other side up to the canal and towing-path, at a certain rent, and under an obligation, on the part of the lessees, to work a certain quantity annually. Burton and the Defendant thereby acquired an interest in the coal comprised in the lease, and which interest afterwards became vested in the Defendant alone.

In consequence of the state of the workings in 1839, Mr. Brakenridge, the solicitor of Mr. Beaumont, requested the Plaintiffs to state what reservation of coal they desired to have made for the safety of their canal. This request was often repeated by Mr. Brakenridge, and in [22] February 1840 the Defendant gave notice to the Plaintiffs, that he was willing to enter into an agreement for such coal as they might require to be left for the security and preservation of the canal.

Mr. Beaumont was entitled to the coal under the canal and towing-path absolutely, but he was not so entitled to the coal under the land on each side of the canal and towing-path; for as to that, the Defendant Mr. Twibell had, under his lease or agreement, a right to get it, upon paying Mr. Beaumont the due consideration.

The Plaintiffs, on the 9th of March 1840, informed Mr. Brakenridge that they were advised to purchase from Mr. Beaumont, coal to the extent of eight yards in breadth, on each side of the canal and towing-path. At this time the Plaintiffs seemed to have supposed that all the coal which they might require to be left for the safety of the canal had been reserved out of the Defendant's lease; but this being explained, by a letter of Mr. Brakenridge, dated on the same 9th of March 1840, the Plaintiffs afterwards, on the 11th of March 1840, served the Defendant with a notice, not to work the coal within eight yards of either side of the canal and towing-path, and required him to state his claim, if he had any, to compensation.

The Defendant, in August 1840, stated the sum of £551, as the amount of his

claim to compensation, and the Plaintiffs, with full knowledge of this claim of the Defendant, treated separately with Mr. Beaumont for a settlement of his claim, and, after long delay, the interest of Mr. Beaumont in the coal under the canal and towing-path, and under the eight yards on each side of them, was purchased by and conveyed to the Plaintiffs for the sum of £756.

[23] It was in dispute, but, from the evidence, the Court was of opinion, that the sum of £756 did not include any compensation to which the Defendant was entitled in respect of his claim; that it was not so intended by Mr. Beaumont, or Mr. Brakenridge who acted for him, and that there was nothing to shew that it was so understood by the Plaintiffs, or by Mr. Foljambe who acted for them. On the contrary, it appeared that the Plaintiffs made their bargain with Mr. Beaumont, with full knowledge that the Defendant's claim was outstanding and unaffected by their arrangement with Mr. Beaumont.

The Plaintiffs, though fully aware of the Defendant's claim, made frequent attempts to postpone and evade the consideration of it; but at length the Defendant succeeded in bringing the matter before the Commissioners under the Act of Parliament, with the view of procuring the proper steps to be taken to ascertain, in the manner directed by the Act, the amount of the compensation which might be due to him.

This bill was filed on the 8th of May 1843, praying a declaration that the Defendant was not entitled to any compensation, and that he might be restrained from proceeding to take any steps for the purpose of ascertaining the amount of such compensation.

On the 11th of May 1843 the case was brought forward on an application for an injunction; but the evidence being then imperfect, and one of the parties refusing to consent to an arrangement which would leave the matter *in statu quo* until the case could be brought before the Court in a more perfect form—

THE MASTER OF THE ROLLS granted the injunction, giving liberty to apply to dissolve it, and imposing on [24] the Plaintiffs the terms that the Defendant should not be prejudiced, in case he should be ultimately allowed to proceed.

On the 17th of November 1843 the Defendant moved to dissolve the injunction. The effect of the argument on the motion for the injunction, and on the motion to dissolve, is stated together.

Mr. Pemberton Leigh and Mr. W. T. S. Daniel, for the Plaintiffs, in support of the motion for an injunction, and in opposition to the motion to dissolve it.

The whole of the coal has been purchased by the company from Beaumont, and fully paid for; the Defendant, therefore, who is Beaumont's lessee, has no right to any compensation. After the passing of the Act of Parliament, whoever took from Beaumont, took subject to the rights conferred on the Plaintiffs by that Act; thenceforward, Beaumont could only demise subject to the rights of the company; and it was not competent for him to create new and additional interests which would prejudice or defeat the rights of the company. The Defendant insists, that the company are bound to pay, not only the full value of the coal as lying in the seam, but also, in addition, the value which he might make by working it; the Act, however, directs compensation for the coal only, and not for any profits to be made from the sale of it, after it has been removed from the mine. If the Defendant is not entitled to compensation, the Commissioners have no right to summon a jury. As to *Martin v. Porter* (5 Mee. & Wels. 351), which will be relied [25] on, Parke Justice, in a cause of *Wood v. Morwood*, lately tried at Derby, held, that the principle of that case only applied to cases, where the party taking the coal had no title at all.

Secondly, The construction and nature of the jurisdiction appointed by the Act for determining the question of compensation, renders it quite incompetent to determine the difficult questions of law arising in this case. Here the Commissioners, mere country gentlemen, are to preside and direct a jury in matters of law, to lay down to them the construction of this Act of Parliament, and the law of the case as regards the Defendant's right to compensation, the effect of the absolute purchase from Beaumont, and of the Defendant's *laches* in not prosecuting his claim until after payment to Beaumont. These are not matters which it was ever intended that the Commissioners and jury should decide; and where the remedy to be obtained from

another jurisdiction is incomplete, this Court will assume jurisdiction (Redesdale, 112). The damage which may be sustained by the Plaintiffs will be irremediable, in case the trial proceeds; for whatever errors in law may be committed, the Plaintiffs will be left without redress. On that ground, at all events, this Court ought to interfere, and prevent the proceedings going on until it sees that complete justice can be done to the Plaintiffs.

Mr. G. Turner and Mr. Glasse, for the Defendant. The Defendant is entitled to a valuable interest, under his lease from Mr. Beaumont. If, for the accommodation of the Plaintiffs he is deprived of that interest, he is entitled to some compensation for his loss, and which com-[26]-pensation is to be determined by a jury in the way pointed out by the Act. The Act of Parliament passed so long back as the year 1793, and the Plaintiffs have postponed and neglected availing themselves of the power, given to them by that Act, of purchasing the coal in question: they are therefore liable to pay compensation for every existing interest, though it may have arisen in the interval.

The payment was made to Mr. Beaumont after notice of the Defendant's rights: no payment to him could prejudice the rights of the Defendant; and the compensation was, in fact, made in respect of Beaumont's interest only: Twibell's interest was not included in the amount, and has never been paid for.

The Plaintiffs have no right to complain of the imperfection of the special tribunal, appointed by their own Act, for finally determining the questions between them and the owners, for they themselves have selected it. This is an attempt to evade the Act, and to withdraw the consideration of the question from the only tribunal which has complete jurisdiction to decide. If there be no jurisdiction to determine the question, according to the mode pointed out by the Act, then the whole proceeding will be a nullity, and no injury will be done to the Plaintiffs; for where a limited tribunal takes upon itself to exercise a jurisdiction which does not belong to it, its decision amounts to nothing, and does not create any necessity for an appeal; *The Attorney-General v. Lord Hotham* (Turn. & Russ. 219); but by staying the trial, the question will be excluded.

THE MASTER OF THE ROLLS, on the motion to dissolve the injunction, reserved his judgment.

[27] The following cases were also cited: *The Queen v. The Bristol and Exeter Railway Company* (1 Railway Cases, 99), *Martin v. Porter* (5 Mee. & Wels. 351), *Barnard v. Wallis* (2 Railway Cases, 162), *Wyrley Canal Company v. Bradley* (7 East, 368), *The Dudley Canal Company v. Grazebrook* (1 Barn. & Ad. 59), *Kemp v. The London and Brighton Railway Company* (1 Railway Cases, 495), *The Clarence Railway Company v. The Great North of England Railway Company* (2 Railway Cases, 763), *Wild v. Holt* (9 Mee. & Wels. 672).

Jan. 18, 1844. THE MASTER OF THE ROLLS [Lord Langdale]. The owners and workers of coal in this township do not appear to have had any information as to their liabilities, except that which they might have obtained from the Canal Act, which reserved to the owners the liberty of working the coals, not thereby injuring the canal. From the correspondence which has been proved in this case, it seems, that the Plaintiffs did not think it incumbent upon them to point out what quantity of coal they required to be left for the safety of the canal, but rather desired the worker to go on at his own peril, and either leave the coal, receiving no compensation for it, or run the hazard of doing an injury to the canal, for which he might be made answerable. If this was the intention of the Plaintiffs, it was defeated by the proper attention given to the subject by Mr. Brakenridge, the agent of Mr. Beaumont.

It was argued for the Plaintiffs, at the Bar, that the Court, which under the Act is entrusted with the duty of [28] ascertaining what satisfaction is to be paid to the coal worker, is not so constituted as to be likely to come to a just conclusion. But I agree with the argument of the Defendant on this point. No equity can be founded on an allegation, that a Court legally constituted is not properly competent to decide questions within its jurisdiction. The Legislature has given the jurisdiction to the Court provided by the Act, and has made its decision final. If any inconvenience arises from the legal exercise of the jurisdiction the Legislature alone can apply a remedy.

It was next argued, that the Plaintiffs had, in fact, paid the whole value of the coal to Mr. Beaumont, and that nothing more can be required from them. Having, as they say, paid to Mr. Beaumont the full value of the coal in the bed, they are under no obligation to give to the Defendant, any compensation for profit which he might have made by selling the coal, which he intended to obtain under his lease; and the rather, because the Act of Parliament informed the Defendant of the Plaintiffs' powers, and that he was not to work so as to injure the canal. It was further argued, that the Court to be constituted under the Act, is only to try and determine the amount of compensation, in cases where it is agreed, or in some way decided, that some compensation is to be paid, and that the Court is not competent to decide the question whether any or no compensation is to be paid.

I consider it to be clear, that the Plaintiffs are not entitled to an injunction, if the Defendant be entitled to any compensation, the amount of which has to be ascertained; and I am of opinion, that the Defendant, under his lease, had an interest in the coal under the eight yards on each side of the canal and towing-path: he had a right to get the coal, to sell it for what he [29] could, paying the sums which became due to Mr. Beaumont. Upon this dealing there might have been profit, which he is prevented from making by the notice of the Plaintiffs and the powers given to them by the Act. The value of the coal in the bed, or the price paid to the coal owner, can be no compensation to the coal worker for the loss of the interest which he had acquired.

The ground on which it is argued that he should have no compensation is, that when he took his lease he had notice, or was informed by the Act of Parliament, that he was not to work the coal so as to injure the canal. But at the time when he took his lease he had no notice that the Plaintiffs would require eight yards of breadth of coal to be left on each side of the canal and towing-path. The coal under the canal and towing-path was not comprised in his lease, and he had no interest in it; but he did not know that the Plaintiffs would require more or less than eight yards, or indeed any breadth of coal on each side of the canal and towing-path. He knew that he was not, by working his coal, to injure the canal, and it does not appear that he did so; he also knew that the Plaintiffs were entitled to inspect his workings, and if he worked contrary to the directions of the Act, were entitled, at his expence, to make the repairs rendered necessary by his improper working; but as the Plaintiffs did not think fit, for so many years, to give any notice as to the quantity of coal, if any, which they required to be left for the safety of the canal, it does not appear, why the Defendant might not enter into an agreement for working and getting all the coal comprised in his lease.

I think it very probable, that the powers given by the Act might have been so exercised as to enable the [30] Plaintiffs to buy the coal under the canal and towing-path and a reasonable distance on each side of them, at the value of the coal in the bed; but for reasons of their own, they probably desired to delay the notices as long as they could; they left it quite uncertain whether they would or would not require any coal to be left for the safety of the canal, and I think that they cannot justly complain, of any rights which the coal owners may have conferred upon the coal workers, during the time that their notices were delayed for their own convenience. Under the circumstances of this case, I am of opinion, that the Defendant lawfully acquired an interest in the coal which the Plaintiffs desire to be left for the safety of the canal.

I do not consider what may be the value of that interest, or what may be the proper mode of computing it. I am of opinion that the Defendant has an interest, in respect of which he is entitled to receive satisfaction, and that the amount of the satisfaction which he is to receive is to be assessed and determined in the manner directed by the Act.

Under these circumstances, I have not thought it necessary to give any opinion upon the question of jurisdiction, in case it had clearly appeared that the Defendant was not entitled to any compensation; and for the reasons which I have stated, I dissolve the injunction which has been granted to restrain the Defendant's proceedings.

On the application to dissolve the injunction the Defendant had filed a vast number of affidavits, thirty in number, and it was objected by the Plaintiffs that an

unnecessary expence had been incurred by the De-[31]-fendant, and that he ought to have filed a simple demurrer, by which the point might have been determined.

THE MASTER OF THE ROLLS said, With regard to the affidavits, I do not think that parties against whom an injunction is applied for and obtained, upon evidence on one side, are under any obligation whatever to demur, if by abstaining from doing so and by filing affidavits, they think they can place their case in a better view before the Court. I think the affidavits in this case were of this character; for although I agree with the argument of the counsel for the company, that the real question in issue in the cause might have been decided upon demurrer; still, if an injunction is applied for and obtained on affidavits on one side, I cannot say that the other party is wrong, in endeavouring to improve his case by stating facts on affidavits.

The injunction was dissolved; and the Defendant was to be placed, as nearly as possible, in the same position as he was in when the injunction was granted: and he was not to be obliged to serve the notices required by the Act, or to begin his proceedings *de novo*.

NOTE.—The company appealed from this decision, but it was affirmed by the Lord Chancellor on the 23d of June 1844.

[32] REED v. O'BRIEN. Nov. 4, 8, 1843.

Where a voluntary trust is perfected, the settlor is not a necessary party to a suit by the *cestui que trust* against the trustee, to compel its performance.

Where a demurrer is overruled, the Court will not give the Plaintiff the costs, if the statements of the bill are vague and uncertain.

The bill stated, that General Maurice de Lacy, who was born in Ireland, but had become domiciled in Russia, had remitted to Ireland several sums of money, for the benefit of the families or descendants of his deceased sisters, Johanna O'Brien and Benedicta Murphy, and that such remittances were divided amongst such families or descendants *per stirpes*, grandchildren taking the place of and representing such of their parents (the children of the deceased sisters) as were dead.

The bill then stated, that in 1815, the Defendant O'Brien, claiming to be a relation, went to Russia to General de Lacy, and that afterwards (but at what time the bill did not state), the Defendant O'Brien received from, or by the directions of the said General Maurice de Lacy, divers large sums of money, or the securities for the same, which were afterwards realized, and the proceeds received by the said Patrick O'Brien, in trust for, and for the benefit of the families or descendants, in this kingdom, of the said Mrs. Johanna O'Brien and Mrs. Benedicta Murphy, equally and *per stirpes*, grandchildren taking in manner aforesaid. That the said Patrick O'Brien did not divide or pay the same, or any part thereof, to such descendants respectively, or their representatives, but retained and applied the same to his own uses and purposes; and that among other sums so received by Patrick O'Brien from General Maurice de Lacy, were three several sums of 50,000 silver roubles, 60,000 silver roubles, and £1931, 14s. 2d. sterling.

[33] That in the course of the year 1817 General Maurice de Lacy delivered to Patrick O'Brien, at different times, divers sums of money, amounting to the said sum of 50,000 silver roubles, in trust for and for the benefit aforesaid. That Patrick O'Brien accepted the said trust, and that he thereafter falsely represented to the said General Maurice de Lacy, or led him to suppose, that he had distributed this sum among the relations. That he accepted the said trusts, and wrote to persons in Ireland, stating that he had received the two last-mentioned sums, on the trusts and for the benefit aforesaid.

That in 1818 General de Lacy delivered to O'Brien 60,000 silver roubles, in trust for and for the benefit of the said descendants of Johanna O'Brien and Benedicta Murphy, and of Mary O'Brien, in three equal shares *per stirpes* as aforesaid. And that Patrick O'Brien also, about the same period, received from General Maurice de Lacy,

in trust for and for the benefit of the families or descendants of the sisters, Johanna and Benedicta, *per stirpes*, in manner and proportion as aforesaid, a sum of £1931, 14s. 2d.

That in 1837 a part of the trust funds was assigned to the Plaintiffs, as trustees for the issue of the marriage between Charles Nash and Mary de Lacy his wife, who was one of the descendants.

The bill sought to recover these sums, and prayed an account of them; but neither the issue of this marriage, nor the legal personal representatives of General de Lacy, were made parties to this suit.

The principal Defendants demurred for want of equity, and, *ore tenus*, for want of parties.

[34] Mr. Teed and Mr. Bacon, in support of the demurrer, contended that the circumstances stated in the bill shewed a mere agency, and not a trust. That the general, according to the statements of the bill, had delivered monies to the Defendant as his agent, for distribution amongst his relations; but that this did not give to such relations the right of insisting on its being handed over to them. That O'Brien had no trust to perform to the Plaintiffs, and that his duty, at the utmost, was to hand over the funds; that for this he was accountable to the general only, whose agent he was, and not to the Plaintiffs, *Adon v. Woodgate* (2 Myl. & K. 492), *Petre v. Espinasse* (*Ib.* 496).

Secondly, that the statements were so vague and uncertain, that it was impossible to ascertain who were the persons for whose benefit the funds were intended. *Wormald v. De Lisle* (3 Beav. 18).

Thirdly, that as the legal personal representatives of the general, had a right to insist that the Defendant was merely an agent, and as they would become entitled to the fund, in case of failure or uncertainty of the objects, such representatives, and also the issue of the marriage of Charles Nash and his wife (who were the *cestui que trust* of the Plaintiffs) were necessary parties to this suit.

Mr. Pemberton Leigh and Mr. Anderson, in support of the bill. The bill expressly states that the Defendant received the money as trustee, and accepted the trust; this statement cannot, on demurrer, be contested. The case is not one of agency; it is a trust executed, which requires no aid of this Court to complete. *M'Fadden v. Jenkyns* (1 Hare, 458, and 1 Phil. 153).

[35] Secondly, the Court will take steps to ascertain the class of objects; and it has often taken upon itself the performance of trusts, where there have been gifts to a class equally uncertain as the present.

The representatives of the settlor are not necessary parties, for, from the moment the gift became irrevocable, the donor's interest ceased.

Mr. Teed, in reply.

Wheatley v. Purr (1 Keen, 551), *Collinson v. Patrick* (2 Keen, 123, and Com. Dig. Chancery, 4 W. a. 5), *Bill v. Cureton* (2 Myl. & K. 503), were cited.

THE MASTER OF THE ROLLS said he would look at the authorities before he decided the demurrer for want of equity.

As to the objection for want of parties, he said that if the bill, on the whole, contained an allegation of a valid trust, then there would be a cessation of property in the donor, and his representatives would not be necessary parties. As to the issue of Nash being made parties, it appeared that a specific interest in the property had been assigned for the benefit of persons who had not been brought before the Court; and that his present impression was, that they were necessary parties.

Nov. 8. THE MASTER OF THE ROLLS [Lord Langdale]. The bill states, that General Maurice de Lacy, who was domiciled in Russia, had remitted to Ireland several [36] sums of money for the benefit of the families or descendants of his deceased sisters, Johanna O'Brien and Benedicta Murphy, and that such remittances were to be divided amongst such families or descendants *per stirpes*, grandchildren taking in the place of, and representing such of their parents, the children of the deceased sisters, as were dead.

The bill then states, that at a time not distinctly mentioned, the Defendant Patrick O'Brien received from General Maurice de Lacy divers large sums of money, in trust for and for the benefit of the families or descendants of Johanna O'Brien and

Benedicta Murphy, equally and *per stirpes*, grandchildren taking in manner aforesaid; and that among other sums so received were 50,000 silver roubles and £1931, 14s. 3d. current money of Great Britain, or a sum of Russian money equal in value thereto; and that the Defendant Patrick O'Brien accepted the said trust, and represented to General Maurice de Lacy that he had distributed the money accordingly.

The bill further states, that in 1818 General Maurice de Lacy delivered to the Defendant Patrick O'Brien 60,000 silver roubles, in trust for and for the benefit of the said descendants of Johanna O'Brien and Benedicta Murphy, and of Mary O'Brien, in three equal shares *per stirpes* as aforesaid; and that the Defendant Patrick O'Brien also, about the same period, received from or by the directions of General Maurice de Lacy, in trust for and for the benefit of the families or descendants of the sisters Johanna and Benedicta *per stirpes*, in manner and proportions aforesaid, a sum of £1931, 14s. 2d.

The bill alleges that the Defendant Patrick O'Brien accepted the said trusts, and wrote to certain persons [37] in Ireland, stating that he had received the two last-mentioned sums, *on the trusts and for the benefit aforesaid*, and that he placed with Sir M. Tierney a large part of the trust monies, and that the said Sir M. Tierney accepted and received the same with knowledge of the trusts, and afterwards invested £2558, part thereof, in the purchase of 3½ per cent. annuities.

These allegations are admitted for the purpose of the demurrer; but it is argued, that although a trust be stated, yet, taking the statements of the alleged trust, together with the context of the bill, it appears, that the real transaction meant to be alleged was a mere agency, and not a trust to be executed in this Court, and, further, that if it be a trust, the nature and purposes are stated with so much uncertainty, as to make it unfit for this Court to entertain the suit.

There is, indeed, a considerable, and perhaps an intended ambiguity in the statements of the bill; but, on carefully reading the whole, and being, I confess, unable to understand why some of the statements are introduced, I cannot say that there is anything irreconcilable with the distinct allegations of trust; and if a trust should ultimately be established, I think that the nature and objects of it are not stated with such vagueness and uncertainty as to make it impracticable for the Court to execute it. The statements are indeed not satisfactorily made, and they are such, as to make it probable that there may be great, if not insuperable, difficulties in establishing the case alleged by the Plaintiffs; but, taking the allegations as they stand admitted on this occasion, I think that the demurrer for want of equity must be overruled.

[38] The Defendants demurred *ore tenus* for want of parties, and stated several objections. Having regard to the allegations of the bill, I do not think, that as the case is now stated, the legal personal representative of General de Lacy is a necessary party. But the Plaintiffs are only assignees of a share once vested in Johanna Pierce, in trust for persons who are not parties; and it does not appear to me, that the suit can proceed in the absence of these *cestuis que trust*.

The trusts are alleged to have been created in or about 1817 or 1818, for the benefit of the families or descendants of the sisters of General de Lacy.

Johanna O'Brien, one of the sisters, died before 1795, leaving a daughter Johanna Pierce, who died in 1821, leaving children. Johanna Pierce was living in 1818, and, according to the statement in the bill, was entitled to a share of the trust funds, and upon her death, this share would pass to her legal personal representative.

Mary de Lacy Pierce was one of the children of Johanna Pierce. In April 1836 she married Charles Nash, and in April 1837, it is alleged, that a deed was executed, whereby John Fitzmaurice Pierce (the surviving husband of Johanna Pierce), and other persons, assigned to the Plaintiff O'Connor and George Pierce a share of the 60,000 silver roubles, part of the alleged trust funds, in trust solely for the issue of the marriage of Charles Nash and Mary de Lacy Pierce. Such, at least, appears to me to be the effect of the statement of this deed which is in the bill; but the statement is in itself not only ambiguous, but so made as to throw some doubt upon the nature of the principal trust alleged in the bill.

[39] It is subsequently alleged, that John Pierce (meaning, I presume, John Fitzmaurice Pierce) became the legal personal representative of his deceased wife

Johanna, and that by a subsequent deed, the Plaintiff Reed was substituted as a trustee for George Pierce.

This bill is filed by Reed and O'Connor, the trustees of the post-nuptial settlement of Nash and his wife; and it being stated that the settlement is made solely for the benefit of the issue of the marriage, it is said, that there is issue of the marriage; but they are not parties to the suit, and they may file a bill against these Defendants in respect of the same matters, after an adjudication in this suit in their absence. I am therefore of opinion, that they must be made parties before the cause can proceed.

Allow the demurrer *ore tenus* for want of parties without costs, and let the Plaintiffs have leave to amend.

I wish to add, that the frame of this bill is such, that having thought it right to overrule the demurrer for want of equity, I must nevertheless refuse to the Plaintiffs the costs of that demurrer.

[40] BLISS v. PUTNAM. Nov. 3, 1843.

[For subsequent proceedings, see 29 Beav. 20.]

A. B., being entitled to a legacy, and being indebted to C. D., by a deed which represented that it was "unincumbered," assigned it to C. D. upon trust, to retain a moiety, and as to the residue in trust for A. B. The fund was in Court, and liable to legacy duty. Held, first, that C. D.'s moiety must bear its share of the legacy duty; and, secondly, that C. D. was not entitled, as against A. B.'s share, to the costs of the proceedings to clear and ascertain the fund and obtain payment.

Under the will of a testator, who died in 1838, John C. Putnam was entitled to a life interest in a moiety of the testator's residuary estate.

John C. Putnam, being, together with his co-partner, indebted to Messrs. Wild & Co. in the sum of £4000, executed an indenture, dated in September 1838, and thereby, after reciting the will, and that he had proposed to pay £2500 to Messrs. Wild in discharge of his individual liability, and that he had represented, that his "life interest was not then *incumbered*," and had proposed to secure the £2500 as after mentioned, John C. Putnam assigned to Messrs. Wild all the interest, &c., thereafter to arise from one moiety of the testator's residuary estate, upon trust to retain a moiety of the monies received by them, until £2500 should be paid, and as to the residue of the monies in trust for John C. Putnam.

John C. Putnam died in July 1840; his interest thereupon ceased, and it was found that the moiety of his portion of the income was insufficient to discharge the £2500. The whole was in Court, and legacy duty, at the rate of 3 per cent., was payable on the amount. Messrs. Wild & Co. had incurred the costs of a petition presented by them, and of certain proceedings before the Master to inquire what was due under the deed, and what portion of the fund in Court had arisen from income accruing after the date of the deed.

[41] A petition was now presented by the executors of John C. Putnam for payment to them of the money in Court, after providing for the claim of Wild & Co.

The questions were, first, whether the moiety to which Messrs. Wild were entitled, was to bear its share of the legacy duty; and, secondly, whether Messrs. Wild's costs ought to be paid out of the portion of the fund belonging to the executors of John C. Putnam.

Mr. Kindersley and Mr. Goodeve, for the executors of John C. Putnam.

Mr. Turner and Mr. Stevens, for Messrs. Wild & Co., contended, that as John C. Putnam had represented his life-estate to be *unincumbered*, and had agreed to assign an unincumbered moiety, his share ought to bear the whole amount of the duty; and, secondly, that Messrs. Wild were entitled to the costs incurred in obtaining the fund, especially as they were to some extent trustees.

THE MASTER OF THE ROLLS [Lord Langdale]. The question is, what is to be done as to the legacy duty and the costs. The legacy duty being a Government

charge on the fund, does not, I think, come within the view of the parties under the word "incumbrance." It appears, therefore, to me that the legacy duty is payable out of the whole fund.

As to the costs, I expected some authority would have been cited. If none can be found, my impression is, that the second moiety is not applicable to the payment of the costs, because by the deed it is made the property of John C. Putnam himself. Each party must bear his own costs.

[42] NICHOLLS v. STRETTON. Dec. 5, 1843.

[S. C. at Law, 10 Q. B. 346; 11 Jur. 1008. See *Baines v. Geary*, 1877, 35 Ch. D. 157; *Baker v. Hedgecock*, 1886, 39 Ch. D. 523.]

A. on being artioled to B., covenanted not to be concerned for any of B.'s clients, and to forfeit £100 for any such breach. A. after being admitted, acted in contravention of this covenant. He was restrained by injunction.

In January 1838 the Plaintiff took the Defendant as an artioled clerk for five years without premium. At the same time, an indenture was executed between them, whereby the Defendant covenanted that he would not, during the said term of five years, nor at any time after the expiration of such term, either directly or indirectly, interfere, or intermeddle with, or be concerned, as attorney, agent, or otherwise, for any person who had already been, or who should, from time to time thereafter, become or be the client or correspondent in business of or with the Plaintiff, or any partner or partners he might admit to a share or shares with him, or any person or persons to whom he might sell or assign the whole or any part of his business or profession of attorney, solicitor, and conveyancer. And that he the Defendant would not act as partner, clerk, or assistant with or to any person or persons who should interfere or intermeddle as aforesaid. And in case the Defendant should commit any breach or breaches of his said covenants, promises, and agreements, he should forfeit and pay, as and for liquidated damages, the sum of £100 for every such breach. And it was thereby declared, that each day's repetition or continuance of any interference or intermeddling, as aforesaid, should be deemed a fresh breach of covenant, and incur a new and separate penalty and right of action. Provided nevertheless, that the same covenant was not to restrict the Defendant from being concerned in business for any of the connections of the said Defendant, who might, through his introduction, become clients of the Plaintiff, and being on [43] the books of the Plaintiff, admitted by him to have been so introduced by the said Defendant. And it was thereby expressly declared, that it was the true intent and meaning of the now stating deed and of the said articles of clerkship, that the Plaintiff should not be obliged to continue the said Charles Marston Stretton in his service, against his will, during the whole or any part of the said term of five years, but that the said Defendant should and would, notwithstanding the said articles of clerkship, at any time quit the service of the Plaintiff, on receiving from the Plaintiff one week's notice in writing so to do, the Plaintiff thereby agreeing to assign the said articles of clerkship to such other attorney as the Defendant might, in such case, require, but such assignment of the said articles of clerkship, was not to affect or invalidate the covenants, promises, and agreements therein contained.

At the expiration of the articles in 1843, the Defendant left the Plaintiff and was admitted an attorney.

The Plaintiff, finding that the Defendant transacted business for some country solicitors who had been his clients and connections, filed this bill, praying that the Defendant might be perpetually restrained by injunction from interfering or intermeddling with, or being concerned, as an attorney, agent, or otherwise, for any client or correspondent of the Plaintiff, or of the Plaintiff and his partners, in the Plaintiff's business of an attorney, solicitor, or conveyancer.

A motion was now made for an injunction in the terms of the prayer.

[44] Mr. Pemberton Leigh and Mr. Goodeve, for the Plaintiff, relied on *Whitaker*

v. *Howe* (3 Beavan, 383. And see *Davis v. Mason*, 5 Term R. 118, *Hitchcock v. Coker*, 6 Adol. & El. 438; *Archer v. Marsh*, *ib.* 959; *Horner v. Graves*, 7 Bing. 735; *Proctor v. Sargent*, 2 M. & Gr. 20; *Ward v. Byrne*, 5 Mee. & W. 548; *Hinde v. Gray*, 1 Man. & G. 195; *Wallis v. Day*, 2 Mee. & W. 273).

Mr. Kindersley and Mr. Rogers, for the Defendant.

The covenant is in restraint of trade, and so oppressive in its nature, that this Court, if asked, would not interfere and direct specific performance, but would leave the Plaintiff to his action for damages. If so, it should not grant the injunction. The Defendant was liable to be turned away at a week's notice, and yet, by the strict terms of the deed, if the Plaintiff had ceased to be employed by a client before the Defendant was born, and such client never intended to employ the Plaintiff again, still the Defendant was to be precluded from being concerned for him, and no injury might be done to the Plaintiff. It might be most detrimental to third parties to prevent the Defendant acting for them.

The deed was never executed by the Plaintiff, and there is, therefore, no mutuality.

Mr. Pemberton Leigh, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. In all cases of this kind, where an injunction is asked to restrain a party from exercising his professional employment, the Court has always had some reluctance in acting, for not only is it, to some extent, a restriction on trade, but it may also have the effect of depriving third parties of the services of those in whom alone they may [46] have confidence. The question has arisen not only in the case of solicitors, but in that of medical men. There was a case before Lord Eldon, of a medical man who had covenanted not to be employed for certain persons, and those persons being taken ill, it was a case of great hardship to say that he should not attend them. It must be admitted that this Court cannot interfere in these cases without the possibility of injury to third parties. That difficulty, however, has been passed over, and the Court has repeatedly exercised its jurisdiction in cases of this nature.

It is no answer to say, in this case, that the client would not have employed the Plaintiff in the particular case referred to. Any interference with his clients was one of the very things which the Plaintiff, when he took the Defendant into his office, was desirous of guarding against.

I do not see any ground on which I can say that this is a contract which this Court will not enforce. The perseverance of Stretton in acting in this manner and in availing himself of the introduction he accidentally acquired in the Plaintiff's office, has made this application necessary. I must grant this injunction; the only question is, as to the terms in which it should be expressed.

NOTE.—An appeal was presented, and a case was directed to a Court of law. [See 10 Q. B. 346.]

[46] BACON v. BARNETT. Nov. 25, Dec. 5, 1843.

The serjeant-at-arms returned *cepi corpus sed languidus*. There being ground for believing that the latter part of the return was untrue, the Court ordered that the serjeant-at-arms should bring the Defendant up on a given day, unless he should on the previous day, shew cause to the contrary.

The Defendant obtained time to answer on the terms of the 21st Order of December 1833 (Ordines Can. 50) consenting to a serjeant-at-arms.

The Defendant having neglected to put in his answer, the serjeant-at-arms went against him on the 7th of November, and on the 16th of November he returned in effect *cepi corpus sed languidus*, and that he could not be brought up without danger.

Mr. G. L. Russell now moved that the serjeant-at-arms might bring the Defendant up. The application was supported by affidavits tending to shew, that, at the time of the return, the Defendant was in health, and following his usual occupations and pleasures. He cited *Miles v. Lingham* (7 Ves. 230).

THE MASTER OF THE ROLLS [Lord Langdale]. That affidavit may be true; yet

we all know health to be so precarious, that it is possible, that to bring him up at the present moment might be attended with the risk of his life. The order I shall make is that the serjeant-at-arms do bring him to the Bar on the 6th of December, unless on the 5th of December he shews cause to the contrary.

Dec. 5. The Defendant having put in his answer,

THE MASTER OF THE ROLLS ordered his discharge upon payment of all the costs of the proceedings.

[47] THOMAS v. THOMAS. *Dec. 7, 1843.*

Under the 2d Order of the 11th of April 1842, the Court nominates the solicitor for the infant, and usually appoints the solicitor of the Suitors' Fund.

Mr. Piggott moved, under the 2d Order of the 11th of April 1842 (Ord. Can. 197) as amended by the 31st Order of the 26th of October 1842 (Ord. Can. 219), that Mr. R. G. a solicitor of this Honourable Court not towards the cause, might be appointed by this Court, guardian of the above-named Defendant John Thomas, an infant, under the age of twenty-one years for the purpose of putting in his answer.

The infant had appeared.

THE MASTER OF THE ROLLS [Lord Langdale]. The Court makes the appointment, and usually appoints Mr. Johnson the solicitor of the Suitors' Fund. I will make the appointment, and a communication will then be made to the gentleman named in the notice of motion.

[48] ALCOCK v. SLOPER. *Dec. 7, 1843.*

Motion in a supplemental suit, to deposit documents with the Master, in whose office other documents had been deposited in the original suit, instead of with the Writ Clerks, though unopposed, was refused.

Under the decree in the original cause certain deeds had been deposited in the Master's office; others, relating to the same matter, had not been deposited.

A supplemental bill having been filed,

Mr. Kindersley moved for the production of the documents mentioned in the answer, and asked that they might be deposited in the Master's office with the other documents instead of being deposited with the Record and Writ Clerk.

Mr. Pemberton Leigh, for the Defendant, consented, but

THE MASTER OF THE ROLLS [Lord Langdale] objected to a departure from the usual practice, and he refused the application.

[49] HAVERGAL v. HARRISON. *Dec. 11, 12, 1843.*

[S. C. 13 L. J. Ch. 30; 7 Jur. 1100.]

Bequest to A. for life, and at her death for her brother and sister, and the testator's brothers and sisters equally. At the date of the will A. had one brother and sister, and the testator had three brothers and one sister. Held, that this was not a gift to an ascertained class, but to the brothers and sisters living at the date of the will. As to personal estate, the Court is bound by the terms of the will appearing on the probate; but if, on production of the original, a doubt exists as to the accuracy of the probate copy, the Court will give an opportunity to the parties to apply to the Ecclesiastical Court to set it right.

The testator, by his will dated in 1800, bequeathed as follows:—"I will and bequeath unto my beloved wife Mary Wilkis all my wordly effects, stock-in-trade, goods and chattels of every description unto me belonging, and at my beloved wife's

departure for her brother and sister, and my brothers and sister, to have equal share of all my stock, goods and chattels."

At the time of making his will the testator had three brothers and one sister, of whom one brother only survived the testator.

At the date of the will his wife had one brother and the sister, of whom one sister alone survived.

The testator died in 1832, and his widow survived till 1839. Under these circumstances the question was, whether the brothers and sisters took in classes, so that the survivor took the whole residue, or whether by the death of four of them in the lifetime of the testator four-sixths lapsed.

Mr. Pemberton Leigh and Mr. Jervis, for the Plaintiffs, the next of kin, contended, that this was a gift to the individuals answering the description at the date of the will, and not a gift to a class to be ascertained at the death of the testator. That if he had intended a fluctuating body, he would have used the words "brothers and sisters" in both instances. They insisted therefore that four-sixths were undisposed of and had lapsed for the benefit of the widow and next of kin.

[50] Mr. Turner and Mr. Craig, for the personal representatives of the widow.

Mr. Kindersley, *contra*. The testator intended a class to be ascertained at a future period. The words in the original will are her brothers and sister. This did not answer the state of her family, for she had but one brother; the Court must act on the original document, and not on the probate, which is incorrect.

[THE MASTER OF THE ROLLS. I am bound by the probate, but if, on the production of the original will, a doubt exists as to the accuracy of the probate copy, this Court will give an opportunity to the parties to apply to the Ecclesiastical Court to set it right.]

Even if the words were "brother and sister" still it would be plain that the intention of the testator was that all should take, and all brothers and sisters would have been let in under those words.

Mr. Pemberton Leigh, in reply. The testator must clearly have meant the individuals; his parents appear to have been married in 1755, and his mother had died in 1773.

Viner v. Francis (2 Cox, 190), *Shuttleworth v. Greaves* (4 Myl. & Cr. 35), *Knight v. Gould* (2 Myl. & K. 295). And see *Harrison v. Harrison*, 1 Russ. & M. 72).

THE MASTER OF THE ROLLS. The only question is this—whether the testator, in the use of a general description, has meant it to apply to [51] persons capable of being enumerated at the time, or to persons who might afterwards come into existence and could not therefore be enumerated till the death of the testator. His wife had one sister, and he had one sister: it is therefore difficult to suppose that he could have meant any other than the sister of himself and the sister of his wife; for if he intended to comprise persons not capable of being enumerated at that time, and persons capable of increase or decrease, it is inconceivable that he should have used the words in the singular number, and exactly applicable to the existing state of things.

If he meant by this description to enumerate the two particular sisters, how can we conceive, that, as to the brothers, he meant to comprise persons not then in existence, and who might afterwards come into *esse*?

I have a strong impression that there is a *descriptio personarum* at the time of the making of the will.

I think that the singular word "sister" shews that he did not intend a class incapable of being ascertained at the time, but individuals who could be then enumerated. I will consider my judgment.

Dec. 12. THE MASTER OF THE ROLLS [Lord Langdale]. I have read the case of *Shuttleworth v. Greaves* (4 My. & Cr. 35), and do not find in it any reason for altering the opinion which I expressed yesterday. The words "all and every my brothers and sisters," which were used by the testator in that cause, were comprehensive enough to include persons not capable of designation at the date of the will, and there was nothing to indicate the de-[52]-signation of any particular person; there were words creating a tenancy in common, and a limitation to executors, administrators, and assigns; and the question seems to have turned, partly upon those words and partly upon the limitation.

In this case, it appears to me that the use of the word "sister" in the singular number can only apply to the sister of his wife, and his own sister then in being, and that, consequently, as to them, there was a *designatio personarum*. The word "brothers," supposing it to have been used in the plural number in both cases, would have admitted of a more comprehensive construction; and in one case, it was not accordant with the fact as now ascertained to have been then existing. It creates some ambiguity, but not enough to overweigh the effect of the word "sister." It seems in the highest degree improbable that the testator should have meant to designate the sisters personally, and have meant an unascertained and unknown class of persons by the word "brothers" in the same clause.

I am of opinion that the brothers and sisters living at the date of the will were the legatees, and that the shares of such of them as died in the testator's lifetime lapsed and now belong to the next of kin.

[53] LADY HARTLAND v. ATCHERLEY. Jan. 11, 1844.

[S. C. 13 L. J. Ch. 122.]

It is not the practice of the Court to appoint a person resident abroad to be guardian *ad litem*.

A. was found lunatic in Ireland, and B. was appointed his committee there. A. being a Defendant to a suit in England, an application was made that B. might be appointed guardian *ad litem*. Held, that the proper course was to get the Irish commission recorded in England, under the 1 W. 4, c. 65, s. 41, and then for the lunatic and committee to answer together.

The Defendant Lord Hartland was, in 1836, found lunatic by inquisition in Ireland, and Dennis Mahon was appointed committee of his person and estate. Lord Hartland and his committee were resident in Ireland.

Mr. W. H. Clarke moved, that Dennis Mahon might be assigned guardian of Lord Hartland to answer this bill, and defend the suit. He stated, that the usual course to obtain the appointment of a guardian *ad litem* to a lunatic Defendant was, to present a petition of course for a commission to assign a guardian; but he argued that the Court might dispense with a commission, as in the case of an infant resident abroad. (See *Smith v. Palmer*, 3 Beavan, 10; *Shuttleworth v. Shuttleworth*, 2 Hare, 147; *Drant v. Vause*, 2 Y. & C. (C. C.) 524.)

THE MASTER OF THE ROLLS said, that it was not the practice of the Court to appoint a person resident abroad to be guardian, as the Court would have no power to compel obedience to its orders; that, unless the interests of the committee and lunatic were inconsistent, they ought to answer together; that here the parties might get the inquisition recorded in England under the Act (1 W. 4, c. 65, s. 41), and then the lunatic and committee could answer together.)

[54] ROBEY v. WHITEWOOD. Jan. 11, 1844.

The 1 W. 4, c. 36, s. xv. rule 17, does not authorize the Court to order that the costs of a Defendant's contempt for not answering, and who is too poor to pay them, may be costs in the cause.

The Defendant was committed for contempt in not answering. (5 Beav. 399.) He put in his answer, but being too poor to pay the costs of the contempt, it was moved on his behalf, that it might be ordered, under the Contempt Act (1 W. 4, c. 36), that the Defendant's costs of contempt might be made costs in the cause, and that the Defendant might forthwith be discharged without payment of costs.

Mr. Teed, in support of the application, referred to the 1 W. 4, c. 36, s. 15, rule 17, by which it is enacted "that in any other case of a commitment for contempt, not herein specially provided for, the Court may, upon any such applica-

tion as last aforesaid, or upon any such report as aforesaid, make such order for the discharge of the prisoner, upon any such terms, and making, if the Court shall see fit, any costs in the cause, as to the Courts shall seem proper."

Mr. Shebbeare, *contra*, was not heard.

THE MASTER OF THE ROLLS [Lord Langdale]. I do not think I can make this order, the effect of which may be, to make the Plaintiff pay the costs of the Defendant's contempt. I doubt whether the seventeenth rule of the Act gives authority to the Court: it provides only for "any other case of a commitment for contempt not herein specially provided for;" and the Act contains this very humane provision, that the prison shall be [55] visited by an officer of the Court, upon whose report the Court may make provision for payment of the costs of a party in contempt, not in the way which is here asked, but out of the Suitors' Fund.

[55] IRELAND v. EADE. Jan. 12, 1844.

[S. C. 13 L. J. Ch. 129.]

A receiver ought not to present a petition, or originate proceedings, in the cause; any necessary application ought to be made by the parties to the suit. There are exceptions to the rule; as where a receiver had incurred costs in the execution of his duties, which the parties had long neglected to provide for, it was held that he was justified in presenting a petition for their payment.

This was a petition of the receiver in the cause, for payment of certain costs, charges and expences which he had incurred.

It appeared that in 1832 Mr. Smallpiece the Petitioner had been appointed receiver, and that he had incurred considerable expences in obtaining possession of the property, in consequence of the violence of one of the Defendants. It was also admitted that he had incurred other costs, charges, and expences in the performance of his duties of receiver, which had not been paid. He had, in 1834 and afterwards, made various applications to the solicitors of the parties, requesting them to obtain an order for the taxation, and some orders had been made to that effect, which, however, had failed, upon technical objection afterwards taken thereto.

In 1839 Mr. Davison had obtained the conduct of the cause, and he promised to make an application to the Court respecting the Petitioner's claim; in 1841 the receiver had been discharged. No further steps having been taken to satisfy the receiver's claim, he presented a petition for the taxation and payment of his costs, charges, and expences.

[56] Mr. G. Turner and Mr. Prescott White, in support of the petition.

Mr. Kindersley, *contra*, contended that the receiver ought not to have presented this petition, and that it had been done without any proper communication with the other parties; he urged that the receiver ought to pay the costs of it.

Mr. Stinton, for the Plaintiff.

THE MASTER OF THE ROLLS [Lord Langdale]. A receiver ought not to present a petition or originate any proceedings in a cause; any necessary application should be made by the parties to the suit. That is the general rule; but there is some difficulty in adhering to it, and many exceptions to it have been allowed. Sir John Leach, however, did adhere to it with considerable strictness.

In this case the Petitioner was appointed receiver twelve years ago, and all acknowledge that he incurred costs, charges and expences in the execution of his duty, which he is entitled to receive. He does not seem to have been desirous of presenting a petition of his own, and he carefully and properly applied to the parties to the suit, in order that they might take proceedings for the satisfaction of his claim. I do not find that they were unwilling to do so; but unfortunately they set about it in such a way as to produce no result to the receiver. An order was even obtained, but without due service, and it could not be acted on. This was not the fault of Mr. Davison, who had not the conduct of the cause till 1839. Though he knew of these costs, charges and expences, and seems to have intended to [57] provide for

them, yet nothing effectual was ever done. The receiver being entitled to costs, charges and expences, and the parties having delayed for ten years to provide for their taxation and payment, I think he was justified in presenting this petition. The order must be made, and I cannot charge him with the costs of the proceedings. The costs of all parties must be paid out of the fund in the hands of the receiver.

[57] ROBERTS v. JONES. Jan. 21, 1844.

[S. C. 7 Beav. 266.]

A Plaintiff neglected to set down a plea for argument. The Defendant moved, *ex parte*, for the costs of the plea and of suit. The Court declined to make the order.

In this case, the Defendant had filed a plea; the Plaintiff neglected to set it down for argument within the three weeks, according to the exigency of the 35th Order of the 26th of August 1841 (Ord. Can. 175), in consequence of which, it was "to be held good to the same extent, and for the same purposes as a plea allowed upon argument."

Mr. Simons now moved, *ex parte*, that the Plaintiff might pay the costs of the plea and suit. He observed that this was like the case of a demurrer submitted to under similar circumstances; *Cartwright v. Smith* (6 Beav. 121), *Mackenzie v. Claridge* (6 Beav. 123); and he referred to the 31st Order of the 3d of April 1828 (Ord. Can. 17), which directs, that on the *allowance* of a plea to the whole suit, the Plaintiff shall pay the taxed costs of the plea and suit, unless the Plaintiff undertakes to reply, or the Court shall think fit to make other order.

[58] THE MASTER OF THE ROLLS. The Plaintiff ought to have notice of this motion, and have an opportunity of undertaking to reply. The case is not like that of a demurrer; for, notwithstanding the plea is to be held good, still the Plaintiff has a right to reply thereto, and to go into evidence to disprove the allegations it contains.

[58] RICHARDSON v. HASTINGS. Jan. 21, 1844.

Liberty given *ex parte* to amend a clerical error in a demurrer, the twelve days for demurring not having expired.

Mr. Hubback moved *ex parte* for leave to amend a demurrer, by inserting the words "this Defendant" for "these Defendants."

The twelve days for demurring had not expired. (Ord. Can. 46.)

THE MASTER OF THE ROLLS gave liberty to make the amendment, the Defendant undertaking to amend the Plaintiffs' office copy.

[59] UPJOHN v. UPJOHN. Nov. 7, Dec. 22, 1843.

A testatrix, having the moiety of an estate, directed her executors to purchase the other moiety; and "if the purchase should be completed within twelve months after her death," she gave the entirety on certain trusts; "but in case her executors should not be able," within that time, "to purchase it," she directed her moiety to be sold, and the produce, together with £1100 to be held on other trusts. The will contained a gift of the residue of her estate of whatever kind, &c. The purchase "was not completed" within the time, although the executors "were able," so that neither of the expressed events happened. Held, first, that the trusts both of the estate and £1100 failed; and, secondly, that as between the devisees and heir at law, the latter was entitled to the testatrix's moiety of the estate. As to the liability of the executors in this case, *quære*.

This case appears fully stated in the judgment. It was argued by Mr. Pemberton Leigh and Mr. Prescott White, for the Plaintiff, and by

Mr. Sidebottom, Mr. Heathfield, Mr. Glasse, Mr. Purvis, Mr. Bagshawe, M. C. J. Hall, Mr. Blunt, Mr. Kindersley, and Mr. Turner, for the several Defendants.

Mr. Pemberton Leigh, in reply.

The cases cited were on points not the subject of the reported decision.

Dec. 22. **THE MASTER OF THE ROLLS** [Lord Langdale]. The questions in this cause arise upon the construction of the will of Ann Tookie, dated the 18th of October 1796.

Some time before the date of the will, an undivided moiety of the estate in question had become vested in the testatrix, by descent from her cousin Ann Burgis. Anthony Burlton Bennett was the owner of the other [60] moiety, and the testatrix, contemplating that her executors might be able to purchase Mr. Bennett's moiety, or might not be able to do so in twelve months, by her will, made dispositions adapted to either event. If Mr. Bennett were disposed to sell his moiety, she directed her executors to purchase it; and if the purchase should be completed within twelve months after her death, she also gave her own moiety to trustees, in trust, during the life of her daughter Catherine Mary Page, to pay the rents to her; and after her death she gave the same moiety to her grandson William George Page and the heirs of his body; and in default of such issue, to her grandson James Clement Page and the heirs of his body; and in default of such issue, to her granddaughter Catherine Anne Page and the heirs of her body; and in default of such issue, to the heirs of the body of her daughter Catherine Mary Page; and in default of such issue to her nephew William Burlton in fee. And if the executors should purchase Mr. Bennett's moiety, she directed the same to be secured and settled, in the manner she had devised the moiety of which she was then possessed, so that the whole might go and descend together.

This was the disposition she made, in contemplation of her trustees and executors completing the purchase of Mr. Bennett's moiety within twelve months after her death. She then proceeded to provide for the other event, and expressed herself as follows: "But in case my said executors shall not be able, within twelve months after my decease, to purchase, on fair and equitable terms, the other moiety of the said estate, then my will and mind is, that they do sell the undivided moiety that I now possess, for the most money that they can procure for the same, and place the money arising from such sale on mortgage security, or vest it in the public [61] funds; and also that they raise £1100 out of my personal estate, and place it on the like security." And she then gave the interest of the sums to be thus invested, to her daughter for life, as she had given to her the rents of the whole estate, if Mr. Bennett's moiety had been purchased; and after the death of her daughter, she gave the purchase-money and the £1100 to her grandson William George Page, if then living, and he should then have attained the age of twenty-one years; but if he died under that age, she gave the principal sum to his brother James Clement Page; and if he also should die under age to his sister Catherine Anne Page, on her attaining twenty-one years of age or day of marriage; and if she died under age and unmarried, then she gave the same sums to any other children her daughter might have, to be divided between them equally, or if her daughter died without children or none of those she left should attain twenty-one years, she gave the same principal sum to her nephew William Burlton. And she gave to her executors all the residue of her estate, of what kind or nature soever, in trust, nevertheless, that they should place the same on mortgage securities, or vest the same in Government security, and pay the interest therefrom arising to her daughter Catherine Mary Page, for her separate use for life, with power for the executors, with her consent, to employ any part of the residue towards the support, education, and advancement in life of her grandson William George Page; and after the death of her daughter, she gave the residue to all the children of her daughter, to be equally divided between them, share and share alike, with survivorship, if any should die under twenty-one years of age; and if none should attain that age, she gave the residue to William Burlton.

By the decree made on the hearing of the cause, inquiries were directed, for the purpose of ascertaining, [62] whether all the persons who were interested in the estate were parties to the cause; and the Master was directed (in case he should find that all parties interested were parties to the suit) to inquire, amongst other things,

whether the executors of Ann Tookie were able, within twelve calendar months after her decease, to purchase, on fair and equitable terms, the moiety of the estate in question which did not belong to her; and in answer to this inquiry the Master has reported, that a negotiation was entered into, immediately after the decease of the testatrix, for the purchase of the moiety of the estate which belonged to Mr. Anthony Burlton Bennett, who expressed his willingness to sell the same to the trustees, long before the expiration of the time named by her for the completion of the purchase; and it was understood, by the parties interested under the will and by Mr. Bennett, that the purchase would be completed within twelve calendar months after the decease of the testatrix; and the testatrix's daughter, in expectation that it would be completed, entered into possession of the entirety of the estate, soon after the death of the testatrix, but, in fact, the purchase never was completed, and Mr. Bennett having died intestate as to his moiety, his heir asserted his claim thereto, and sold and conveyed it to Mr. Upjohn; and, under these circumstances, the Master found, that *the executors of the testatrix were able, within twelve calendar months after her death, to purchase, on fair and equitable terms, the moiety of the estate which did not belong to her.*

We have, therefore, this state of things; the executors might, according to the directions of the will, and therefore ought to have completed the purchase within twelve calendar months after her death, but they neglected to do so, and, in fact, the purchase never was completed. In the event of the purchase of Bennett's [63] moiety being completed in twelve months, the testatrix limited the entirety of the estate in a particular manner. In the event of the executors not being able within twelve months to purchase Bennett's moiety, she directed her own moiety to be sold, and the purchase-money, together with £1100, to be raised out of her personal estate, to be limited in another particular manner.

Inasmuch as the purchase of Bennett's moiety was not completed in twelve calendar months after the testatrix's death, it is said, that the limitation of the entirety of the estate fails. And inasmuch as the executors were able to complete the purchase within the time, it is said, that the limitation of the purchase-money and of £1100, directed in the event of their being unable to complete, fails. And both these limitations failing, it is contended, that the testatrix's moiety of the estate in question passes by the residuary clause in the will.

The apparent object of the testatrix was, to limit and settle this particular estate, if the entirety could be obtained, for the purposes of her trust; she did not intend to limit any other real estate, or her own moiety of this estate, if the other moiety could not be obtained. On the contrary, her intention was to limit money only, if the other moiety of the estate could not be obtained; and for that purpose she desired to have her own moiety sold. The executors, as it would seem, by mere neglect, did not complete the purchase, and the moiety which might and ought to have been purchased according to the trusts of the will, has now vested in a person who is under no obligation to sell. Not only was the purchase not completed in the time limited by the testatrix, but there is no reason to suppose, and it is not alleged, that it can now be completed at all. The intention to limit this [64] particular estate is wholly defeated, and, as the testatrix did not intend to limit any other real estate, or her own moiety of this particular estate, separately, I think that, under the circumstances, no effect can now be given to this devise.

Again, the testatrix did not, in the event which happened (the executors being able to purchase the other moiety), intend to have her moiety sold, in order that the purchase-money, together with £1100, might be limited in the way she directed. Her apparent object was this:—The sale and the limitation of the money were to take effect, only in the event of the executors being unable to purchase Bennett's moiety in twelve months, which they were not; and I do not think, that the default of the executors in not purchasing, can be allowed, contrary to the intention of the testatrix, to give effect to a limitation intended to take effect under different circumstances.

It appears to me that the testatrix intended, at all events, to give a life interest to her daughter, and a certain succession of interests to the grandchildren named in her will; but it cannot be understood, for what reason she varied the limitations to

grandchildren, so as to alter the interests, in the different events which she contemplated.

It may be conjectured that she would have made no difference, between the event of the executors being able and neglecting to make the purchase in twelve months, and the event of their being unable to make the purchase in that time; but this would be no more than conjecture. The will affords no clue for the discovery of what her intention might have been, in the event which occurred; and the context of the will does [65] not assist in the construction of the particular clauses. In such circumstances, it appears to me that the safest course is to adhere to the strict words of the clauses. That which was the primary object of the testatrix was defeated by the neglect of the executors. That which was her object only in the event of the first being unattainable, can only have effect given to it, by allowing the neglect of the executors to defeat the first, for the purpose of making the second available, in circumstances different from those which were contemplated by the testatrix.

Whether the executors, or those who represent them, can, in any way, be made answerable for the consequences of their neglect, does not appear to be a question in this cause; but it appears to me, that, under the circumstances, both the directions fail: that the £1100 is not to be raised, but remains part of the residuary personal estate. The remaining question is, whether the testatrix's moiety of the real estate in question passes by the residuary devise in the will, and I think that it does not, for although the words in which the residuary clause is expressed are large enough to comprise real estate, yet the testatrix having clearly intended to dispose of this particular estate in a different manner, it is plain that she did not intend it to pass as residue, and it appears to me that the heir at law became entitled to it.(1)

It must, therefore, be declared, that the sum of £1100 is not to be raised out of the personal estate, and that, under the circumstances, the heir at law of the testatrix is entitled to her moiety of the real estate in question.

[66] LINGREN v. LINGREN. DICK v. LACY. Jan. 25, 1844.

On an application, by motion, for the appointment without a commission of a guardian *ad litem* to an infant abroad, an affidavit should be produced of the infancy of the party.

Mr. G. Russell in the former case, and Mr. Beavan in the latter, moved for the appointment of a guardian *ad litem* to an infant resident abroad, without a commission. (See *Smith v. Palmer*, 3 Beav. 10.)

THE MASTER OF THE ROLLS [Lord Langdale], in both instances, said, that after the recent case which had come before him (*Green v. Baddeley*, 13 Feb. 1844), in which a guardian had been assigned to a Defendant, who was represented to be an infant, but turned out to have been thirty years of age, he must, on applications of this kind, require an affidavit, that the party was an infant at the time of making the application.

[66] FIELD v. ROBINSON. Jan. 25, 1844.

Where the Defendant submits to pay the whole demand of the Plaintiff, the Court stays the proceedings; but if there be a question in dispute as to the Plaintiff's right to recover certain expenses, and the Defendant does not submit thereto, the Court will not interfere summarily and stop the suit.

A Defendant submitted to the claim of the Plaintiff except the costs of a *distringas*. The Court would not stay the proceedings till the question was agreed upon or determined.

(1) See *Goodright v. Opie*, 8 Mod. 123, *Wright v. Horne*, Fort. 182, and 8 Mod. 222; *Roe v. Fludd*, Fort. 184; *Doe dem. Wells v. Scott*, 3 Mau. & S. 300, and 1 Vict. c. 26, s. xxv.

Mr. Turner moved to stay all proceedings in the cause, on payment of the legacy claimed and the costs of suit. *Pemberton v. Topham* (1 Beav. 316).

[67] Mr. Kindersley, for the Plaintiff, opposed the application, unless the Defendant also paid the costs of a *distringas*, which the Plaintiff, for his protection, had placed on the fund.

THE MASTER OF THE ROLLS [Lord Langdale]. Where all that the Plaintiff can recover is a certain sum of money and the costs of the suit, and the Defendant comes and offers to pay the whole demand, it is the usual practice of the Court to prevent the suit going on; but if there is a question whether the Plaintiff has or not a right to recover certain expenses incurred by him, and that is in dispute between the parties, and not submitted to by the Defendant, it must be in some way determined (see *Vin Sandau v. Moore*, 1 Russ. p. 469) before the Court can interfere summarily and stop the suit. (The parties afterwards agreed on a sum to be paid in full.)

[67] NICHOLSON v. NORTON. Jan. 25, 1844.

[S. C. 13 L. J. Ch. 140.]

By the decree sums due from a legatee were ordered to be set off against her share of the testator's estate, and her costs were ordered to be paid to her solicitor. It being found that the claims against her exceeded her portion of the estate, and the legatee being insolvent, an application was made by motion, that the costs ordered to be paid to her solicitor might be carried to the credit of her account. The Court stayed the payment of the costs for a month, in order that the matter might be set right.

The Defendant Elizabeth Elisha was entitled to a share of the estate of the testator in the cause, in respect of which, advances had been made to her by the executor Norton to the amount of £317. She was [68] also indebted to the estate of the testator in the sum of £102.

By the decree, the Defendant Norton was directed to retain those sums out of her share, and her costs were ordered to be paid to her solicitor.

Mr. Wickens, on behalf of Norton, now moved to vary the decree as to the payment of the costs to the solicitor, and that the amount might be carried to the credit of Elizabeth Elisha in taking the accounts. He grounded the application on this, that the share of Elizabeth Elisha in the estate amounted to £250 only, a sum quite insufficient to discharge what was due from her, and that she was insolvent. He argued that a party indebted to the estate will not be allowed to receive any payment while his debt continues unsatisfied; but the costs due to him will be set off *pro tanto* against the debt due from him; *Harmer v. Harris* (1 Russ. 155); and that this might be done independently of the solicitor's lien, and by motion after decree; *Shine v. Gough* (2 Ball & B. 33. And see *Cattell v. Simons*, 6 Beav. 308).

Mr. Teed, *contra*. The practice of the Court is not to vary the decree on motion, which can only be done on a rehearing. The state of the accounts is not proved.

THE MASTER OF THE ROLLS [Lord Langdale]. I think there is a fair question to be determined. I will therefore stay the payment of the costs for a month, and give an opportunity to apply to set the matter right.

[69] HOLMES v. BADDELEY. BADDELEY v. HOLMES. Jan. 31, 1844.

[For previous proceedings, see 6 Beav. 521; 49 E. R. 927; 1 Ph. 476; 41 E. R. 713.]

A prudent solicitor never takes an order for time to answer, on the condition of a serjeant-at-arms, in the terms of the 21st Order of December 1833.

Proceedings on a cross-cause were stayed, till the Defendant in the original cause had fully answered. The answer in the original cause was found sufficient, but some documents, though ordered, had not been produced, their production being the

subject of a pending appeal. The Court, overruling the decision of the Master, gave the Defendant in the cross-cause an unconditional order for time to answer, with liberty to apply to extend it.

This was an application by the Defendant in the second suit, for a month's time to answer after the production of the documents mentioned in the answer of the Defendant to the first suit.

On the 5th of July 1842 the original bill was filed, to which the Defendant put in an insufficient answer.

On the 29th of March 1843 the second bill, in the nature of a cross-bill, was filed; and the Defendant in the first suit having filed a second answer on the 15th of July 1843, the Master of the Rolls, on the 27th of July 1843, ordered the production of the documents in the first suit (6 Beavan, 521); and the proceedings in the second suit were stayed, until the Defendant in the first suit had fully answered. The Defendant in the first suit appealed to the Lord Chancellor, as regarded the order for production of certain documents which he considered privileged. (6 Beav. 525, n.)

The answer of the Defendant in the first suit was not found sufficient till the 12th of December 1843; and an application being made to the Master, by the Defendant in the cross-suit, for time to answer, the Master, on the 7th of January 1844, refused to grant it, except on the terms of the 21st Order of December 1833 (Ord. Can. 50), viz., of the [70] Defendant consenting to a serjeant-at-arms, which the Defendant Holmes declined to take; whereupon he applied to the Court.

The appeal had not been disposed of, and the documents, the subject of it, had not been produced. It appeared also, that on the 11th of January instant, an order had been made, in the first cause, for the production of further documents mentioned in the further answer of the Defendant Baddeley, and that it had not yet been complied with.

The present application was supported by an affidavit of the clerk of the solicitor, stating that counsel had advised that before Holmes answered the second bill, the first bill ought to be amended, which ought not to be done till the documents had been produced; and that the deponent believed that counsel could not settle the answer of Holmes, until a month after the documents should have been left for inspection, without great injury to the case of Holmes.

Mr. Turner and Mr. Bird, in support of the motion.

Mr. Kindersley and Mr. G. L. Russell, *contra*.

THE MASTER OF THE ROLLS [Lord Langdale]. The answer of the Defendant in the first suit was found sufficient on the 12th of December last; but all the documents have not yet been produced, so that though, in one sense, the answer is sufficient, yet, in another sense, it is still insufficient.

The answer having been found sufficient, the Defendant applied to the Master for time to answer the cross-[71]-bill. He was of opinion that time ought to be granted, but on the condition of the Defendant consenting to a serjeant-at-arms. In my long experience, I never knew this condition submitted to by any prudent solicitor.

Holmes, having had an inspection of some, but not of all, of the documents which have been ordered to be produced, now asks for further time to answer, and I think he is entitled to it.

If he had stated that he was unable to answer until the documents which are the subject of the appeal had been produced, I should have suspended his obligation to answer until they had been produced. The affidavit however states that he requires these documents for the purpose of amending his bill. I cannot attend to that; it can have no weight on this occasion; but then it goes on to say, that the solicitor believes that the answer cannot be settled until a month after the documents have been inspected. This statement is sufficient, and it seems right to grant him five weeks' time, with liberty to apply to extend it, on affidavit shewing that an inspection of these documents is material and necessary before the Defendant can put in his answer to the cross-bill.

[72] ALLEN v. THORP. Nov. 8, 1843.

[S. C. 13 L. J. Ch. 5. See *In re Clay*, 1885, 54 L. J. Ch. 649.]

The ultimate trust in a marriage settlement of a fund belonging to the wife, was to her *executors or administrators*. Held, first, that the surviving husband, who was her administrator, and not her next of kin, was entitled; and, secondly, that if by those words her next of kin were intended, then that the next of kin at the death of the wife, and not of the husband (who was tenant for life), were entitled.

By a marriage settlement, a fund belonging to the wife was settled on the husband and wife for their respective lives, with remainder to the children of the marriage, to be vested at twenty-one or marriage; and in case no children should attain vested interests (which happened), then as the wife should appoint; and in default unto the *executors or administrators* of the wife. The wife predeceased the husband, and made no appointment. There was one child only of the marriage, who survived her mother, but died without attaining a vested interest. Held, that the ultimate limitation was in favour of the wife's administrator, and not of her next of kin, and one of two trustees having declined to transfer the fund to the surviving husband, who was his wife's administrator, and having severed in his defence in a suit to obtain a transfer, was allowed no costs.

By the settlement made on the marriage of Mundeford Allen with Elizabeth Rush, a sum of £3000 was settled on the wife and husband for life, in succession, with remainder to the children of the marriage, as the husband and wife or the survivor should appoint, and, for want of such appointment, to the children of the marriage, to be vested at twenty-one or on marriage with consent; and in case no child should attain that age or marry with consent (which happened), then to transfer to such person as the wife should appoint, and in default "unto the executors or administrators of the said Elizabeth Rush."

No appointment was ever made. The wife died in 1827, and a daughter, the only issue of the marriage, died under twenty-one, without having been married. The surviving husband took out administration to his wife and daughter, and applied to Thorp and Griffin, the trustees, to have the fund transferred. Griffin was willing to comply, but Thorp refused.

The husband filed a bill against the trustees, praying a transfer of the trust fund.

[73] The next of kin of the wife were not parties to the suit.

The trustees severed in their defence; Griffin submitted to transfer; but Thorp, by his answer, stated, "that he had been advised by counsel, that it was very doubtful, whether the limitation in the settlement (in default of the appointments therein mentioned), to the executors or administrators of the said Elizabeth Allen (formerly Elizabeth Rush), operated in favour of the said Mundeford Allen, as her husband and administrator, or in favour of the next of kin of the said Elizabeth Rush (afterwards Elizabeth Allen); and that it was also doubtful, whether the words of limitation, used in the said settlement, denoted next of kin living at the decease of the said Elizabeth Allen (in which case they would apply to Elizabeth Frances Allen, the daughter of the said Elizabeth Allen, who died an infant shortly after the decease of the said Elizabeth Allen), or whether they designated next of kin of the said Elizabeth Allen who should be living when the preceding trust failed," in which case certain persons, whom he named, would be her next of kin.

Mr. Pemberton Leigh and Mr. Rogers, for the Plaintiff. The husband, as administrator of his wife, is entitled under the ultimate limitation to her executors or administrators. That point was clearly settled by Lord Cottenham in *Daniel v. Dudley* (1 Phillips, 1).

Supposing, however, that this is not the proper construction, and that the words "executors or administrators" mean next of kin, then the next of kin of the wife living at her death are alone entitled. Her [74] daughter was sole next of kin at that period; and the Plaintiff, in the character of administrator of his daughter, is entitled to the fund.

The Defendant Thorp, who has unnecessarily occasioned the litigation, in a case in which the Plaintiff is entitled in either alternative, ought to bear the costs.

Mr. G. Turner and Mr. Younge, for Thorp. Though there is a strong expression of Lord Cottenham's opinion in *Daniel v. Dudley*, still there was no ultimate decision in that case; and the opinions of Lord Brougham in *Bulmer v. Jay* (3 Myl. & K. 197) and of Sir L. Shadwell in *Bulmer and Jay and Daniel v. Dudley* are opposed to what fell from Lord Cottenham in the case of *Daniel v. Dudley*.

Secondly, if the next of kin are entitled; they must be ascertained at the death of the tenant for life, and therefore the representative of the daughter is not entitled. *Briden v. Hewlett* (2 Myl. & K. 90. And see *Bird v. Wood*, 2 Sim. & S. 400, and *Miller v. Eaton*, Cooper, 272).

The Defendant, who has acted *bonâ fide*, under the opinion of counsel, in a case in which the highest authorities differ, ought to be allowed his costs.

Mr. Walpole, for Griffin, the other trustees.

Mr. Pemberton Leigh, in reply. Lord Brougham, in *Bulmer v. Jay* (3 Myl. & K. 204), held the fund liable to the wife's debts: this makes that case consistent with *Daniel v. Dudley*. *Briden v. Hewlett* turned on the peculiar expression "would," which was held to "import that [75] the testator intended his next of kin at the death of his mother." (See *Urquhart v. Urquhart*, V.-C. E., 20th of February 1844.) The case of *Daniel v. Dudley* was brought to the consideration of the Defendant Thorp prior to the institution of the suit. He refused to act on it.

THE MASTER OF THE ROLLS [Lord Langdale]. The first question in this case is, whether I am to hold that the words "executors or administrators" mean the next of kin; and I consider that question concluded by authority. The case of *Daniel v. Dudley* is entirely in point; and I could not consistently come to a different conclusion. But if that question were otherwise decided, and the limitation to the "executors or administrators" of the wife were taken to be a limitation to her next of kin, then the daughter who was next of kin of the lady living at the time of her death would be entitled, and she is represented by the Plaintiff. It seems therefore perfectly clear, in one way or the other, that the Plaintiff must be entitled.

It is matter of argument, in almost every case of this kind, whether you are to intend by the next of kin those who are really so at the time of the death of the party whose next of kin are to take, or whether you can collect from the instrument that there was an intention or reason to exclude them, and give the property to somebody else; but I think that in this case there is no sufficient foundation for the argument, and therefore, in whichever way you may view it, if you look at it as depending upon the authority of the case of *Daniel v. Dudley*, or upon the construction of the words, as a [76] limitation to the next of kin, in either case, it seems to me, the Plaintiff is entitled.

With respect to costs, the Court, I think, ought to have great regard to the difficult situation in which trustees are almost necessarily placed, in consequence of the various decisions which almost unavoidably arise in this Court, upon the construction of deeds and wills. I feel that this particular Defendant, having, as far as anything appears, fairly laid the case before counsel, and taken his advice and opinion upon it, is entitled to consideration in that respect, and would be entitled to his costs, if there were not other circumstances to countervail that particular circumstance. Now, taking the fact to have been, as it is alleged, that previous to the suit being instituted, this particular decision was pointed out to the Defendant, or to those who were advising him, and in which the point was clearly taken into consideration and decided, and that there is to be set against it only one case, in which the Judge who ultimately decided it, added a clause, the effect of which was to make it, in substance, in conformity with the case of *Daniel v. Dudley*, namely the clause, that the property was liable to the debts of the wife, I think in the result of this case I ought not to charge this trustee with costs, but that I ought not to give him any.

[77] ROBEY v. WHITEWOOD. Dec. 5, 1843.

A Defendant in custody for want of answer, not having been brought to the Bar of the Court within the limited period, was discharged. Held, that the Plaintiff might, by special order, proceed by a second attachment to enforce an answer.

By the 1 W. 4, c. 36, s. 15, rule 5, where a Defendant is in custody for not answering, and the Plaintiff shall not bring him to the Bar within the period there specified, "the sheriff, gaoler, &c., shall thereupon discharge him out of custody."

The Defendant in this case was taken under an attachment for not answering, and, not having been brought to the Bar within the proper time, was discharged. The Court, subsequently, on the 22d of June, directed, that, unless he answered within a fortnight, a new attachment should issue against him. (5 Beavan, 399.)

The Defendant having been served with the order then made, neglected to put in his answer, whereupon a second attachment issued against him. He was taken under this attachment on the 2d of November 1843, and was turned over to the Queen's Prison on the 4th of November.

A motion was now made to set aside the order of the 22d of June, the second attachment, and the subsequent proceedings, and that the Defendant might be discharged out of custody.

Mr. Teed, in support of the motion. The order of the 22d of June was irregular, the object of the statute was to compel the Plaintiff to use proper diligence, and, [78] to attain that object, it directs, that, in default of the Plaintiff proceeding in the manner therein pointed out, the Defendant, after a certain time, shall be released from custody; *Greening v. Greening* (1 Beavan, 121). This would be perfectly illusory, and the Defendant would be deprived of the benefit intended for him by the statute, if, being discharged, he might be brought back to prison a second time for the same cause. The fifth rule is imperative that he shall be discharged, and the Court has no discretion to remand him. If it had been intended to vest any discretion in the Court, the Act would have provided for it, as in the thirteenth rule.

At law, where a party has been arrested and discharged, he cannot be taken again for the same cause. The execution operates as a satisfaction. (See *Blackburn v. Stupart*, 2 East, 243; *Clarke v. Clement*, 6 T. R. 525; *Tanner v. Hague*, 7 T. R. 420.) So, here, the discharge from custody is a discharge from the contempt. By force of the statute, the neglect of the Plaintiff has also operated as a waiver or discharge of the contempt, for which it would be unjust to punish an individual a second time.

In *Williams v. Townshend* (6 Sim. 296) a Defendant having been discharged, as in the present case, Mr. Spence, for the Plaintiff, then moved for liberty to issue a fresh *subpoena* against the Defendant. But the Vice-Chancellor doubting, whether, if a fresh *subpoena* were issued, an attachment could be taken out upon it, desired a certificate to be obtained from the clerks in Court upon the point. The certificate was as follows:—"The clerks in Court are of opinion, that, although a new *sub*-[79]-*pens* may be issued, yet, as the former attachment was regularly enforced, a new attachment cannot be issued; and as the Defendant has not appeared to the bill, it may be dismissed against that Defendant without costs, and a supplemental bill in the nature of an original bill filed against her." It appears, from the report, that Mr. Spence accordingly moved to dismiss the bill, which was ordered.

Mr. Shebbeare, *contra*, was not called on by

THE MASTER OF THE ROLLS [Lord Langdale], who said, I cannot grant this application. The construction of this Act of Parliament is certainly very perplexing; and it is quite right that the subject of this motion should again be brought under my consideration. The Defendant appeared, and was afterwards taken into custody on an attachment for want of answer; and the Plaintiff having neglected to cause him to be brought to the Bar of the Court within the time limited by the Act, he was discharged from custody. Now comes the question what is to be done under the Act of Parliament. The Act states, that in case he shall not be brought up within the time limited, he is to be discharged without being required to pay any costs. The Act does not say he is to be discharged from the contempt, or that the Plaintiff is not

to be entitled to take any further steps in the cause: the question therefore is, whether the Court is to hold that the Plaintiff is deprived of his right to prosecute the suit, because the Act has discharged the Defendant without payment of costs.

The Plaintiff is not to be deprived of his rights by conjecture or inference; and I think that if the Act meant it, it would have stated that the Defendant, after his discharge, should not be further sued. What then is [80] this Court to do? The Defendant having been discharged, the officer of the Court knew that he was not to issue a new writ of attachment without the order of the Court, and having refused it, the matter was brought before me. The Plaintiff said the Defendant has been discharged; my bill is still on the file, and my suit depending; am I to be deprived of the right of prosecuting my suit? The Act of Parliament does not say so, and I am entitled to all that the Act has not taken from me.

I considered, on the former occasion, what was proper to be done; the course being doubtful, I did not act without consulting the officers of the Court, and, after consideration, I made the order complained of. The Defendant was served with notice of that order, and had the opportunity of putting in his answer, which he has not done.

This application must be refused, but without costs. It was not improper to bring the matter again to my attention.

Admitting that this proceeding is new, it is founded on this, that a man's rights are not to be taken away by inference, which would be the case if the Plaintiff were prevented going on with his suit.

[81] EVANS v. DAVIES. DAVIES v. EVANS. Nov. 17, 1843.

[Followed, *In re Heiron's Estate*, 1879, 12 Ch. D. 795.]

Mode of enforcing the sheriff's return to a writ of *fi. fa.* issuing out of Chancery.

By the decree, David Evans was ordered to pay a sum of £100, 14s. 6d. A writ of *feri facias* issued to compel payment with interest (Ordines Can. 142), which was forwarded to the Under-Sheriff of Cardigan for execution. The amount was levied on the 12th of October 1843.

On the 24th of October the usual *ex parte* order was made, upon petition of course at the Rolls, that the sheriff should return the writ *forthwith*.

This not having been obeyed, it was now moved that the sheriff should return the writ in six days after notice, or stand committed.

The proceedings by *fi. fa.* being new, the only question was as to the proper form of order now to be made.

Mr. Goodeve, in support of the motion, cited Smith's Pr. (1 Smith's Pr. 217 (3d edit.), and two MSS. cases of *Snell v. Waring* (Reg. Lib. 1767, A. fo. 293) and *Wyatt v. Austin* (13th of May 1825), furnished by Mr. Walker the registrar. (And see Wy. Pr. Reg. 51; *Clough v. Cross*, 2 Dickens, 555, 1 Newland's Pr. 92, and 1 Daniel's Pr. 590.)

[82] From the affidavits it appeared that the sheriff had been repeatedly urged to make the return.

THE MASTER OF THE ROLLS ordered that the sheriff should, within six days after notice of the order, return the writ, or stand committed, and that he should pay the costs of the two applications.

The London agents of the under-sheriff were alone served with the order of the 24th of October; and in drawing up the present order, a question arose, whether that was sufficient (see the 3 & 4 W. 4, c. 42, s. 20), but the matter was arranged between the parties.

[82] REYNELL v. REYNELL. Dec. 13, 1843.

An order of the Master, giving the Defendant three weeks to answer after the Plaintiff had amended his bill, which was defective for want of parties, discharged as irregular.

This bill was filed on the 21st of July 1843. On the 6th of November, and before the Defendant had answered, the Plaintiff gave notice to the Defendant, that on the 15th of July 1843 he had conveyed one moiety of the estates mentioned in the bill, "to Charles Wilson, his heirs and assigns, to uses, for the benefit of R. S. M. Sprye and Henrietta D. his wife."

The Defendant's solicitor thereupon wrote to the Plaintiff's solicitor, to know if he intended to obtain an order to amend, by adding those persons parties, and in reply was informed, on the 10th of November, "that no amendment would be made until after the Defendant's answer had been put in."

[83] On the 16th of November the Master ordered "that the Defendant should have three weeks' time to plead, answer, or demur to the Plaintiff's bill, not demurring alone, after the Plaintiff should have amended his bill."

Mr. Kindersley now moved to discharge this order, on the ground that it was irregular, and that the Master had no authority to make an order in this form.

Mr. Piggott, *contra*, contended, that the order was valid, though perhaps unusual, and that it was one which would have the effect of saving considerable expence and delay to the parties.

THE MASTER OF THE ROLLS [Lord Langdale]. The Master must have been taken by surprise in this case; I think the order cannot be supported. Let it be discharged without costs, and let the Defendant have three weeks' time to answer.

[83] ELLIS v. GRIFFITHS. Jan. 11, 1844.

In a foreclosure suit, the mortgagee having received rents between the date of the Master's report and the day appointed for payment, the Court, on motion, referred it back to the Master to continue the accounts, and to fix a new day.

A decree was made for foreclosure, and a day was appointed for payment at the Rolls Chapel of £4961, 2s. 9d., the amount by the Master's report found to be due on that day, and in default the Defendant was to be foreclosed.

[84] The mortgagee, being in possession, received half a year's rent, after the date of the report, and before the day appointed for payment. (*Garlick v. Jackson*, 4 Beavan, 154; and *Alden v. Foster*, 5 Beavan, 592.) He attended at the Rolls on the day named (14th November 1843), but no person tendered the amount.

The balance having been altered by the receipt of the rent, the mortgagee now came, by motion, to refer it back to the Master to carry on the subsequent account, and to appoint a fresh day to redeem.

Mr. Stinton, in support of the application.

THE MASTER OF THE ROLLS [Lord Langdale] made the order.

[84] CROFT v. DAY. Dec. 18, 1843.

[See *Metzler v. Wood*, 1878, 8 Ch. D. 608; *Turton v. Turton*, 1889, 42 Ch. D. 144; *Tussaud v. Tussaud*, 1890, 44 Ch. D. 691; *Reddaway v. Banham* [1896], A. C. 209. Cf. *Valentine Meat Juice Company v. Valentine Extract Company, Limited*, 1899, 1900, 17 R. P. C. 1, 673; *Cash v. Cash*, 1901, 1902, 18 R. P. C. 213; 19 R. P. C. 181; *Morrall v. Hessin*, 1903, 20 R. P. C. 429.]

A blacking manufactory had long been carried on under the firm of Day & Martin, at 97 High Holborn. The executors of the survivor continued the business under

the same name. A person of the name of Day having obtained the authority of one Martin to use his name, set up the same trade at 90½ Holborn Hill, and sold blacking as of the manufacture of Day & Martin, 90½ Holborn Hill, in bottles and with labels having a general resemblance to those of the original firm. He was restrained by injunction.

Principles on which the Court interferes to prevent the use of trade marks.

This was a motion, on behalf of the executors of Mr. Day, the well-known blacking maker, to restrain the Defendant, his nephew, from selling blacking manufactured by him, in bottles having affixed thereto labels, being copies, or fac-similes or imitations with colourable variations only, of those used by the firm of Day & Martin, or any labels which should repre-[85]-sent, or have the appearance of representing, the said firm of Day & Martin as manufacturers of the composition or blacking described in such labels, and from using trade cards of the same description.

It appeared from the case of the Plaintiffs, that in 1801 Charles Day and Benjamin Martin entered into partnership as blacking manufacturers, for the term of 21 years, and carried on the business at 97 High Holborn. In 1808 Martin transferred his interest to Day, who was to be at liberty to use Martin's name for the remainder of the 21 years. This term was afterwards extended to 25 years, from the year 1820, determinable on the death of Martin, and they agreed (but how did not appear) to be partners for that period.

Martin died in 1834, and Day died in 1836, and the business was carried on in the names of Day & Martin by Day's executors. The Defendant Day, the testator's nephew, had recently set up as a blacking maker at No. 90½ Holborn Hill, and had sold blacking in similar bottles, and with similar labels (with some variations), to those which had heretofore been used by Day & Martin, and to those now used by the executors of Day. The variation was thus described in the affidavit:—"Saith, that the name of the article sold as being real Japan blacking made by Day & Martin, and the description and directions for the use of the said article, and the price, and signature of the names Day & Martin, contained in the labels of the Defendant, are in the same precise words, and (with very trifling and unimportant variations) are in the same character and description of type, as the name of the article to be sold, and the description, and directions for use, and the price, and the signature of the said firm in the label used by the firm of Day & Martin as foresaid; and the only difference in the [86] two labels is, that the Defendant has substituted the Royal arms in the centre of the label, for the representation or drawing of the manufactory of the firm contained on the labels of the firm, and has substituted in the label the figures and words 90½ Holborn Hill, for the figures and words 97 High Holborn, contained in the label of the firm, and has omitted to insert the figures 90½ the names Day & Martin, in the manner in which those words or names are inserted by the firm in their said figures 97."

The Defendant by his affidavit stated, that the carts of the Plaintiffs now bore the names of Charles Day and Richard, and not Benjamin, Martin. That previously to the Defendant's vending or offering for sale any blacking, he applied to an intimate acquaintance of his, of the name of Martin, to join him in the manufacture and sale hereof, and obtained permission to use his name, in conjunction with his own, as manufacturers and vendors of blacking, and that he, the Defendant, was now in treaty, and only waiting the result of this suit, finally to settle the terms of a partnership with Mr. Martin, for carrying on the said business of blacking manufacturers.

Mr. Tinney, Mr. Purvis, and Mr. Toller, in support of the motion, argued, that the Defendant was intentionally practising a fraud upon the Plaintiffs, and a deception on the public; and that whatever might be his right to manufacture and sell blacking in his own name, still he had no right or authority to assume the additional name of Martin, and use labels, &c., whose general character was so similar to that which the Plaintiffs and the testator had long been in the habit of using, as to induce purchasers to believe that the article [87] sold by the Defendant was manufactured by and purchased from the Plaintiffs.

Mr. Turner and Mr. Mylne, *contra*, contended that the Defendant had an undoubted right to affix his own name to his own manufacture, and that he had authority to add

that of Mr. Martin, with whom he was in treaty for a partnership. That there was a marked difference between the labels, and as to those points in which there was a resemblance, they had long been adopted by the trade in general.

That the Plaintiffs had practised a deception on the public, by representing the manufacture to be that of Day & Martin, while no person of those names was concerned therein; that consequently the Plaintiffs came before the Court under circumstances to disentitle them to its assistance.

Knott v. Morgan (2 Keen, 213), *Perry v. Truefitt* (6 Beavan, 66), were referred to.

THE MASTER OF THE ROLLS [Lord Langdale] (without hearing a reply). What is proper to be done in cases of this kind must, more or less, depend upon the circumstances which attend them.

There are cases like that of the London Conveyance Company, in which the injunction is granted at once; there are cases like that of the Mexican Balm, in which the injunction is refused until the Plaintiff has established his right at law. In short, in such cases, there must be a great variety of circumstances; and the Court must deal with each case according to the nature of its peculiar circumstances.

[88] The accusation which is made against this Defendant is this:—that he is selling goods, under forms and symbols of such a nature and character, as will induce the public to believe, that he is selling the goods which are manufactured at the manufactory which belonged to the testator in this cause. It has been very correctly said, that the principle, in these cases, is this:—that no man has a right to sell his own goods as the goods of another. You may express the same principle in a different form, and say that no man has a right to dress himself in colours, or adopt and bear symbols, to which he has no peculiar or exclusive right, and thereby personate another person, for the purpose of inducing the public to suppose, either that he is that other person, or that he is connected with and selling the manufacture of such other person, while he is really selling his own. It is perfectly manifest, that to do these things is to commit a fraud, and a very gross fraud. I stated, upon a former occasion, that, in my opinion, the right which any person may have to the protection of this Court, does not depend upon any exclusive right which he may be supposed to have to a particular name, or to a particular form of words. His right is to be protected against fraud, and fraud may be practised against him by means of a name, though the person practising it may have a perfect right to use that name, provided he does not accompany the use of it with such other circumstances as to effect a fraud upon others.

It is perfectly manifest, that two things are required for the accomplishment of a fraud such as is here contemplated. First, there must be such a general resemblance of the forms, words, symbols, and accompaniments as to mislead the public. And secondly, a sufficient distinctive individuality must be preserved, so as to procure for the person himself the benefit of that [89] deception which the general resemblance is calculated to produce. To have a copy of the thing would not do, for though it might mislead the public in one respect, it would lead them back to the place where they were to get the genuine article, an imitation of which is improperly sought to be sold. For the accomplishment of such a fraud it is necessary, in the first instance, to mislead the public, and in the next place, to secure a benefit to the party practising the deception by preserving his own individuality.

There are many distinctions, even more than have been stated, between these two labels. It is truly said, that if anyone takes upon himself to study these two labels he will find several marks of distinction. On the other hand, the colours are of the same nature, the labels are exactly of the same size, the letters are arranged precisely in the same mode, and the very same name appears on the face of the jars or bottles in which the blacking is put. It appears, therefore, to me that there is quite sufficient to mislead the ordinary run of persons, and that the object of the Defendant is, to persuade the public that this new establishment is, in some way or other, connected with the old firm or manufacturer, and at the same time to get purchasers to go to 90½ Holborn Hill, and not to 97 High Holborn. I think what has been done here is quite calculated to effect that purpose, and the Defendant must be restrained.

My decision does not depend on any peculiar or exclusive right the Plaintiffs have to use the names Day & Martin, but upon the fact of the Defendant using them

names in connection with certain circumstances, and in a manner calculated to mislead the public, and to enable the Defendant to obtain, at the expense of Day's estate, a benefit for himself, to which he is not, [90] in fair and honest dealing, entitled. Such being my opinion, I must grant the injunction restraining the Defendant from carrying on that deception. He has a right to carry on the business of a blacking manufacturer honestly and fairly; he has a right to the use of his own name; I will not do anything to debar him from the use of that, or any other name calculated to benefit himself in an honest way; but I must prevent him from using it in such a way as to deceive and defraud the public, and obtain for himself, at the expense of the Plaintiffs, an undue and improper advantage.

The form of the injunction was discussed, when

THE MASTER OF THE ROLLS, after stating that he was inclined to rely on the terms of the injunction in *Knott v. Morgan*, as that case had been the subject of appeal, said, he would himself settle the terms of the injunction.

By the terms of the injunction, the Defendant, his servants, &c., were restrained from selling, or exposing for sale, or procuring to be sold, any composition or blacking described as, or purporting to be, blacking manufactured by Day & Martin, in bottles, having affixed thereto such labels as in the Complainants' bill mentioned, or any other labels, so contrived or expressed, as, by colourable imitation or otherwise, to represent the composition or blacking sold by the Defendant, to be the same as the composition or blacking manufactured and sold by John Weston (the manager), for the benefit of the estate of Charles Day the testator; and from using trade cards, so contrived or expressed, as to represent that any composition or blacking sold or proposed to be sold by the Defendant, is the same as the composition or blacking manufactured or sold by John Weston.

[91] STORY v. TONGE. Jan. 23, 25, Feb. 20, 1844.

[S. C. 13 L. J. Ch. 191; 8 Jur. 566.]

Whether a *feme covert*, who is entitled to a reversionary interest in a chose in action, can, by obtaining a release of the prior interest, effectually dispose of the property, *quære*.

The testator gave his residuary personal estate to his widow *durante viduitate*, and on her decease, upon certain trusts, under which Elizabeth, the wife of G. L. Moore, was entitled to a vested interest in one-ninth part, immediately expectant on the decease or marriage of the widow.

The property amounted in the whole to about £1800, and consisted of a mortgage, and of a sum of £312 consols in Court. The parties being desirous of compromising the suit, the widow released unto G. L. Moore and wife her interest in one-ninth of the residuary estate, the object being, to reduce the reversionary interest of Mrs. Moore into one in possession, for the purpose of effecting the compromise.

A petition was now presented, praying a division of the consols in the manner agreed upon, and the question was whether, under these circumstances, the share of Mrs. Moore, a married woman, could be effectually dealt with. (See *Purdew v. Jackson*, 1 Russ. 1; *Honner v. Morton*, 3 Russ. 65; *Stiffe v. Everitt*, 1 Myl. & Cr. 37.)

Mr. Rogers, in support of the petition, argued that the interest was no longer reversionary, and could therefore be effectually disposed of so as to bind the wife, if she survived. He cited the following authorities:—*Dorwell v. Earle*, 12 Ves. 473; *Lewin on Trusts*, 296 (2d edit.); *Wilson v. Oldham*, *Ibid.* 297; *Bean v. [92] Sykes*, 2 Hayes on Convey. 640 (5th edit.); *Lachton v. Adams*, 5 Law J. Rep. (N. S.) Chanc. 382; 6 Jarman's Convey. 236 (1st ed.); *Preston v. Smelt*, 2 Leg. Ex. 501; *Re Silcock's Estate*, 3 Russ. 369.

THE MASTER OF THE ROLLS [Lord Langdale], after consideration, thought that the principle involved in this case was of too much importance to be decided on petition, and intimated that a bill must be filed to accomplish the wishes of the parties.

[92] BUSTARD v. SAUNDERS. Nov. 9, 1843.

[S. C. 7 Jur. 986. See *Newill v. Newill*, 1871, 72, L. R. 12 Eq. 436; reversed, L. R. 7 Ch. 253. *In re Seyton*, 1887, 34 Ch. D. 515.]

A sum of money was remitted to England, to be secured for the benefit of a married woman and her children, so that the same might not come to the hands of her husband. Held, that they took as joint-tenants.

In this case, Achilles Preston the younger, some time before the year 1764, remitted from India to Achilles Preston the elder, his father, and Alexander Whitchurch his uncle, £500, "which he directed to be secured for the benefit of his sister Ann, then the wife of Cuthbert Allanson, and her children, so that the same might not come to the hands or power of her husband."

Ann Allanson had three children only, all of whom were born previous to the year 1764. Ann Allanson survived all her children, and died in 1812.

The question was, whether the mother took this fund for life, with remainder to her children, or whether they took in a class as joint-tenants.

Mr. Pemberton Leigh and Mr. Willcock, argued that the mother and her children, took as joint-tenants, and therefore that the mother became entitled to the whole by survivorship.

[93] Mr. Faber, for the Defendant. There was a direction to secure the sum in question for the sister and her children, excluding the husband. A settlement was therefore contemplated, and in carrying into effect an executory agreement for a settlement expressed in such terms, the Court would give a life-estate to the parent, with remainder to the children as tenants in common.

The following cases were cited, *Jubber v. Jubber* (9 Sim. 503), *De Witte v. De Witte* (11 Sim. 41), *Vaughan v. The Marquis of Headfort* (10 Sim. 639), *Robinson v. Tickell* (8 Ves. 142).

THE MASTER OF THE ROLLS [Lord Langdale] said, he should follow the decision of *De Witte v. De Witte*, and he held that the mother and children took the £500 as joint-tenants.

[93] MAN v. RICKETTS. Feb. 20, 21, 22, 1844.

[Affirmed with variation, sub nom. *Ricketts v. Turquand*, 1 H. L. C. 472; 9 E. R. 842. For other proceedings, see 7 Beav. 484; 9 Beav. 4. See *Webb v. Byng*, 1855, 1 Kay & J. 580; *Whitfield v. Langdale*, 1875, 1 Ch. D. 61. Followed, *Jennings v. Jennings*, 1878, 1 L. R. Ir. 552. Distinguished, *King v. King*, 1884, 13 L. R. Ir. 531.]

An heir who disputes the will, may, by long acquiescence, lose his right to have its validity tried at law, upon an issue *devisavit vel non*, and where an heir had acted as devisee in trust under the will for a great number of years, he was refused an issue even to try the question of parcels.

A will thirty years old, produced from the proper custody, proves itself. The thirty years are to be computed from the date of the will, and not from the death of the testator, and are calculated as at the time of its production.

Heir at law being also the devisee in trust, misconducting his defence, ordered to pay all the costs of the suit.

In the year 1802 the testator, George Crawford Ricketts, purchased a mansion and 166 acres of land adjoining thereto, which together were generally called and known as the Ashford Hall estate.

[94] In 1804 the testator, on the marriage of his eldest son, the Defendant Thomas Bourke Ricketts, charged a portion of this estate with a sum of £4000 for the benefit of the Defendant, his wife, and the children of the marriage.

On the 26th of April 1808 the testator made his will, whereby he devised as follows:—"As it is my wish and desire that all my estate in Shropshire, called Ashford Hall, should be sold, I do therefore give and devise the same unto my son Thomas B. Ricketts, and my son-in-law the Rev. R. F. Hallifax," "in trust to sell,"

&c. "The proceeds of such sale, after deducting what may be due on the mortgage given on my eldest son's marriage, I give and bequeath unto my sons and daughters in equal proportions share and share alike."

The testator died in April 1811, leaving the Defendant Thomas B. Ricketts his heir at law; and shortly after in the same month, the will was proved by Thomas B. Ricketts and R. F. Hallifax.

In October 1811 the trustees put up the whole property, including 166 acres, for sale, and in the particulars the whole was treated as vested in devisees in trust for sale; the property, however, was not then sold. In 1812 it was again advertised for sale, in terms which shewed that the whole was included. This second attempt to sell was again unsuccessful. In 1823 they sold a part of the estate to Miss Buckley, and in the correspondence of the Defendant and on the treaty, no doubt was made either as to the name of the estate, or as to what had passed by the devise. The conveyance to Miss Buckley was executed in 1824, and thereby, after reciting the will, &c., the trustees conveyed, and [95] the Defendant Thomas Bourke Ricketts, as heir at law, confirmed, the portion of the property purchased.

From the death of the testator, the Defendant Thomas Bourke Ricketts retained possession of the property unsold. In 1831, one of the testator's children having become bankrupt, his assignees, in December 1836, filed this bill against the trustees of the will and others, to have the trusts of the will performed, for an account of the proceeds of the property sold, and of the rents, and for the sale of the remainder. The will was not proved by the attesting witnesses, but was produced only from the proper custody, it being conceived that, being thirty years old, it proved itself.

Mr. Kindersley, Mr. Turner, and Mr. Hallett, for the Plaintiffs.

Mr. C. P. Cooper, and Mr. Kent, for the Defendant Thomas B. Ricketts, resisted the claim of the Plaintiffs, insisting, first, that the will had not been properly proved in the cause; that if the mere production of an ancient will was sufficient proof, the thirty years must be computed from the death of the party, when it first had any operation, and must end before the filing of the bill, or at all events upon the filing of the answer contesting its validity (1); secondly, that under the devise of the estate called Ashford Hall, the hall or mansion and a few acres of land passed, and not the whole 166 acres; thirdly, that he was not accountable for the intermediate rents, or at all events not for more than six years; and, [96] lastly, that he was entitled to an issue *devisee vel non* to try the validity of the will, or, at least, to determine the question of parcels.

Mr. Tinney, Mr. Roupell, and Mr. Willcock, for other Defendants.

THE MASTER OF THE ROLLS [Lord Langdale]. In such a case as this, I ought not to ask for a reply. It seems to me too clear a case. The only point on which I had a doubt was, whether under any circumstances the heir at law might not have an issue *devisee vel non*. Three points have been raised here by way of defence. First, that it is not proved that there was any such will; secondly, supposing there was such a will, that it does not appear that the whole of this estate passed by it; thirdly, if it shall appear there was such a will, and that such an estate passed by it, then that the Defendant is not bound to account for the rents and profits beyond six years.

This case certainly surpasses anything I have met with. The testator had purchased an estate in Shropshire, which was called the estate of Ashford Hall, or Ashford Hall estate, which estate is described in several deeds executed before the date of the will; the testator then makes this will, "As it is my wish and desire," &c.

The will was dated on the 26th of April 1808. The testator died in April 1811, and the will was proved a very short time afterwards. The Defendant Thomas Bourke Ricketts, who was himself entitled to the benefit of a mortgage on the greatest part, though not the whole of the property, accepted the devise, and, with his co-[97]-trustee, took upon himself the execution of the trust. In the same year he advertised the whole for sale, and described the whole as the Ashford Hall estate, or the estate

(1) See *M'Kenire v. Fraser*, 9 Ves. 5; *Doe dem. Oldham v. Wolley*, 8 Barn. & Cr. 22; *Holton v. Lloyd*, 1 Mol. 30. On the last point see the cases of *Tucker v. Sanger*, *M'Clelland*, 424. S. C. 13 Price, 119, and see *Earl of Fingal v. Blake*, 1 Molloy, 113.

called Ashford Hall, and as consisting of 166 acres of land, being the whole of the land and property which is now in question. A sale was not then effected, and in the following year, he, consistently with the duty which was imposed upon him, together with Mr. Hallifax, again advertized the property for sale, not in the same words, but in words quite sufficiently descriptive to shew that the whole was meant. It is therefore a matter beyond all question, and a purely idle thing to doubt, for a moment, that he and his co-trustee accepted the devise made to them in trust, that they undertook to perform the trust, and at that time fairly, honestly, and in due discharge of their duty endeavoured to perform the trust, by selling the estate, in order that the proceeds might be divided, according to the direction of the will. The second attempt to sell was not more successful than the first. Several years elapsed which have not been accounted for, but there appears to have been a treaty, which ended successfully in the sale of a portion of the estate to Miss Buckley. The Defendant, Mr. Ricketts, took an active part upon that occasion, and we have his correspondence on the treaty; in which there appears to have been not the least doubt or hesitation as to the name of the estate, as to what passed by the devise, or as to the duty of himself and his co-trustee.

Upon the performance of the contract with Miss Buckley, a conveyance was executed to her, in which the testator's will is recited, and this gentleman and his co-trustee, as trustees, join in conveying. It is clear from this deed, that the particular attention of this gentleman was called, and must have been called, at the [98] time, to his own character as heir at law; for after conveying as trustee, he, in his character of heir, ratifies and confirms what had been previously done by the trustees; yet he now affects to say, in the first place, that there was no such duly executed will, and, in the next place, that a very small portion, and not the whole of these lands, passed by the will. This is by no means all. There continue a series of transactions, further negotiations with this lady, and a correspondence, which further evidences the nature of the case. It certainly is not without considerable surprise that one hears such a defence raised after what has taken place.

Afterwards one of his brothers becomes a bankrupt, and the estate, as to two-sixth parts of it, becomes vested in his assignees, and then in the year 1835 this gentleman, being called upon to give an account of this trust, does not raise the smallest question as to the will, or as to what passed by it, or as to what was his duty as trustee in regard to the sale of the estate. He however sets up a most extraordinary claim; for, admitting that there was this trust for a sale, and that it was to be made for the benefit of himself and his brothers and sisters, he says, "Oh, but there is no devise at all of the rents intermediate between the death of the testator and the sale of the estate. I may keep the estate unsold for forty years, and the persons who are objects of the trust are entitled to no benefit from the rents to accrue in the meantime." That is what he seems to have said in his examination under the bankruptcy.

It is really not worth while to go any further, though there are other things stated, as the account, &c., of the proof of which I am not well satisfied. I have stated, however, far more than enough to make it absolutely [99] incumbent on the Court to say, that there is abundant proof of his continued acting as trustee. It is proved that he has acted as trustee, claimed the right to be devisee of the trust, admitted that he was to perform his trust from the time of the testator's death for the full period of twenty-five years, and it is plain that he has done this with his eyes constantly open, and perfectly well knowing all the circumstances; there is not a pretence to the contrary, except what I shall presently notice.

The assignees of the bankrupt brother filed this bill in December 1836. The evasive and improper conduct of this Defendant, as to the mode of answering the bill, can have no effect on his rights at the hearing; but he did certainly, in the most extraordinary manner, evade answering the bill, for reasons which would bear no consideration at all. However, at length an answer is obtained, and what does he say and put in issue? He admits, in the third answer, that the testator was seized, that he duly made and published his last will, of such date, and to such purport and effect as in the bill mentioned. He admits the testator was of sound mind. Whether it was executed so as to pass freehold estates, he submits to the Court; he raises a question upon that. Then he states that this Ashford Hall estate, which he had

admitted over and over again to consist of 166 acres of land, consisted of a messuage, garden, and so on, and ten acres of land. He repeats the same thing over and over again in different parts of the answer, and says afterwards, that, according to his knowledge and belief, the only estate in Shropshire called Ashford Hall which passed by the will, and is thereby directed to be sold, was a capital messuage and appurtenances, together with part only of his other freehold estate.

[100] Does he or not mean to admit that that part passed? I am very much disposed to think, if it were necessary to determine that question, that he did admit that part passed, consequently that there was a good devise, and consequently that he was not entitled to have an issue of *devisavit vel non*. However, it is ambiguous: the answer is prepared with studied ambiguity, for the very purpose, I presume, of preventing him from committing himself, in the way he might have done, if he had said there was a good devise of this or not a good devise of the other part of the estate. He did not wish to do that, but to express himself in such ambiguous terms as to avoid the consequences which might arise from a distinct statement of the fact.

I was very anxious to ascertain, among other things, what it was that this gentleman supposed he had discovered after this bill had been filed, and when he was called upon to state what passed by the devise, and which discovery caused a total alteration of the opinion, upon which he had, advisedly, acted for not less than twenty-five years. What he says is this, "that he did not know, until he was called upon by the original bill to state what the Ashford Hall estate consisted of, that the testator was seised of anything so called except his mansion-house in Shropshire, or of any real estate which would not have passed under a devise of his mansion-house in Shropshire called Ashford Hall; and the Defendant then discovered, for the first time, that the testator had shrubberies and fish-pools, which had been purchased from an adjoining estate a few years before he purchased the property, and were then so called, as well as the said mansion-house, and would not have passed under a devise of the mere mansion-house only."

[101] I was curious to see how these things were described in these deeds—it was rather important to do so. The deeds convey "all that capital messuage or mansion-house, with the gardens, shrubberies, stables, fish-pools, coach-house, building, and appurtenances thereto belonging, called Ashford Hall." Now he has not attempted to shew by the least distinction that those words do not apply.

The real question is, whether I am to direct an issue upon one point or the other. The Defendant's counsel does not desire that I should take any admission from him, therefore I will consider it as not admitted at all. The will is proved sufficiently for this Court to establish it; it is proved to be thirty years old from the date to the time when it is produced; and sufficient authority has been produced from the decisions at common law that this is enough. Since I came into Court, the registrar has reminded me that I had a case here, on the same subject-matter, some time since, and in which the same point was decided. I apprehend that this is perfectly clear, and that the proof is sufficient. This is, therefore, a case of the will being proved, and the question is, whether it is to be established without an issue *devisavit vel non*. I quite concur in the opinion that was expressed by Chief Baron Alexander in the case cited. It is the ordinary course to grant an issue at the request of an heir, but it is not a necessary course, when the special circumstances are such as to make it manifestly improper. Now no case has been produced from the books, in which, upon special reasons assigned, the heir at law has been refused such an issue to try his right at law, and I have not met with any such case myself; the case before Chief Baron Alexander was not one, for there it was granted. I am therefore under the necessity of making a precedent in this case. Mr. [102] Ricketts will have the benefit of considering it as a point newly decided, if he thinks fit to do so. I adopt, however, the opinion of Chief Baron Alexander, in which I concur; and the question is, whether the special circumstances of this case are such, as to make it proper to act upon that opinion. I am of opinion they are. What, shall a trustee, taking upon himself a trust in the year 1811, proceeding towards the execution of it, carrying part of it into execution, procuring the payment to himself of the mortgage, which was to be paid in execution of that trust, and proceeding throughout the whole

course of this business in the manner he has done in this case, when the will is produced and proved, when he himself does not deny its validity by his answer, be permitted to say, after all this length of time, "Whatever inconvenience may happen to the parties, I have a right to have this matter tried by an issue *devisavit vel non*!" I am of opinion that he is not so entitled. The special circumstances of this case seem to me to take it out of the general rule, and bring it within the particular rule mentioned by Chief Baron Alexander. I have great doubt whether this gentleman will ever, in any way whatever, be brought to say that he does not believe that the will was duly executed by his father. I believe there are boundaries beyond which he will not go.

The next question is, whether I am to direct an issue to try parcel or no parcel. It would be absurd to do it after what has passed here, after what is contained in these deeds, after the description given by this gentleman himself, after the correspondence produced under his own hand, in which he admits all these things, and upon his statement in his answer, that the only things he has described are the fishponds and the shrubbery, which were acquired a few years before the testator purchased the estate. It would be absurd if I were to do it. This Court is not bound to direct an issue to try a matter of this kind, if it is satisfied upon the evidence before it. I am clearly satisfied the whole of this passed, and I must, therefore, so declare, in the decree I am to make.

The next question is, whether there is to be an account of the rents. Can anybody doubt that a trustee, taking possession of an estate, receiving the rents, applying them to his own use, professing, down to the year 1835, that he intends to execute the trust, professing beyond all doubt or question, therefore, that he holds the possession for the use of the *cestui que trust*—are we to be told, there has been no demand of it, because they have confided in his professions, that the trust was to be executed by sale, down to the time when this bill was filed in 1836, and that, therefore, they were not to call upon him for any accounts whatever, but that he is to be allowed to apply the rents he has received for his *cestui que trust* to his own use! Upon none of these points do I feel that I ought to hesitate at all.

Upon the first point, it is very possible this is a new decision, and it is very possible it may deserve consideration elsewhere. I have, however, stated what is my deliberate opinion upon it.

The will must be established. It must be declared that the whole of the testator's land in Shropshire passed by this will. Then there must be an account taken of the rents as prayed for by the bill, except only that the Plaintiff must not have annual rests in the accounts. In taking the accounts care must be taken with respect to the mortgage. This gentleman was entitled to have the interest of the mortgage, therefore, in taking [104] the accounts, he must be allowed up to the time when the mortgage was paid off. There must be an occupation rent set upon this property during the time the Defendant was in the occupation of the property.

Lastly comes the question as to the costs, and I am bound to take into consideration the whole conduct of the Defendant. He must pay the costs of this suit up to this hearing. Reserve the costs of the subsequent proceedings. The costs of the Co-defendants must be paid by the Plaintiffs in the first instance, and they to recover them over against the Defendant.

[104] *In re BROUGH.* Jan. 16, 19, 1844.

The clerk at the Enrolment Office cannot receive an enrolment conditionally, and the Master of the Rolls refused to cancel or vacate an enrolment of a specification which had been left at the office, and had been enrolled, notwithstanding directions not to enrol it until further order.

This was a petition of a patentee, praying that the enrolment of his patent might be cancelled or vacated, under the following circumstances, stated in the petition:—

The Petitioner obtained a patent, dated the 3d of June 1843, subject to the usual conditions for making it void in default of the patentee enrolling a specification within six months "next and immediately after the date of the letters patent."

The specification being acknowledged by the Petitioner was, on Monday the 4th day of December 1843, taken to the Enrolment Office and delivered to a clerk in attendance there, with written instructions annexed not to enrol it until further order, it being doubtful, [105] whether the enrolment of it on Monday the 4th of December would be in sufficient time to prevent the letters patent from being void.

The written instructions were as follows :—"Brough's specification. To be left at the Enrolment Office; but as yesterday was the last day, and it being doubtful whether the patent is not void, although the last day was on a Sunday, we do not wish it enrolled at present, until further advised as to its utility. If we wish it to be enrolled, it will, of course, be marked as of to-day."

On the 6th of December the Petitioner again called at the Enrolment Office, when the clerk referred to the fact of having received the specifications, upon the terms of the aforesaid instructions, but stated that if it was intended to be enrolled, it was necessary that he should be informed of such intention.

The Petitioner, being advised not to rely on the first patent, applied for a new grant, and there being no opposition, it was probable that the new grant would be completed in a fortnight.

The Petitioner's agent, on the 9th of January, applied at the Enrolment Office for the specification "when he was informed, to his great surprise, that the same had been enrolled, notwithstanding the written instructions to the contrary." The agent required that it might be cancelled, but was ultimately informed that it could not be cancelled without an order of the Master of the Rolls.

The patentee, by his petition, stated, that his interest might be most prejudicially affected, if such unauthorised enrolment was allowed to remain uncanceled and [106] unvacated, and that he would be prepared to enrol a specification of his invention, as soon as the letters patent for which he was applying were sealed, which would be in about a fortnight. He prayed that the enrolment of the patent might be cancelled or vacated.

Mr. James Parker, in support of the petition, referred to *Ex parte Peck* (1 Bro. C. C. 578).

Jan. 19. THE MASTER OF THE ROLLS [Lord Langdale]. I cannot make any order on this petition. The case cited of *Ex parte Beck* does not apply; for on enquiry, I find, that in that case there had been no enrolment, and the question was, if there was to be an amendment or a new patent.

Here the specification was taken to the Enrolment Office on the 4th of December, and nothing was done until the 9th of January.

I am of opinion that the specification can be delivered into the office only for the purpose of being enrolled. To make the enrolment is in such a case the sole business of the office; the Petitioner had no right to give special directions to the clerk there, and if he meant to keep any control over the enrolment, he ought to have kept the specification in his own hands. It was no part of the officer's duty to act as the agent of the Petitioner in such a matter.

I had rather not say more as to this matter, or as to the effect of the 3d of December being a Sunday, further, than it appears to me a serious question, whether the Petitioner can be relieved by any authority less than an Act of Parliament.

[107] MARQUIS OF HERTFORD v. LORD LOWTHER. (THE COUNTESS OF BERCHTOLDT'S CASE.) June 9, 10, Dec. 12, 1843.

[S. C. 13 L. J. Ch. 41; 7 Jur. 1098.]

A testator bequeathed as follows :—"To M. C. B., besides Austrian metalliques for 104,000 florins, I give £5000." By a subsequent codicil he bequeathed as follows :—"Whereas, I have by indorsement on two little parcels, containing 104 Austrian bonds of 1000 florins each, given them to M. C. B.; I confirm said disposition, and add to it £20,000." Held, first, that the testator, as to the Austrian securities, referred to the same subject-matter; and the testator not possessing such securities at his death, that the gift of them failed; and, secondly,

that the gifts of the two sums of £5000 and £20,000 (though both were connected with the gift of the same Austrian securities) were cumulative and not substitutional.

Where a testator, having given a general legacy, by a subsequent instrument makes it specific, the ademption of the specific legacy, without more, will not set up the general legacy.

The late Marquis of Hertford, the testator in this cause, having, by several codicils to his will, made large provisions for his ward the Countess Berchtoldt, by a codicil dated Boulogne-sur-Mer, 17th of September 1835, bequeathed as follows:—"To Matilda Countess Berchtoldt, besides Austrian metalliques for 104,000 florins, I give £5000."

By another codicil, dated Milan, 27th of January 1837, he bequeathed as follows:—"Whereas I have, by indorsement on two little parcels containing 104 Austrian bonds of 1000 florins each, given them to Matilda Countess Berchtoldt, I confirm said disposition, and add to it £20,000 English currency."

By a subsequent codicil, dated in April 1839, he ratified and confirmed his will and codicil.

The Master, by his separate report, made pursuant to the decree, found, that the testator did not die possessed of the Austrian metalliques for 104,000 florins (mentioned in the codicil of the 17th of September 1835), or of the 104 Austrian bonds (mentioned in the codicil of the 27th of January 1837); and he therefore found, that the legacies of Austrian metalliques for 104,000 florins, and 104 Austrian bonds of 1000 florins each, [108] were adeemed. And he further found, that the legacy of £20,000, mentioned in the codicil of the 27th of January 1837 was a substitution for the legacy of £5000 mentioned in the codicil of the 17th of September 1835; and in conformity with the finding, the Master, in taking an account of what was due to the Countess Berchtoldt, excluded the bequests contained in the codicil of the 17th of September 1835, and the bequest of 104 Austrian bonds of 1000 florins each, mentioned in the codicil of the 27th of January 1837.

The countess took exceptions to the Master's report, and, admitting the legacy of 104 Austrian bonds for 1000 florins each was a specific legacy and adeemed, she claimed to be entitled to the legacies alleged to be given by the codicil of the 17th of September 1835, and also to the £20,000 given by the codicil of the 27th of January 1837.

Mr. G. Turner and Mr. Tripp, for the Countess Berchtoldt.

Mr. Pemberton Leigh and Mr. Follett, for the executors.

Sir C. Wetherell, Mr. Kindersley, and Mr. Schomburg, for the residuary legatee.

Dec. 12. THE MASTER OF THE ROLLS [Lord Langdale]. In amount and description, Austrian metalliques for 104,000 florins have the same meaning with 104 Austrian bonds for 1000 florins each; and as to the legacy, it has been argued, 1st, That the first gift was a general [109] legacy. (1) 2dly, That the second gift, which is a specific legacy, was not a substitution for the first (*Hurst v. Beach*, 5 Mad. 358; *Guy v. Sharp*, 1 Myl. & K. 589; *Robley v. Robley*, 2 Beavan, 95; *Wray v. Field*, 6 Mad. 300; *Mackenzie v. Mackenzie*, 2 Russ. 262); and, 3dly, That if it ought to be so considered, the ademption of the substituted legacy operated as a revivor of the gift for which it was substituted.

Looking minutely at the words used by the testator in both the codicils in question; observing that in the second of them he evidently treated the gift as having been made by the indorsement on the parcels, and that by the first of them he rather alludes to the gift as having been otherwise made, than as being then made, I think that he must be considered as referring to the same subject-matter, the same specific legacy in both instruments, and that in the two codicils he was not intending to make two distinct gifts, or two gifts of which the last was to be a substitution for the first, but was intending to allude to one gift otherwise made; but if the case were otherwise, if the first of these two codicils gave a general legacy, and

(1) *Robinson v. Addison*, 2 Beavan, 515; *Bronsdon v. Winter*, Ambler, 56; *Allen v. Callow*, 3 Ves. 289; and *Barclay v. Wainwright*, 3 Ves. 462.

the second a specific legacy, I should be of opinion that the subject of the gift was the same. It does not, indeed, appear by proof, that the testator actually possessed Austrian metalliques for 104,000 florins on the 17th of September 1835. It may possibly, however improbably, have been, as now argued, that he meant such securities to that amount to be purchased, out of his general estate, for the legatee, and that he afterwards purchased the same amount himself, and made a specific gift or legacy of them. Even if this improbable state of facts appeared, I could [110] not find any ground for presuming that he intended to give the amount as a specific legacy in one codicil, and leave his executors, acting under the former codicil, subject to the obligation of purchasing an equal amount for the same legatee out of his general assets. I should find it necessary to conclude, that the specific legacy was intended to be a substitution for the first; and if the testator himself made a legacy specific, which was at first intended to be general, I am of opinion that the ademption of the specific legacy, without more, would not set up the general legacy. It therefore appears to me that the Master's report is right, in not finding anything to be due to the Countess Berchtoldt in respect of the 104,000 florins mentioned in the two codicils.

The Master has further considered, that the gifts of sterling money mentioned with the 104,000 florins in the two codicils were connected with the gifts of florins so closely, as to make, in each case, an united legacy; and that the legacy in the latter codicil, florins and sterling money together, were a substitution for the legacy in the former codicil, florins and sterling money together. He has also considered, that the gift of florins in the second of the two codicils, being specific and adeemed, left the £20,000 a gift in substitution for the £5000 in the former codicil. The question appears to me to be attended with some doubt, but, upon consideration, I am unable to concur in the Master's view of the case. Looking at the several codicils annexed to the will, I think that if the 104,000 florins had never been mentioned, the legatee, the Countess Berchtoldt, would have been entitled to the £5000 given by the codicil of the 17th of September 1835, and also to the £20,000 mentioned in the codicil of the 27th of January 1837.

[111] The idea of substitution arises from the connection of the gifts of sterling money with the gifts of florins. They might have been so connected, so united or consolidated, that upon the failure or ademption of the gift of florins there might have been a failure or ademption of the gift of sterling money; but this is not found or even contended for. What then is the nature of the connection between two gifts, which admits of one standing, whilst the other fails, and yet communicates a qualification, which excludes addition to a former gift, and introduces substitution for it? It would be vain to conjecture, for what reason the gifts of sterling money were at all connected with the gifts of florins; but what the testator seems to have, in effect, said, is, first, I have given Countess Berchtoldt 104,000 florins, and I give her besides £5000 sterling; secondly, I have given Countess Berchtoldt 104,000 florins by indorsement on two little parcels, and I add to it £20,000 British currency.

On the best consideration which I can give to the subject, and differing from the Master with reluctance, because I think the question doubtful, it appears to me, that the two gifts of sterling money may well stand together; and having read through all the codicils, with the view of ascertaining from the various modes in which the testator has expressed himself, what was probably his intention, I am of opinion that the £20,000 ought not to be taken as a substitution for, but as an addition to, the gift of £5000, and that in this respect, the exception must be allowed.

Affirmed by the Lord Chancellor, 11th of February 1845.

[112] RICHARDSON v. HORTON. Dec. 7, 9, 16, 1843.

[S. C. 13 L. J. Ch. 186 ; 7 Jur. 1144. Disapproved, *Hynes v. Redington*, 1858, 10 Ir. Ch. Rep. 206. Cf. *In re Hedgley*, 1886, 34 Ch. D. 379.]

Settlement by the heir, upon his marriage, of the ancestor's estates, supported against the claims of the specialty creditors of such ancestor.

Sir W. H. died indebted in specialty. After his death, on the marriage of his heiress, a settlement was executed, whereby (after reciting the insufficiency of the personal estate to pay the debts, and that a considerable sum was due on that account) a part of the estates were conveyed to provide a fund to pay the debts, and the remainder was settled on the heiress, her intended husband, and their issue. Many years after, the produce of the estates appropriated to the payment of the debts was found insufficient. Held, that the circumstances did not afford any proof of fraud, or any want of *bona fides* in the execution of the settlement, that the settled estates were not liable to the specialty debts; and that even if a want of *bona fides* had appeared, relief could only be obtained in a suit putting the *mala fides* properly in issue.

This case came before the Court upon exceptions to the Master's report. Several of the circumstances of the case will be found in a former report of *Farrow v. Rees* (4 Beav. 18).

Sir Watts Horton died on the 5th of November 1811, indebted on specialties in which his heirs were bound.

He left an only daughter his heiress at law. The real estate of which he was entitled to dispose consisted of reversions, one of which fell into possession upon his own death. By his will, he devised his real estate to his wife for life, with remainder to his daughter. He did not charge his real estate with the payment of his debts, and his personal estate was found insufficient to pay them.

In the year 1813 Miss Horton married the Defendant Mr. Rees. On that occasion, and in consideration of the then intended marriage, and for the purpose of providing a fund for payment of the debts, an indenture, dated the 5th of July 1813, was executed, by and between the Defendant Mr. Rees of the first part, Miss Horton (described as the heir of Sir Watts) of the second part, Lady Horton of the third part, Lord Stanley and Wil-[113]-liam Horton of the fourth part, and William Cross and John Lee of the fifth part. This deed, amongst other things, recited that the personal estate of Sir Watts was insufficient for the payment of his debts, and that a considerable sum was due on that account, which it had always been the wish of Lady Horton and Miss Horton to discharge: that a marriage was intended between Mr. Rees and Miss Horton, and that on the treaty for the same, it had been agreed, that a part of the estates should be sold, for the purpose of providing a fund for the payment of all the debts of Sir Watts, and that the other estates should be settled; and that for the purpose of enabling her daughter to make the settlement, Lady Horton had agreed to relinquish the life-estate given to her by the will; and it was thereby witnessed, that the estates were conveyed by Lady Horton and Miss Horton to Lord Stanley and William Horton, as to part of them, in trust to sell and to apply the money arising from the sale in payment of all the debts of Sir Watts, and after full payment thereof, to pay any surplus to Mr. Rees; and, until the sale, the rents of these estates were made payable to the person, who, for the time being, should be in possession of the other estates. The remainder of the estates were to be held in trust for Mr. Rees for life; after his death, provision was made for payment of a jointure to his widow, and portions for the younger children of the marriage, and, subject thereto, the estates were limited to the first and other sons of the marriage.

The bill in this cause was filed in 1824, by unsatisfied specialty creditors of Sir Watts Horton. It was not thereby alleged that the settlement was in any manner fraudulent; but it was charged, that if the personal estate was insufficient for the payment of the debts of Sir Watts, the deficiency ought to be made good out of the

real estates devised to Miss Horton, subject to the [114] life-estate of Lady Horton, or which descended on Miss Horton; and that, notwithstanding the settlement, the specialty creditors were entitled to have a sufficient part of all the estates therein comprised, sold, to supply the deficiency of the personal estate. The bill prayed for the usual accounts; and if the personal estate and also the money arising from the sale of the estates conveyed to be sold should be insufficient for payment of the debts, that the deficiency should be raised by sale or mortgage of the other real estates of the testator.

The Defendants, Mr. and Mrs. Rees and Lady Horton, in their answer, stated their belief, that the provision made by the settlement for the payment of all the debts of Sir Watts was fully sufficient for that purpose, except such of the debts as were secured by mortgage. The bill charged no fraud, and the answer, necessarily, contained no defence to any imputation of fraud.

The decree ordered that the usual accounts of the personal estate, and of the monies arising from the sale of the estates conveyed to be sold, should be taken, and directed the due application thereof; and, if the personal estate and those monies should be insufficient for the payment of the debts, it was ordered that the Master should take an account of the real estate of the testator liable to pay his debts.

The Master, having found that the personal estate and the purchase-monies of the estates sold were insufficient to pay the debts, proceeded to take an account of the real estates of the testator liable to pay his debts; and it appearing that all the unsold estates were subject to the trusts of the settlement, he found that there was no real estate of the testator liable to pay his debts. The Plaintiff took exceptions to his report.

[116] Lady Horton and Mrs. Rees were now both dead; but there was issue of the marriage between Mr. and Mrs. Rees.

Mr. Turner and Mr. Rogers, for the Plaintiff, in support of the exceptions. Though the estate was reversionary, still it formed assets for the payment of the testator's specialty debts; and it would have been decreed to be sold for that purpose; *Tyndale v. Warre* (Jacob, 212).

At the time of the testator's death, his real estate was liable to the payment of his specialty debts: the remedy of the specialty creditors would not have been merely personal against the heir, in respect of assets descended, but the testator's estate would specifically have been made applicable to the payment of the debts. Even at law the judgment would be that the creditor "do recover his debt and costs, to be levied of the lands and tenements which were of the testator in fee-simple at the time of his death (Tidd's Forms, 389);" and in equity the estate would have been ordered to be sold for payment. (Seton's Decrees, 84.) The Court would order a receiver, upon a deficiency of personal estate, and restrain a purchaser from paying the heir; *Green v. Loves* (3 B. C. C. 217). Such were the rights of the parties at the death of the testator: the question is, whether the heiress, by a settlement of the estate on herself and her family, could defeat those rights. By the statute of Elizabeth (13 Eliz. c. 5, s. 2), all alienations and conveyances, for the intent and purpose to delay, hinder, or defraud creditors, are declared to be clearly and utterly void. This settlement was a mere shift and contrivance of the [116] heiress, who was bound by the obligation of her ancestor, to delay the creditors, and would be void under the statute. The statute of the 3 & 4 W. & M. c. 14 makes wills void, as against creditors by bond binding the testator's heirs, and gives a remedy against the heir and devise jointly; and the fifth section makes the heir answerable, in cases where he sells before action brought; and execution may be taken out as if the debt were the debt of the heir, "saving that the lands, tenements, and hereditaments *bond fide* aliened before the action brought shall not be liable to such execution," intimating clearly, that the lands not *bond fide* aliened (as in the present case) are still to be liable. By the combined operation of these two statutes, the estate still remains liable to the claim of the bond creditors.

The heir at law, like an executor, must have the means of selling the real estate for the purpose of providing a fund for the discharge of the specialty debts, and a *bond fide* sale for that purpose would be protected; but by settling the property on

the heiress's family, no fund could possibly arise for the discharge of the debts: its object, on the face of it, was not to pay the debts, but to exclude the rights of the creditors. The settlement recites that a considerable sum was due on account of the debts of the testator, and that the personal estate was insufficient for the payment, and yet it is attempted, by that deed, to withdraw the real estate, which was the only means of payment, from the creditors. Every person taking under the settlement had notice that the heiress was improperly dealing with the estate for her own benefit, and not for the purpose of raising a fund for payment of the specialty debts. They are, therefore, bound by that notice, and can claim no more than what, in equity, the settlor herself was entitled to.

[117] That a conveyance by the heir may be fraudulent against the creditors of the ancestor, was decided so long back as the time of Lord Coke. In *Gooch's case* (5 Reports, 60 a.) the ancestor was indebted in bond; an action was brought against the heir, who pleaded *riens per descent*, and he proved that, before the action brought, he had enfeoffed W. G. in fee of the descended lands, but the Plaintiff's counsel alleged and proved, that the feoffment was made by fraud and *convin*, to defraud the Plaintiff of his action, and therefore void by the statute of 13 Eliz. c. 5, as to the Plaintiff, and it was so held by the whole Court.

Again, a Court of Equity will relieve in such a case; *Bateman v. Bateman* (1 Eq. Ca. Abr. 149, pl. 6). Where "a man bound himself and his heirs in a bond, and died leaving a real estate to descend to his heir, and the heir having aliened the real estate, the obligee brought a bill against the heir and purchaser, to be relieved, on the statute (of 3 & 4 W. & M.) against fraudulent devises, and the Lord Chancellor relieved him."

A purchaser, where there are debts, is not required to see to the application of the purchase-money; "but if the nature of the transaction affords intrinsic evidence, that the executor, in the mortgage or sale, is not acting in the execution of his duty, but is committing a breach of trust, as where the consideration of the mortgage or sale is a personal debt due from the executors to the mortgagee or purchaser, there such mortgagee or purchaser, being a party to the breach of trust, does not hold the property discharged from the trusts, but equally subject to the payment of debts and legacies, as it would have [118] been in the hands of the executor. The same principle is applied to real estate." *Watkins v. Cheek* (2 Sim. & S. 199).

The fact of notice makes this case differ from those decided. In *Mathews v. Jones* (2 Anst. 506) the Defendants were not charged with notice (*Ib.* p. 511) of the existence of any of the testator's debts; and in *Spackman v. Timbrell* (8 Sim. 253) there was no notice of the existence of any debts.

In *Higgins v. Shaw* (2 Dr. & War. 356) the Court said, "If a man sells lands which are subject to bond or other specialty debts, this Court presumes that the purchase-money is to be applied to the discharge of those debts; and that the sale is made with that view, and the purchaser will be discharged. But this is a different case, for here the party does not *sell*, he merely *settles* the estate. The case as against John is still stronger—he first wasted the assets, and then, two years after the filing of the bill, put the estate into settlement."

At all events, the life-estate of the husband is still liable to the specialty creditors: it is the estate to which he would be entitled, *jure mariti*, independent of the settlement, and still forms part of the testator's estate. Where a fraud is committed, the Court will lay hold of the interest of any party concerned in it, as an indemnity to the parties injured. *Burridge v. Row* (1 Y. & C. (N. C.) 183).

Mr. Pemberton Leigh and Mr. Koe, for Mr. Rees and his son. The question is, whether a mere specialty debt, which is neither charged by will or otherwise on an estate, but is a simple legal liability to be enforced by [119] action or suit against the person and property of the debtor, constitutes a charge or lien on the estate of the deceased debtor, or remains, after his death, a pure legal demand, to be enforced against the heir in the usual way.

Here is a bond debt which, in the lifetime of the testator, formed no charge or lien on his estate, how, then, did it become a charge or lien after his death? There is no charge of debts in the will, nor any trust for their payment. It is said that it must be a charge, because, upon a judgment or decree, payment would be enforced

out of the testator's estate: it is quite true that payment would be so enforced, but that is by force of the judgment: it is no more than would have resulted from a judgment or decree against the testator himself in his lifetime; but here there is no judgment. The class of cases like *Watkins v. Cheek* has no application, for there there was a trust created by the testator, here there is none.

It is said that the settlement was fraudulent and void under the statute of Elizabeth; but that statute has no application to a case where full valuable consideration is given for the property. The consideration of marriage has always been held to be sufficient to support any settlement. In a case before Sir William Grant, a stockbroker, greatly indebted, married his mistress, and settled his property on her: it was supported even against his creditors. (*Campion v. Cotton*, 17 Ves. 263.) If Sir Watts Horton himself had settled the estate on the marriage of his daughter, could it have been impeached by his creditors? How, then, does it differ that the heiress, contracting with an intended husband, made the settlement? The value of the estates exceeded the testator's debts, and by the set-[120]-tlement a provision was made for their payment, which at the time was ample, and it is not now shewn that it is insufficient.

The statute of the 3 & 4 William and Mary (repealed and re-enacted by the 11 G. 4, and 1 W. 4, c. 47) does not affect the question. Previous to that Act, the devisee was not liable to the testator's debts, and the creditors might also be defeated by the alienation of the heir before action brought. To remedy this, the Act avoids the devise as against the creditor, and enables him to maintain an action jointly against the heir and devisee. By the 5th section the heir is made answerable for the land aliened by him before action, and a similar liability is imposed on the devisee. The statute gives these remedies to the creditor, but in no way permits him to follow the estate into the hands of a purchaser for valuable consideration.

This case was decided in *Spackman v. Timbrell* (8 Sim. 253): there A., who was a trader at his death, and indebted by specialty and simple contract, devised freehold estates to his son in fee. The son, on his marriage, settled the estates on his wife and children, and afterwards died. It was held that the 3 & 4 W. & M. c. 14, and the 47 G. 3, c. 74, sess. 2 did not charge the real assets, descended or devised, with the ancestor's debts, but made the heir or devisee personally liable, to the value of the assets; and, therefore, that the son's widow and children were entitled to hold the estates, discharged from the debts of the father. In that case the settlement recited the will and the devise for payment of the debts; and the notice thereby given was relied on in argument, but did not prevail. Again, in *Matheus v. Jones* (3 Anstr. 506), a marriage settlement of the ancestor's estate [121] by the heir, who was also devisee, was supported against a bond creditor of the ancestor. Notice of the testator's debts can make no difference; for if the debt be not a charge on the estate, no notice can make it so.

Lastly, the case now attempted to be made is not stated on the pleadings, and the parties have had no opportunity of meeting it.

Mr. Turner, in reply. To take a case out of the statute of Elizabeth, not only must the conveyance be on good consideration, but *bonâ fide*, and without notice of "covein, fraud, or collusion."

The following cases were referred to in the course of the argument:—*Townsend v. Westacott* (2 Beav. 340, and 4 Beav. 58); *Partridge v. Gopp* (Ambl. 596); *Braithwaite v. Britain* (1 Keen, 206); *Ex parte Morton* (5 Ves. 449); *Rogers v. Rogers* (6 Sim. 364).

THE MASTER OF THE ROLLS [Lord Langdale]. It is clear, that the specialty creditors of Sir Watts Horton might, on his death, by adopting the proper proceedings, have obtained payment out of his real estates; but it is equally clear that the bond debts did not of themselves constitute a lien or charge upon those estates. The estates might have been made available: the heir, to the extent of assets, was bound to pay the specialty debts; and, by the statute, the devisee is placed, substantially and for all practical purposes, in the same situation as the heir.

What has occurred is this:—The estates appropriated by the settlement to the payment of the debts have [122] been sold, and after allowing all proper deductions, the sum of £5110 remains for the payment of debts, amounting to £7174. The fund

being insufficient, the question is, whether the creditors have a right to resort to the estate settled by the deed of 1813?

The question arises in a very singular form. It is strange, if it was intended to raise a question so important as this, that a distinct declaration should not have been asked, and still more strange, that it should not have been provided for by the decree. It is now argued that this settlement, though in consideration of marriage, was executed under such circumstances, that it cannot be held to have been made *bona fide*. If the Plaintiff sought to set it aside on the ground that it was not executed *bona fide*, would it not be proper that all the circumstances from which the *mala fides* was to be inferred should be stated? and ought not its invalidity to have been expressly charged by the bill, in order that the Defendants might have the means of meeting it?

The Master, in proceeding under the decree, has thought that the settlement was a valid alienation, and that the settled estates are not liable to the specialty debts. This is the question which, upon the exceptions to his report, I shall have to consider. Several authorities have been referred to, and I confess I think that the doctrine laid down in that of *Mathews v. Jones* extremely applicable to the present case; the only difference between the two cases is the notice.

Dec. 16. THE MASTER OF THE ROLLS [Lord Langdale]. The only question upon these exceptions is, whether the testator's real estates, which were comprised in the settlement of the daughter, and limited on the trusts of [123] the settlement, are, in the hands of the persons claiming under the settlement, liable to the payment of the testator's specialty debts.

Debts by specialty, in which the heirs are bound, constitute no lien or charge upon the land, either in the hands of the debtor or of his heir. Notwithstanding the existence of such debts, the debtor himself may alienate the land, or he may, by will, make it equitable assets, thereby preventing its exclusive application to the payment of specialty debts, or, as Lord C. J. Willes says (*Willes*, 524), he may devise it for the payment of a particular debt on simple contract, and so withdraw it from specialty creditors altogether.

By taking proper proceedings, the specialty creditors may obtain payment, out of the descended or devised real estate in the hands of the heir or devisee; but if such proceedings are not taken, the heir or devisee may alienate, and in the hands of the alienee, the land is not liable, though the heir or devisee remains personally liable, to the extent of the value of the land alienated.

The difference which arises from the alienation appears strongly in the case of a mortgagor becoming subsequently indebted to the mortgagee on bond, and then dying. The heir cannot himself redeem the mortgage without paying the bond; but the assignee of the equity of redemption from the heir may redeem the mortgage without paying the bond. (*Coleman v. Winch*, 1 P. Williams, 775.)

The heir, being named in the obligation, is considered to be himself a debtor, not indeed a debtor liable to pay [124] the debt under all circumstances, but liable to the extent of the value of the real estate descended, and he is not restrained from alienation; but after the alienation, he is personally liable to pay his ancestor's debts, to the amount of the value of the land he has alienated.

The case of *Mathews v. Jones* (2 Anstr. 506) sufficiently establishes, that, in the absence of any special circumstances, the land, after an alienation by the heir for the purposes of a marriage settlement, is not liable to the specialty debts of the ancestor.

But in this case it has been argued, that the settlement is fraudulent and void under the statute of 13 Eliz. c. 5. Miss Horton, as heir of the reversion, being owner of the land, and Miss Horton being debtor under the obligation of her father, it is said that the settlement was prejudicial to the creditors, and therefore void.

Admitting, on the authority of *Gooch's case* (5 Co. Rep. 60 a.) and the case of *Apharry v. Bodingham* (Cro. Eliz. 350), that cases of this kind may fall within the statute, the enactment makes void any conveyance executed with the intent or purpose to delay, hinder, or defraud creditors of their just and lawful actions, suits, or reliefs; but it is not to extend to any interest, upon good consideration, and *bona fide* conveyed to any person not having notice of the fraud.

In this case the settlement was made, in consideration of marriage, a good

and valuable consideration, and the alienation left the heir subject to personal liability.

[125] No direct or express fraud is proved or attempted to be proved. If any fraud there were, it must be detected and established by inference from independent facts distinctly proved, or from the provisions of the deed itself; and it may reasonably be asked, was it false to allege, as was professed by the deed, that the parties desired and intended that all the debts should be fully paid? Were the estates conveyed to be sold at the time inadequate for the full payment of the debts? If so, were they known to be inadequate, so that the provision pretended to be for the payment of the debts was not only insufficient but delusive? Was the heir who alienated the land insolvent, so that her personal liability was accompanied by inability to pay, and of no value, and the alienation of the land removed from the creditor the only means by which he had any prospect of obtaining payment? Were the creditors in any way delayed or hindered? There has been, indeed, very great delay, but has it arisen from, or was it intended to be occasioned by, the deed? Nothing of the kind is even alleged, but the imputation of fraud rests upon this:—that the parties to the settlement, knowing that there were debts of Sir Watts Horton remaining unpaid, and setting apart only a portion of the estates to provide a fund for the payment of those debts, settled the remainder, providing, at the same time, that the rents of the estate set apart for the debts, should, until the estates were sold, be paid to Mr. Rees; and that since those estates have been sold, upon an account taken after a lapse of about thirty years, without one word of explanation, either as to the cause of the delay or the cause of the defalcation, the produce of the sales is found to be insufficient for the full payment of the debts and the interest which has accumulated upon them.

I am of opinion that these circumstances, thus barely appearing, do not afford any proof of fraud or any want [126] of *bona fides* in the execution of the settlement, and that the exceptions must therefore be overruled.

But I think it right to add, that even if the circumstances had been such, as to afford a probable reason for thinking that there was such a want of *bona fides*, as might entitle the creditor to relief, I should nevertheless have been of opinion, that such relief could not have been had in this suit.

The bill is founded upon the notion that the claim of the creditor to be paid out of the real estate was, in no respect, altered by the alienation or settlement made by the devisee and heir. It charges none of the fraud upon which the creditor now insists, and the Defendants have had no means of placing upon the record and proving such defence, as they might have been enabled to make if the charge had been made; and I do not think, that by a decree directing an account to be taken of a testator's real estate liable to the payment of his debts, it was meant to refer such a question as has been raised upon the exceptions to the Master's report.

Overrule the exceptions.

[127] THE EARL OF MEXBOROUGH v. BOWER. Dec. 6, 1843.

[Affirmed by Lord Chancellor, 2 L. T. (O. S.), 205.]

Injunction granted, prohibitory in form, but mandatory in its effect.

Tenant of a mine restrained, on motion, from permitting a communication with an adjoining mine to continue open, and water to flow through the same, the effect intended being to compel the Defendants to close the communication.

Arbitration clauses in deeds are not binding on the parties, so as to oust the jurisdiction of the Court.

This was an application for an injunction to restrain the Defendants, who were the lessees of the Plaintiffs' coal mine, from acting in contravention of the covenants contained in their lease.

In February 1839 the Plaintiffs granted to the Defendants a lease of a coal mine in the county of York, at a rent of £520, with a proportionable increased rent for all coal worked beyond two acres annually. The Defendants, amongst other

things, covenanted not to permit any of the brick clay to be carried off the land; to work the seam in a fair and workmanlike manner; to leave proper and sufficient barriers in the said seam or bed of coal against all adjoining collieries: to prevent the draining or laying dry any such other mines, seams, or beds; and the Defendants further covenanted, not to work, get, or raise up, from the pits or shafts to be sunk and made by them, or carry over the demised premises, any coal belonging to other proprietors, without the consent in writing of the Plaintiffs.

The lease contained a proviso, that if any dispute, doubt, or question, should arise between the Plaintiffs and the Defendants, either on the construction of the lease, or respecting any matter or thing whatsoever, arising out of or connected with the demise or lease, or any of the covenants, conditions, stipulations, and provisions therein before contained, then every such dispute, doubt, or question should be referred to the arbitration of two indifferent questions, one to be named by each party in dispute. And it was thereby further agreed, that their submission to reference might be [128] made a rule of Her Majesty's Court of Queen's Bench. And it was thereby further agreed, that no suit at law or in equity should be commenced or instituted by either of the parties in dispute, against the other of them, touching the matters in dispute, before the parties to be made Defendants to such suit or suits should have refused, or neglected to refer the matters in difference respectively, or unless the time limited for making such award or determination should have expired, without any such award or determination having been made.

The bill, the material allegations of which were verified, alleged that in December 1842 the Plaintiffs' agents discovered, as the fact was, that the Defendants had not left proper and sufficient barriers in the seam or bed of coal, and that they had made a communication or road in the bed of coal into an adjoining coal-field, the property of Sir John Lowther; that they had commenced working the coal of Sir John Lowther, and had worked, gotten, or raised up, from the pits or shafts sunk by them on the property comprised in the aforesaid indenture, and had also carried over the premises comprised in the aforesaid indenture coal belonging to Sir John Lowther; that the Defendants, by means of the aforesaid communication, conducted the water from the seam of coal of Sir John Lowther, into the seam of coal demised to the Defendants by the aforesaid indenture, and that they raised the same by means of the said pits or shafts; that the Defendants had thereby drained or laid dry the mines, seams or beds of coal on the property of Sir John Lowther, and had conveyed the coal gotten by them from the property of Sir John Lowther along the railway and staith on the premises comprised in the aforesaid indenture. The bill also alleged, that [129] the Defendants had made bricks and tiles on the property, which they had carried off the premises.

The Plaintiffs now moved for an injunction to restrain the Defendants from carrying the brick clay, or bricks or tiles made thereof, off the land; from working away sufficient barriers in the seam in the parts adjoining; from making a communication into adjoining collieries, and from draining any other mines, or permitting the same to be drained, by means of the demised colliery; *and from permitting the communication complained of to continue open*, and from permitting any water to flow through the same into the demised colliery, and from raising, by means of the shafts on the demised premises, any coal of any other proprietor, and from carrying the same over the demised premises; and from doing, &c., any act, &c., in breach of the covenants in the lease.

The affidavit in support of the motion verified the statements in the bill, and also stated that, by erecting proper dams or barriers, the said communication might be blocked up, and the water prevented flowing from the said property of Sir J. Lowther into the bed or seam of coal comprised in the aforesaid indenture.

The affidavits in opposition stated, that there was a fall or dip from the Plaintiffs' collieries to those of Sir John Lowther; that consequently all the water necessarily flowed towards Sir John Lowther's coal, and not towards the bed or seam of coal demised by the Plaintiffs to the Defendants; and that the effect of the communication would be, to materially benefit and improve the property and mines of the Plaintiffs, and diminish the expense of working the same.

Mr. Pemberton Leigh and Mr. Bates, in support of the motion.

[130] Mr. Kindersley and Mr. Wright, *contra*.

Waters v. Taylor (15 Ves. 10), *Lingood v. Croucher* (2 Atk. 395), *Mitchell v. Harris* (2 Ves. jun. 131), were cited.

THE MASTER OF THE ROLLS [Lord Langdale]. The only question in this case, is as to the form and the extent of the injunction to be granted.

From the course of the argument, one would really think, that some doubt had arisen as to the jurisdiction of the Court to compel parties to perform their covenants and agreements, and that the jurisdiction of this Court, to prevent parties from wilfully and avowedly violating contracts deliberately entered into, had become perfectly unnecessary.

What are the facts? A lease of a coal mine was granted by the Plaintiffs; certain covenants required by one party were entered into, and agreed to by the other, and constituted a portion of the consideration upon which the contract was founded. It is now plainly admitted by the Defendants, that they have acted in direct violation of those covenants, and an application being made to this Court to prevent that violation being continued, it is said, in answer by the Defendants, "We have indeed violated the covenants, but we have not done it in a way prejudicial to you; on the contrary, according to our judgment and the view we take of your case, this is a very profitable and beneficial proceeding for you, and you must abide by our judgment." It is sufficient to say, that the Plaintiffs have a right to insist on their own view of their own interest, and that even if it should be as beneficial to them, as has been argued on the other side, they may nevertheless choose [131] to insist on having the terms of the contract strictly obeyed.

Next it is said, "You had notice of this long before you filed your bill; a treaty for compensation took place after you were aware of it, and if the proposed compensation had satisfied you, you would never have complained of this violation." It is possible that the parties who stipulated for the benefit of these covenants would have waived them, and they might have entered into a treaty for the purpose of considering whether such a compensation in damages would be made, as would have induced them to waive the agreement. But here the case is otherwise: they were not satisfied, and they therefore demand the strict performance of the contract.

With regard to the length of time, nothing can be more true than this—if parties come and ask for an injunction *ex parte*, the Court looks most minutely to the time in which they have permitted the matter complained of to proceed, and will not allow them to obtain an injunction in the absence of the other party, when they have themselves, for some time, acquiesced. It is quite reasonable that that should be so, because the granting of an injunction *ex parte* is the exercise of a very extraordinary jurisdiction, the effect of which, in every case in which it is asked, is almost alarming; therefore the time at which the Plaintiff first had notice of the existence of the subject of complaint, is looked to with the greatest care and jealousy, in order to prevent an improper order being made against a party in his absence; but when the party has notice of the motion, the question then is entirely of a different kind. The question then is, whether, during the time which has elapsed, there has been a course of conduct from which a waiver of the terms or an acquiescence in the violation of the [132] contract is to be inferred. That is quite another thing, and there is nothing at all like it in this case.

The next thing said is, "You have accepted a compensation for increased work, and a sum of money has been paid now in respect of it;" but the answer is, that there is, in other respects, a continued violation of the covenants, and no acquiescence in the violation.

The remaining argument is, that the deed contains a clause for a reference to arbitration. Now there are a great number of cases in which, from the difficulty of ascertaining the truth and the great complication of the rights and interests involved, it is almost impossible for the Court to do strict justice between parties within such limits of time and expense as are in any degree proportionate to the value of the interests in question. Many cases occur, in which it is perfectly clear, that by means of a reference to arbitration, the real interests of the parties will be much better satisfied than they could be by any litigation in a Court of Justice. In these cases the Court has shewn itself very anxious that matters of this kind should

be determined in a way most beneficial to the parties, and much more so, when it finds that the parties, anticipating difficulties of that kind, have provided for their settlement by arbitration. It has, however, been decided, that these clauses for a reference are not binding upon the parties, who cannot contract themselves out of their right to have their disputes settled in Courts of Justice. Notwithstanding the many cases in which a reference to arbitration may justly be preferred to prolonged litigation in Court, cases without end arise, in which, by no possibility, could arbitrators do that justice which the powers of Courts of Justice enable them to administer. Cases arise which were not in the contemplation of the parties when they entered into their agreement. It has, under these circumstances, been, I [133] think, justly held, that arbitration clauses are not to be enforced against the parties, and I find nothing in the wording of these particular clauses which at all alters this case.

Upon none of these grounds do I think the Plaintiffs have, in any way, disentitled themselves to the protection of this Court, or to their right to insist in this Court that the covenants which they have contracted for shall from day to day be obeyed by the Defendants. Nevertheless, it is very important to consider what the terms of the injunction are to be; I do not think it ought to extend beyond the violations which have taken place; it ought not to be expressed in such general terms as may imply that the Defendants intend to violate those covenants which they have hitherto respected. This motion asks for something more than ordinary; namely, to restrain the Defendants permitting water to flow through the communication. It is however no unusual thing to ask an injunction in this form: I think it was granted in the case of *Robinson v. Lord Byron*, (1) and in other cases. Indeed, I believe that in another branch of the Court, some few years ago, a direct order was made for the party to do that which was required, to put an end to the violation of covenants: I do not however know whether that has been since acted upon, and I do not mean to deviate from the regular and established practice. The injunction therefore must be confined to those things in respect [134] of which at this time and upon the evidence before me, it appears that the Plaintiffs require protection, and it should not extend to the last general words; this Court never, without necessity, presumes there will be a violation of the covenants.

The injunction was granted in the terms of the notice of motion, omitting the last clause. The order was affirmed on appeal, 9th December 1843.

[134] BARKER v. BUTTRESS. Dec. 14, 15, 1843.

[S. C. 13 L. J. Ch. 58; 8 Jur. 89. See *Ex parte Gouthwaite*, 1851, 3 Mac. & G. 203; 42 E. R. 237.]

The remedies given by the Banking Act (7 G. 4, c. 46) are not cumulative, but substitutional for the prior liabilities of partners, and therefore proceedings cannot be had against a party three years after he has ceased to be a member.

A person at his death was member of a banking company established under the 7 G. 4, c. 46, and subject to its liabilities. After the expiration of three years, a suit was instituted for the administration of his estate, and the common decree was made for taking an account of his debts. Persons who were creditors of the banking company at the testator's death claimed before the Master. Held, that their claims did not come within the scope of the decree; secondly, that their claims were barred by the lapse of three years; and, thirdly, that the proper way of bringing their claims before the Court was by petition, and not by exception.

(1) 1 B. C. C. 588. And see *Blakemore v. The Glamorganshire Canal Company*, 1 M. & K. 154; *Milligan v. Mitchell*, *Id.* 452; *Lane v. Newdigate*, 10 Ves. 192; *Nutbrown v. Thornton*, *Id.* 159; *Rankin v. Huskisson*, 4 Sim. 13; *Taylor v. Davis*, 3 Beav. 388, n. (e.); *Spencer v. The London and Birmingham Railway Company*, 8 Sim. 193; *Squire v. Campbell*, 1 Myl. & Cr. 465, 467; *Whittaker v. Howe*, 3 Beav. 387 and 395, n.; *The Great North of England, &c., Railway v. The Clarence Railway*, 1 Collyer, 507.

The question in this case depended on the construction of the Banking Act (7 Geo. 4, c. 46). It will therefore be convenient, in the first place, to refer to its provisions, so far as it affected the present case.

By the 1st section, banking co-partnerships, though consisting of more than six persons, may issue bills payable on demand, at any place exceeding sixty-five miles from London; but that section also provides as follows: "That every member of any such corporation or co-partnership shall be liable to, and responsible for, the due payment of all bills and notes which shall be issued, and for all sums of money which shall be borrowed, owed, or taken up by the corporation or co-part-[135]nership of which such person shall be a member, such person being a member at the period of the date of the bills or notes, or becoming or being a member, before or at the time of the bills or notes being payable, or being such member at the time of the borrowing, owing, or taking up of any sum or sums of money upon any bills or notes, by the corporation or co-partnership, or while any sum of money on any bills or notes is owing or unpaid, or at the time the same became due from the corporation or co-partnership, any agreement, covenant, or contract to the contrary notwithstanding."

The 9th section provides, that the co-partnerships "shall and lawfully may" sue and be sued in the name of the registered "public officer."

The 10th section is as follows:—"That no person or persons, or body or bodies politic or corporate, having or claiming to have any demand upon or against any such corporation or co-partnership, shall bring more than one action or suit, in case the merits shall have been tried in such action or suit, in respect of such demand; and the proceedings in any action or suit by or against any one of the public officers, nominated as aforesaid, for the time being of any such co-partnership, may be pleaded in bar of any other action or actions, suit or suits, for the same demand, by or against any other of the public officers of such co-partnership."

By the 11th section, decrees in equity against the public officer are to have the like effect against the property of the co-partnership, and the persons and property of the members, as if such members were parties to the suit; and by the 12th section, judgments and decrees are to have the same effect on the property and [136] members as if such judgment had been recovered against the co-partnership.

The 13th section is as follows:—"That execution upon any judgment, in any action obtained against any public officer for the time being of any such corporation or co-partnership carrying on the business of banking under the provisions of this Act, whether as Plaintiff or Defendant, may be issued against any member or members for the time being of such corporation or co-partnership; and that in case any such execution against any member or members for the time being of any such corporation or co-partnership shall be ineffectual for obtaining payment and satisfaction of the amount of such judgment, it shall be lawful for the party or parties, so having obtained judgment against such public officer for the time being, to issue execution against any person or persons, who was or were a member or members of such corporation or co-partnership at the time when the contract or contracts, or engagement or engagements in which such judgment may have been obtained, was or were entered into, or became a member at any time before such contracts or engagements were executed, or was a member at the time of the judgment obtained. Provided always, that no such execution as last mentioned shall be issued, without leave first granted, on motion in open Court, by the Court in which such judgment shall have been obtained, and when motion shall be made, on notice to the person or persons sought to be charged, *nor after the expiration of three years next after any such person or persons shall have ceased to be a member or members of such corporation or co-partnership.*"

The facts which gave rise to this cause were shortly as follows:—Mr. Barker, the testator in this case, died [137] on the 16th of March 1839. At the time of his death, he was a member of a banking company established under the above Act, called the "Imperial Bank of England," and he had been a registered member since November 1838. (NOTE.—The particulars relating to this company will be found in *Wallworth v. Holt*, 4 Myl. & Cr. 619.)

Shortly after his death, viz., on the 30th of April 1839, the bank stopped payment, and was found insolvent. In June 1839 John Wood recovered a judgment

against the registered public officer of the bank for £4600; in September following, T. L. Rushton obtained a similar judgment for £2001; and on the 8th of August 1840 Nicholas Wood obtained a similar judgment for £24,819. The principal part of these sums was, at the death of the testator, due from the company, as indorsees of bills, and on a banking account.

On the 20th of July 1842 this suit was instituted by legatees, for the administration of the testator's estate; and on the 20th of December 1842 a decree was made, referring it to the Master, in the usual form, to take an account of debts, funeral expenses, and legacies of the testator. The above-named creditors of the bank went in under the decree, and claimed to be creditors of the testator, but the Master having rejected their claims, two of them took exceptions to his report, and the third presented a petition, praying that the Petitioner might be admitted to prove his debt, and that the Master might be directed to admit the Petitioner to prove, or for liberty to except to the report.

Mr. Temple and Mr. Lovat, in support of the exceptions.

[138] Mr. Bazalgette, in support of the petition, argued as follows:—The testator in his lifetime was liable to the claimants, and nothing has since happened to release his assets from the obligation. Though, at law, the liability of a party upon a joint debt ceases on his death, by surviving to the joint contractors, yet, in equity, the estate of the deceased partner continues liable. *Devaynes v. Noble* (*Sleech's case*) (1 Mer. 539, and 2 R. & M. 495), *Winter v. Innes* (4 M. & Cr. 101), *Gray v. Chiswell* (9 Ves. 118); for every joint loan is in equity considered joint and several, *Thorpe v. Jackson* (3 Y. & C. (Ex.) 553). It is not necessary in proceeding against the assets of the deceased partner to prove that the surviving partner is insolvent. *Wilkinson v. Henderson* (1 Myl. & K. 582).

The testator, being a member at the time of the contract, became, by the 13th section, liable to the claimants, and his assets are still liable, after payment of his separate debts.

Again, the creditor's remedies are not limited to those given by the statute. The testator was a partner in this concern, and by the ordinary rules of this Court, independent of the statute, the claimants are entitled to come in under the decree and prove their debts. It was so held in *Cowell v. Sikes* (2 Russ. 191), decided by Lord Eldon on appeal. It has been held also, that a creditor of such joint stock bank has the usual remedies in bankruptcy, against the members, and may sue out a fiat against the individual members of the concern without proceeding against the public officer. (*Exp. Wood*, 1 M. D. & De G. 92, and 2 M. D. & De G. 282.)

[139] There being a decree for the administration of the estate, all the claims upon that estate must be ascertained and provided for, before the residuary legatees can be permitted to receive any portion of the assets. The Master must therefore take all the necessary accounts; and if the reference be not already sufficiently extensive, the Court will supply the defect of his authority; *Paynter v. Housden* (3 Mer. 297), *Baker v. Martin* (5 Sim. 380).

Mr. Pemberton Leigh, Mr. Turner, and Mr. G. L. Russell, for the Plaintiff; and

Mr. Kindersley and Mr. Mylne, Mr. Teed and Mr. Bayley, for the Defendants, *contra*. The statute has created new rights for the benefit of the creditors of banking companies, and has subjected its members to new liabilities; in return it has imposed a limitation on the liability of the members, and required that those remedies alone which are thereby given, and no others, "shall" be pursued. The remedies given by the statute are in lieu and substitutional for the common law remedies, and not additional or cumulative; *Steward v. Greaves* (10 Mee. & W. 711). There, Baron Parke says, "We are all of opinion that the creditors of a company so established, and having a public officer, have no remedy against the individual members as at common law. And we are of this opinion upon the words of the ninth section, giving the remedy against the public officers, and upon the whole purview of the Act. The words of the section are, that 'all actions against the co-partnership shall, and lawfully may, be commenced, instituted, and prosecuted against one or more [140] of the public officers, nominated as before mentioned as the nominal Defendant.' These words, according to their ordinary import, are obligatory, and ought to have that construction, unless it would lead to some absurd or inconvenient consequence, or

would be at variance with the intent of the Legislature, to be collected from other parts of the Act. But this construction is manifestly reasonable, and consistent with the context, and in accordance with the intent of the framers of the Act, to be collected from every part of it." And after shewing that the liability created by the statute was very different from that which existed independently of it, he says: "The framers of the Act had in view the convenience of the public, and thereby provided a more convenient remedy to creditors than at common law; but they had also in view the benefit of the members of the company, by restricting their personal liability." And his Lordship afterwards adds, "We are of opinion, therefore, that this Act of Parliament meant to give one remedy only, and that against the company in the name of its public officer."

A similar principle was acted on in the cases of *The Dundalk Western Railway Company v. Tapster* (1 Q. B. Rep. 670) and *Harrison v. Timmins* (4 Mee. & W. 510).

Under the provisions of this Act, the assets of the testator are in no way liable. First, because the executors and administrators of parties are not made liable by the Act; and, secondly, because the testator had ceased to be a member three years before any proceedings were taken by the claimants against the executors. Again, if there were any liability, then it is a secondary liability. The remedy must be obtained in the manner [141] pointed out by the thirteenth section, upon an application to the Court by motion, and by *scire facias*, *Ransford v. Bosanquet* (12 Adol. & E. 813); on which application it must be shewn that *bond fide* endeavours have been used to obtain an available execution against the persons who were members at the date of the judgment, and who are primarily liable (sect. 13); *Eardley v. Law* (12 Ad. & E. 802); *Harwood v. Law* (7 Mee. & W. 203).

Lastly, the tenth section provides that no claimant against the company shall bring more than one action or suit in respect of the same demand, and the former proceedings may be pleaded in bar. The present proceedings are quite inconsistent with this provision.

Mr. Bazalgette, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. This case is undoubtedly one of very great importance; and, considering the extent to which it may affect a great variety of transactions dependent upon this Act of Parliament, I cannot help feeling some regret both at the time and the mode in which it has been brought forward.

The decree in this cause was made in the simple and usual form, "to take an account of the debts, funeral expenses, and legacies of the testator." It is evident, therefore, that I have to consider what sort of claims can be established under such a decree, and I must have regard to the time when this matter was first brought forward. The parties being desirous to avoid a decision on any technical ground, I am willing, so far [142] as the facts of the case will allow, to state my opinion as if these claims under the decree had been brought forward in the most favourable form.

The question arises, first, upon the rights of these parties under the Act of Parliament, which has been so often referred to; and, secondly, upon any rights they may have independent of that Act. The Act was passed to relieve the public from certain restrictions imposed on bankers, in consequence of an agreement between Government and the Bank of England. It provided that persons who entered into banking partnerships might do various things previously prohibited, and, at the same time, it created a number of liabilities which did not previously exist. While it provided various facilities to creditors of banking companies, it subjected the persons engaged in them to various new liabilities, and also provided certain new regulations for enforcing them. These, in my opinion, were intended as an exoneration from those liabilities, to which, under other circumstances, the members would have been subject.

The first section provides, that every member shall be liable for all bills, &c., such person being a member at the date of the bills, or at the time of their being payable, or while owing or unpaid. So that any person, being a member, at any time between the date of the contract and the time when the debt arising therefrom is satisfied, is to become liable for its payment. A person might not be a party or liable to the contract: he might not be a member of the co-partnership at the time when proceedings were taken to enforce it, but by becoming a member at an intermediate period

between the contract and the judgment, he would thereby render [143] himself liable to the payment. This is no small advantage given to the creditor of such a concern. It is a liability attaching to any person becoming a member at any time between the periods I have referred to.

In a subsequent part, this Act of Parliament proceeds to point out the mode in which satisfaction is to be obtained; and I can entertain no doubt (quite independently of the cases cited) that the remedies thus given, are for the satisfaction of liabilities previously created by the Act, and for no others. What then is the remedy provided for by this Act? Actions are to be brought against the registered "public officer;" when judgment has been obtained against him, it is to be considered as a judgment against the property of the partnership and all its members. How is the judgment to be executed? First, execution is to be had against any existing member. Nothing could be more just than that execution should go against those persons who are virtually parties to the proceedings upon which judgment has been obtained: their liability had been provided for before, although they might not have been parties to the contract, but might have become members afterwards, and be members at the time the proceedings took place which led to the judgment. These are the persons against whom execution is to issue in the first place. The Act then provides, that if this execution should be ineffectual for obtaining payment of the amount of the judgment, the Plaintiff may issue execution against any persons who were members at the time when the contract was entered into; secondly, against persons who became members at any time before such contract was executed; and thirdly, against persons who were members at the time the judgment was obtained, and this follows:—"Provided that no such execution as last mentioned shall be issued without leave first granted, on motion in open Court, by the [144] Court in which such judgment shall have been obtained, and when motion shall be made, on notice to the person or persons sought to be charged, nor after the expiration of three years next after any such person or persons shall have ceased to be a member or members of such corporation or co-partnership." This then is a clear limitation of three years, within which execution is to issue against such persons.

Let me apply this provision to the present case. The testator here necessarily ceased to be a member upon his death, in March 1839. The proceedings against the public officer, on which the judgments were obtained, were adopted sometime after his death. Now it has been admitted that execution could not, in any view, issue against the executors; they were not registered members, and the case was not provided for by the Act. Suppose then that this Act of Parliament affords an exclusive remedy in the cases only which are distinctly provided for, is a party, in a case not provided for by the Act, to be at liberty to resort to any other remedy which, under other circumstances, law or equity would afford? Law would afford him no remedy; that is perfectly clear, because the debt would survive. Would equity afford him a remedy? If it would, must it not govern itself by analogy to the limitation of time, at the expiration of which the legal liability would cease? There being perfectly new liabilities created by this Act of Parliament, and for which a specific remedy is provided, and there being a party living, against whom that remedy is to be enforced, would a Court of Equity, taking away entirely that protection which was intended to be afforded by the limitation of time, interfere, not for the purpose of relieving the creditor from the difficulty arising by reason of the death of the member of the concern, but in order to relieve him altogether from the limitation of time which [145] is distinctly provided by the Act of Parliament? I must say that I do not think it would.

It is very true, that at the time of Mr. Barker's death, he was subject to a liability; and it has very naturally been argued, that there being a liability, there must be some remedy by which the rights of the creditor may be made effectual and profitable. But what is that liability? It is a liability to have execution issued against him and his property before, but not after, the expiration of three years from the time the party ceased to be a member. That alone was this testator's liability. Notwithstanding the general words which are contained in the first clause of the Act, yet taking all the clauses together, looking at the means of making these liabilities effectual, and seeing that they were first created by this Act, we find this express

limitation—that the liability is not to be enforced, by execution, after the expiration of three years from the time when the party shall have ceased to be a member of the co-partnership.

That being so, I do not see how I can grant any sort of relief, in a case in which the application is made to this Court long after the expiration of those three years. I do not mean to say anything as to the relief which might have been afforded, if a bill had been filed by these claimants within the three years; but this seems clear to me, that if, in such a case as this, relief is to be had in this Court against the assets of a deceased party, it must be sought before the legal liability under this Act would have expired, if the party had continued alive. In this state of the record, I do not think that any remedy can be given to the claimants in the present case.

I should state, that I think that a petition is the proper course of proceeding in a case like the present. [146] The matter does not come within the scope of the decree, and the Master, therefore, could not properly consider it.

The exceptions must be overruled, and the petition dismissed, and with costs.

[146] CLAPHAM v. SHILLITO. Jan. 24, Feb. 1, 16, 1844.

[See *Roots v. Snelling*, 1883, 48 L. T. 218.]

Consideration of the effect, in equity, of misrepresentation made by parties upon entering into contracts.

Cases have frequently occurred, in which, upon entering into contracts, misrepresentations made by one party have not been, in any degree, relied on by the other party. If the party to whom the representations were made, himself resorted to the proper means of verification, before he entered into the contract, it may appear that he relied upon the result of his own investigation and inquiry, and not upon the representations made to him by the other party; or if the means of investigation and verification be at hand, and the attention of the party receiving the representations be drawn to them, the circumstances of the case may be such as to make it incumbent on a Court of Justice to impute to him a knowledge of the result, which, upon due inquiry, he ought to have obtained, and thus the notion of reliance on the representations made to him may be excluded.

Again, when the Court is endeavouring to ascertain what reliance was placed on representations, it must consider them with reference to the subject-matter, and the relative knowledge of the parties. If the subject is capable of being accurately known, and one party is, or is supposed to be, possessed of accurate knowledge, and the other is entirely ignorant, and a contract is entered into, after representations made by the party who knows, or is supposed to know, without any means of verification being resorted to by the other, it may well enough be presumed, that the ignorant man relied on the statements made by him who was supposed to be better informed; but if the subject is in its nature uncertain, if all that is known about it is matter of inference from something else, and if the parties making it, and receiving representations on the subject, have equal knowledge, and means of acquiring knowledge, and equal skill, it is not easy to presume that representations made by one would have much or any influence upon the other.

This was a motion for a new trial of an issue directed by the Court. The circumstances fully appear in the judgment.

Mr. Kindersley, Mr. Watson, and Mr. Wright, for the Defendant, in support of the motion.

[147] Mr. Turner, Mr. Knowles, and Mr. Elmsley, *contra*, for the Plaintiff.

Feb. 1. THE MASTER OF THE ROLLS [Lord Langdale]. The bill in this cause was filed for the purpose of compelling the Defendant specifically to perform an agreement which he had entered into, to take from the Plaintiff a lease of certain coal mines.

On the hearing of the cause, two issues were directed to be tried: 1. Whether,

during the treaty for the agreement, any false representations, on which the Defendant relied, were made by the Plaintiff or his agent, to the Defendant or his agent, in respect to the mines or property comprised in the agreement; 2. Whether the Defendant signed the memorandum at the foot of the draft lease under any false representations of the Plaintiff or his solicitor, made to the Defendant or his solicitor, in respect of the contents of the same draft lease, or any alterations made therein.

The Plaintiff in this cause was also Plaintiff in the issues, and on the trial a verdict was found for the Plaintiff on both issues.

The Defendant, now, acquiescing in the verdict found on the second issue, has moved for a new trial on the first.

The coal comprised in the lease comprised beds of coal distinguished by the names of the Adwalton coal, the Middleton deep coal, and the Middleton little coal.

[148] In answer to questions put by the learned Judge before whom the issues were tried, the jury stated, that the Plaintiff did not make any false representation to the Defendant or his agent, as to the quantity of the Adwalton coal remaining to be gotten; and that the Plaintiff did make false representations to the Defendant, as to the depth of the Middleton deep coal from the surface, and as to the thickness of the Middleton little coal, but that Shillito or his agent did not rely on any such false representations.

The Defendant alleges, that the opinion expressed by the jury that the Plaintiff did not make any false representation as to the quantity of the Adwalton coal remaining to be gotten, is against the evidence which was produced on the trial; and that the opinion expressed by the jury, that the Defendant or his agent did not rely on any false representations as to the Middleton coal, is erroneous, and arose from some want of sufficient explanation of the meaning of the term reliance, which might have been, but was not, afforded by the Judge.

Having carefully read the Judge's notes and the evidence in the cause, and considered the arguments of counsel, I am of opinion that there is no reason to disturb the verdict, on the ground, that the opinion of the jury respecting the quantity of coal remaining to be gotten in the Adwalton mine was against the evidence produced. It was, indeed, against the testimony of Field, but having regard to the other evidence in the case, and the means which the trial afforded of testing the credibility of Field, I see no reason to think, that the jury came to an erroneous conclusion on that point.

Upon the other point, it appears to me that there is more difficulty. The jury were of opinion, that false [149] misrepresentations were made respecting the Middleton coal during the treaty for the agreement; and if we suppose that conclusion to be correct, it requires, at least, some consideration and explanation to shew, that representations, found to be false, had not some influence on the Defendant when he entered into the agreement.

Cases have frequently occurred, in which, upon entering into contracts, misrepresentations made by one party have not been, in any degree, relied on by the other party. If the party to whom the representations were made himself resorted to the proper means of verification, before he entered into the contract, it may appear, that he relied upon the result of his own investigation and inquiry, and not upon the representations made to him by the other party: or if the means of investigation and verification be at hand, and the attention of the party receiving the representations be drawn to them, the circumstances of the case may be such, as to make it incumbent on a Court of Justice to impute to him a knowledge of the result, which, upon due inquiry, he ought to have obtained, and thus the notion of reliance on the representations made to him may be excluded.

Again, when we are endeavouring to ascertain what reliance was placed on representations, we must consider them with reference to the subject-matter, and the relative knowledge of the parties. If the subject is capable of being accurately known, and one party is, or is supposed to be, possessed of accurate knowledge, and the other is entirely ignorant, and a contract is entered into, after representations made by the party who knows, or is supposed to know, without any means of verification being resorted to by the other, it may well enough be [150] presumed,

that the ignorant man relied on the statements made by him who was supposed to be better informed; but if the subject is in its nature uncertain—if all that is known about it is matter of inference from something else, and if the parties making and receiving representations on the subject have equal knowledge, and means of acquiring knowledge, and equal skill, it is not easy to presume, that representations made by one would have much or any influence upon the other.

Cases vary infinitely in their circumstances, and it is, I think, obvious, that a very great variety of circumstances may occur, in which it may appear that a contract was entered into after erroneous representations made by one party, and yet without the other party having at all relied on those erroneous representations.

In the present case, it may be that the jury has correctly found, that the representations made to the Defendant respecting the Middleton coal were false, and not relied on by the Defendant.

It does not appear that the closes of land containing the coal in question had been bored, for the purpose of ascertaining what were the depth and thickness of the Middleton coal. The depth and thickness, at some distance, were known, but there were variations in the beds, and all that was known afforded only obscure and uncertain indications of the depth and thickness of the beds in particular closes, which had not been bored to the requisite depth.

Having regard to the nature of the subject, to the language of the witnesses, and to the experience of the Defendant's agent, to whom the representations were made, I cannot, upon the mere statement of the evidence to me, avoid entertaining some doubt, whether the representations made to Field were such as can properly be called false; and having carefully read, not only the notes of the evidence taken at the trial, but also all the evidence taken in this suit, and being without the benefit of any personal observation upon the witnesses under examination at the trial, I do not see any sufficient reason for thinking that the jury came to an improper conclusion.

In that state of circumstances, I have anxiously considered what was said at the Bar, respecting the summing up of the learned Judge, and I am satisfied that the proper questions were fairly and sufficiently brought under the consideration of the jury. It is not alleged that any additional evidence can be adduced; and it appears to me, that in a matter, which in itself may have been somewhat doubtful—in which I have myself some doubt upon the finding as to false representations, and in which I agree with the finding as to the non-reliance of the Defendant upon false representations (supposing them to have been made), I ought to be satisfied with the verdict upon the first issue.

I therefore refuse the motion for a new trial. The costs of the motion must be considered at the hearing on the equity reserved.

Feb. 16. The cause came on for further directions, when specific performance was decreed, with the costs of suit, of the issues, and of the application for a new trial.

See *Atwood v. Small*, 6 Cl. & Fin. 232.

[152] UPJOHN v. UPJOHN. *Feb. 15, 1844.*

Bequest of residue to A. for life, with power thereout to advance her eldest son, and a gift, after A.'s death, of the said residue to A.'s children equally. Held, on the context, that the amount advanced to A.'s eldest son was not to be taken into account in the ultimate division of the remainder amongst A.'s children.

The testatrix gave and devised "all the residue of her estate" to her executors, in trust to invest, and to pay the interest to her daughter Catherine Mary Page for life. She then proceeded in the following words:—"And I do hereby empower my said executors and executrix, during the lifetime of my said daughter (her consent in writing first obtained), to employ and expend any part of the said residue, they, in their discretion, shall think meet, towards the support, education, and advance-

ment in life of my grandson William George Page. And from and after the death of my said daughter, I give *the said residue* to all the children of my said daughter now born or hereafter to be born, by her present or any future husband, to be equally divided between them, share and share alike, and to be severally paid them as they shall respectively attain the age of twenty-one years; the share or shares of such as shall die under that age to be equally divided between the survivors. But if none of them shall attain the said age of twenty-one years, then I give *the said residue* to my nephew William Burlton."

Catherine Mary Page had issue William George Page her eldest son, and three other children.

The executors of the will, with the consent of Catherine Mary Upjohn, and by virtue of the power given by the will, "advanced to and for the benefit of William George Page the sum of £300."

[153] The question which now came before the Court was, whether, in the ultimate division of the residue, this sum of £300 was to be deducted from William George Page's share.

Mr. Prescott White, and Mr. Campbell, argued as follows:—The £300 ought not to be deducted from the share of William George Page.

The power to employ any portion of the residue towards the support, education, and advancement in life of William George Page, does not mean a power of prepayment out of his share, but a benefit, beyond that given to the other children, of promoting or establishing him in the world.

The usual clauses in settlements contain the hotchpot clause, or a direction that the money advanced shall be taken "as part of the provision thereby provided." (Sanders on Uses, 172.) Here there is no such clause. This gift also differs from the ordinary clause of advancement contained in a settlement, in several respects. First, here the power *precedes* the gift. Secondly, it applies to one child only, and not to all. Thirdly, it is to be executed only during the life of the tenant for life, and not afterwards, though the legatee be then a minor. And fourthly, it empowers the executors to raise any part of the whole residue, and is not limited to the presumptive share of the eldest son.

The testatrix intending a preference in favour of William George Page, gave a power of appointing any part of the whole fund to him. The power has been exercised, and the appointee takes as if the ap-[154]-pointment had been contained in the will itself, and he is entitled to his full share of the unappointed residue.

Mr. Glasse, Mr. Parry, and Mr. Bagshawe, *contra*. The testatrix clearly intended an equality amongst all the children. The residue was to be divided, "share and share alike," and it is to be remarked she uses the word "*said residue*," viz., the whole residue previously mentioned, before any deduction.

The only way of arriving at an equality, is by attributing the £300 to the share of William George Page in the residue.

THE MASTER OF THE ROLLS [Lord Langdale] (without hearing a reply). The testatrix did not mean an equality, for, there being a plurality of children, she, for some reason, which we can only conjecture, gave to the eldest a benefit which she did not extend to the other children.

Having given "all her residue," the whole was to remain in mass, and the interest was to be paid to her daughter for life; but there was a power, with the daughter's consent, to employ and expend "any part of the said residue" (that is, of the residue in mass), towards the support, &c., of her eldest son, and on her death, "the said residue" was to be divided among the children.

By the last words, "the said residue," she could not have meant the whole of her residue, excluding the money which might have been advanced, because the gift over is in the same terms, namely, of "her said [155] residue," which must evidently have meant her residue after such deduction.

It appears to me that a benefit was given to the eldest beyond the other children, and the £300 ought not therefore to be deducted from his share.

[155] GILL v. EYTON. Dec. 8, 1843.

After a bill for redemption had been filed, but before the *subpoena* had been served, the mortgagee transferred his mortgage, and his transferee was brought before the Court by supplemental bill. It was alleged that the transfer had been made for fraudulent and vexatious purposes. Held, that the Plaintiff was not entitled to the production of the deed of transfer.

This was a motion for the production of papers.

The Plaintiff Gill filed his original bill against one Danily for the redemption of a mortgage; and pending the suit, but before service of the *subpoena*, Danily assigned his mortgage to Eyton. The Plaintiff thereupon brought Eyton before the Court by a supplemental bill. It was alleged that the assignment was fraudulent and vexatious, and in order to impede the Plaintiff in the enforcement of his rights. The Defendant Eyton admitted that he had the assignment in his possession, and the question now was, whether he was bound to produce it.

Mr. Pemberton Leigh, for the Plaintiff. We allege that this was a fraudulent and vexatious contrivance, in order to defeat the rights of the Plaintiff; and it is settled, that where a deed is impeached for fraud, a Plaintiff is entitled to its production. (See *Bassford v. Blakesley*, 6 Beav. 131.)

[156] Mr. Kindersley, *contrà*.

A mortgagee is not bound to produce his deeds until payment of what is due to him. This suit does not impeach the assignment for fraud, but seeks to redeem; and the allegations as to the assignment are only introduced with a view to the costs of the suit.

Mr. Pemberton Leigh, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. As to the production of this deed, it is to be observed, that this bill does not impeach it for fraud, for the Plaintiff is willing to pay what is due upon the mortgage. It is, however, alleged, that the assignment was fraudulent and vexatious, because it was executed in order to hamper the Plaintiff in recovering back the mortgage property. I think this no sufficient reason why it should be ordered to be produced.

See *Browne v. Lockhart*, 10 Sim. 420.

[157] ATTORNEY-GENERAL v. THE LEATHER SELLERS' COMPANY.
In re J. T. Jan. 13, 1844.

[See *In re Freston*, 1883, 11 Q. B. D. 555.]

A solicitor who is proceeding to Court to attend his professional business there pending, is privileged from arrest.

A solicitor, on an application for his discharge, swore, that at the time of the caption he was proceeding direct from his dwelling-house for the purpose of attending the hearing of two petitions at Westminster. On the other hand, two witnesses deposed, that the direction in which he was walking was not the direction they would have proceeded as the nearest and most direct way to Westminster. Held, that this was not a sufficient proof of deviation, so as to disentitle the solicitor to his discharge.

In this case an attachment had issued against J. T., the solicitor in the cause, for non-delivery of his bill of costs, pursuant to an order to that effect. He was arrested thereunder on the 12th of January.

It was now moved that he might be discharged out of custody, on the ground that, at the time of his arrest, he was proceeding to attend a case in the Rolls Court in which he was engaged as solicitor. His affidavit stated, that at the time of the arrest, he was proceeding direct from his own dwelling-house in Wharton Street,

Pentonville, for the express purpose of attending this Court, to be present at the hearing of two petitions standing in the paper.

J. T.'s clerk stated, that he left J. T., at his dwelling-house, at or very shortly before eleven o'clock of the same day, with the papers to be used on the hearing of the petitions, he being instructed and informed by J. T. to call at his chambers in Gray's Inn, and that the said J. T. should leave his said dwelling-house in a quarter of an hour, and go direct to Westminster, and would meet the deponent on his road to Westminster, and take the said papers, as he, J. T., must be at Westminster before twelve o'clock, by which time he expected the petitions to come on, and when he had appointed to meet some of the other solicitors in the said cause at Westminster.

[158] On the other hand, the officer and another witness stated, that he arrested J. T. in Bagnigge Wells Road, when J. T. stated, that he had a cause at Westminster, and was then on his way to attend it, but he did not name the Court in which such cause was to be heard, nor did he shew any papers confirmatory of this statement; that he on the contrary, and in the same breath, stated, that he had an appointment at Judges' Chambers, and after that another appointment in Lincoln's Inn Fields. That when he, the officer, arrested J. T. in the Bagnigge Wells Road, he was walking towards Coppice Row, Clerkenwell, which is not the direction in which the deponents, if they resided in Wharton Street, Pentonville, would have proceeded to Westminster, as the nearest and most direct way to such last-mentioned place.

Mr. C. P. Cooper now moved that J. T. might be discharged out of custody, on the ground that he was privileged from arrest, while proceeding to attend to his professional duties in this Court.

Mr. John Baily, *contrà*, contended that the party was not entitled to his discharge; that he had deviated from the direct road to the Court, and was, in fact, proceeding to other places before coming to Westminster.

THE MASTER OF THE ROLLS [Lord Langdale]. The only question is, whether Mr. J. T. is entitled to his protection from arrest.

No doubt a solicitor, who is proceeding to Court to attend to his professional business there pending, is privileged from arrest; and the question always is, whether, at the time of the arrest, he was *bona fide* pro-[159]-ceeding in a direct line to or from the Court. Here, he states positively, that he was proceeding direct from his residence towards Westminster Hall, for the express purpose of attending the hearing of two petitions in the paper, and he is corroborated in this by another person, who states other collateral circumstances.

I think this would clearly be sufficient to entitle him to his privilege; but a doubt is thrown on the matter, by his not having given a distinct account to the officer of where he was proceeding: it is, however, very possible that he might have been flurried at the time, and that he might have intended to go to the several places, first to the Court, and afterwards to the others; this would not be quite inconsistent with what he stated.

With regard to his proceeding in a direct line, the officer says that he would not have proceeded in this direction, as the nearest and most direct way to Westminster; but he might be better acquainted with the way, and might have known a nearer road; and he has not stated that this was not the way by which persons ordinarily go from Wharton Street to Westminster.

I think that, on the affidavits before me, this party is entitled to his discharge. (See *Ex parte Ledwich*, 8 Ves. 598; *Gascoygne's case*, 14 Ves. 183; *Castle's case*, 16 Ves. 412; *Ex parte Byrne*, 1 Ves. & B. 317.)

[160] THE MARQUIS OF HERTFORD v. SUISSE. Feb. 8, 1844.

A motion to dismiss being made, the Vice-Chancellor ordered it to stand over till the Lord Chancellor had decided on appeal a motion relating to the subject. After the Lord Chancellor's decision, the Plaintiff, suppressing what had taken place before the Vice-Chancellor, obtained, at the Rolls, an order of course to amend. It was held irregular, and discharged with costs.

The bill in this cause was filed on the 12th of July 1842, against Suisse and other Defendants. The answer of Suisse was filed on the 17th of November 1842.

On the 8th of May 1843 Suisse moved, before the Vice-Chancellor of England, to dismiss the bill for want of prosecution, but an appeal motion being then pending before the Lord Chancellor, which related to the matters of the cause, the Vice-Chancellor of England ordered the application to dismiss to stand over, until the Lord Chancellor had given judgment on the motion.

On the 18th of November 1843 the Lord Chancellor gave judgment (1 Phillips, 207), and on the 25th of January 1844 the Plaintiff, upon petition of course, obtained at the Rolls an order to amend his bill. The Plaintiff, in his petition, made no mention of the pendency of the motion to dismiss, or of what had taken place before the Vice-Chancellor of England on that motion.

Mr. Roupell and Mr. De Gex now moved to discharge the order to amend. They argued, that it was irregular, first, on the merits (which it is unnecessary to state, as the judgment was founded on the irregularity); secondly, because it had been obtained while the motion to dismiss was pending, and by a suppression of those material circumstances which had occurred before the Vice-Chancellor.

[161] Mr. Kindersley and Mr. Schomberg, *contra*, argued that the order was regular on the merits, that there was no suppression of any facts which were material; and that an order to amend was regular, if obtained before judgment given on the motion to dismiss.

THE MASTER OF THE ROLLS was of opinion that the order was irregular, having been irregularly obtained, as of course, upon a suppression of material facts. (See 6th Order of 9th May 1839, Ordines Can. 137.) He said that he could not determine the merits, as the cause was attached to the other branch of the Court. He discharged the order with costs. (See *Robinson v. Milner*, 5 Beav. 49; *Hooper v. Paver*, 6 Beav. 173; *St. Victor v. Devereux*, 6 Beav. 584.)

[161] BOWMAN v. BELL. Feb. 10, 1845.

On an issue *devisavit vel non*, the jury found in favour of the will, but before the cause had been heard on the equity reserved, the devisees in trust applied for a reference, to inquire whether a contract entered into by them was beneficial. Held, that the application was premature.

A testator devised his estate to trustees, who contracted to sell the property. This suit being afterwards instituted, the heir disputed the will. An issue *devisavit vel non* was directed, the accounts of the personal estate were ordered to be taken, and further directions were reserved.

The jury found in favour of the will. The trustees, before the case had been brought on upon the equity reserved, presented a petition for a reference to the Master to ascertain if it would be beneficial to the parties to adopt the sale.

Mr. Kindersley, Mr. Purvis, and Mr. Shee, for different parties.

[162] THE MASTER OF THE ROLLS [Lord Langdale] thought the application premature, and that this petition could not be heard till the case had been disposed of on the equity reserved. He said that the issue having been directed merely to inform the conscience of the Court, the validity of the will had not yet been finally established so as to enable the Court at present to act upon it.

[162] CLARKE v. MANNING. Feb. 24, 1844.

This Court has concurrent jurisdiction with Courts of law in cases of fraud, but there are courses of conduct which this Court construes as fraudulent, but which Courts of law would not notice.

Upon an injunction to restrain an action at law, on the ground both of legal and equitable fraud, the Court, admitting its jurisdiction to determine the legal fraud, permitted the action to proceed, in order to determine the question of legal fraud,

and restrained execution only, with liberty to apply. The jury having found that there was no legal fraud, this Court afterwards entered into the consideration of the question of equitable fraud, and finding none to exist, permitted execution to be taken out.

This was a motion for an injunction to restrain proceedings at law, and was founded on the merits confessed by the Defendant's answer.

It appeared that in 1842 Roe and Blachford carried on business in the Isle of Wight as bankers, and that they had in their hands monies, to a considerable amount, belonging jointly to the Defendant Manning and others, who were their customers. A joint stock bank being about to be formed, it was agreed that the business of Roe & Blachford should cease, that the banking company should be carried on upon the same premises, and that Roe and Blachford should become two of the managing directors of the banking company.

The company accordingly commenced business on the 12th of May 1842. Manning, some time afterwards, opened an account with the new banking company, and [163] Blachford, acting for the company, fraudulently transferred the balance of £1977, due to Manning from himself and Roe, from the account of the old firm to that of the new; and, on behalf of the bank, rendered them liable to Manning for the payment. The amount was entered in the "pass-book," but was omitted in the other books of the company. A correspondence which took place between Manning and the company, acting by Blachford, was in like manner suppressed.

In December 1842 Blachford and Roe became bankrupts, the fraud became known, and the question was, who was to suffer by it. Manning commenced an action at law against the banking company for the recovery of the balance due, including the £1977, and the bank, submitting to the remainder of the claim, filed this bill to be relieved from the payment of the £1977, and charging Manning with fraud and collusion in the matter.

An answer was put in, denying all the charges of fraud particularly set out in the bill. A motion was now made for an injunction. The other facts of this case are stated in the judgment of the Court.

Mr. Kindersley and Mr. Bagshawe, in support of the motion.

Mr. Turner and Mr. Allnutt, *contra*.

THE MASTER OF THE ROLLS [Lord Langdale]. The Plaintiff in this case is the managing officer of the Isle of Wight Joint Stock Banking Company. The bill is filed by him for the purpose of restraining the Defendants from pro-[164]-ceeding at law to recover a debt alleged to be due to them from the banking company.

The circumstances of this case are singular. In the month of May 1842 two persons of the name of Roe and Blachford carried on the business of bankers at Newport in the Isle of Wight. At that time, the formation of the Isle of Wight Joint Stock Banking Company was in contemplation, and arrangements were made between Roe and Blachford and the persons forming the new company, by which the business of Roe & Blachford, as bankers, was to cease, their business was to be wound up in a place in the neighbourhood, and their former place of business was to be occupied as the banking shop of the Joint Stock Banking Company then in formation. The deed of settlement was executed on the 9th of May 1842, and the business commenced on the 12th of May. The directors who were appointed to superintend the business were four persons, of whom Roe and Blachford, partners in the old firm, were to be the managing directors—an arrangement, the prudence of which certainly seems (to say the least of it) very questionable. They accordingly undertook to be the managing directors. Roe and Blachford were debtors to the Defendants, in this cause on two separate accounts. On one account they were debtors to the amount of £463, 14s. 6d., and on the other for the sum of £1877, 18s. Some variations took place in one of these accounts before the month of August 1842, when, on one account, £463, 14s. 6d. was due from Roe and Blachford, and on the other £1467, 12s. 1d. There was some interest due, and the whole sum then due for principal and interest amounted to £1977, which is the only sum now in question between the parties.

[165] In the same month of August, the Defendants were desirous that the

balance due to them from the old firm, should be transferred to the account of the new firm, the Joint Stock Banking Company, and on the 11th of August a letter was written by Mr. Blachford to the Defendants, stating that they were at liberty to draw on the new firm to the amount of £1467, 12s. 1d., the balance due upon one of the two accounts. On the 15th of August a cheque was drawn by the Defendants upon the new firm, for the sum of £1000, in favour of Mr. Deacon, the solicitor of the Defendants. Mr. Deacon paid it into the hands of his bankers, his bankers communicated with the Joint Stock Bank, but when it was paid, does not appear. Another cheque, for a sum of £1000, was also drawn on the 29th of August by the Defendants in favour of Mr. Deacon, and which was treated in the same manner. When that was paid, does not appear.

I think it does appear, on this occasion, that when these two cheques were drawn, there was no account open between the new firm and the Defendants, but it seems, that on the 5th of September, Mr. Blachford, the managing director, gave instructions to the clerk of the new firm, to open an account between the new firm and the Defendants; and we find entries made, beginning on a day in September which is not stated, in which those two checks of £1000 each, together with other sums, are duly entered. The first entry on the other side of the account is dated on the 23d of September, and consisted of a sum then paid into the new bank by the Defendants, and some other sums were also entered. On the 30th of September there is one of cash entered as £55, 10s., paid in by the Defendants to the new bank, and immediately under that entry, and seemingly on the same day, there is an entry to the [166] credit of the Defendants of £1977, being the sum which is now in question between these parties, and stated to be the amount of the whole balance due to the Defendants from Roe and Blachford. It is thus entered, on the 30th September, to the credit of the Defendants with the new firm, in the pass-book between the new firm and the Defendants; but as it seems at present, entered nowhere else, and not at all entered in any of the general open books of the partnership, which books, though they comprise the entries of the other sums of money comprised in this "pass-book," do not contain any entry whatever of this particular sum. The account, as kept in the pass-book, goes on with this item of £1977, but as kept in the other books of the firm, without that item. The pass-book is, from time to time, made up with that item. Whether there was any making up of the accounts in the other books, does not appear on this occasion; but this item was not in them, as it would seem. The matter so proceeds, and the account goes on between the parties. Roe and Blachford became bankrupts in December 1842. The pass-book is then communicated to the persons who at that time had the management of the business, and it is discovered that the accounts in the pass-book, and in the other books of the firm differ in respect of this item. It became plain a fraud must have been committed, and a very gross fraud. Who is to bear the burthen of it? That is really the only question between these parties. The fraud, which up to that time was secret, having been exposed, immediately, and of necessity, arises the question between these parties, "who is to be charged with the effect of it?" The Joint Stock Banking Company, who are the Plaintiffs in this cause, say, they are advised, that, under the circumstances, they ought not to bear it. The Defendants say they have acted in the usual way between bankers and their customers; that [167] they were justified in trusting the persons with whom they dealt, who acted on behalf of the company; that they are perfectly and entirely innocent, and therefore ought not to be charged with the consequences of this fraud.

In that state of things the Defendants commence their action, for the purpose of recovering what appears to be due on the balance of their account, including in it this disputed item of £1977. The Defendants in the action, represented by the Plaintiffs in this cause, say, you are not entitled to so large a sum as that; we must deduct the £1977, the subject of this fraud, and we will pay into Court the remaining part of the balance. They did pay that into Court. The Plaintiffs in the action have accepted that sum, and it now appears that the remaining sum is, as I stated before, the only one in question.

This bill is filed, stating these and some other facts which I have not thought it necessary minutely to detail; and, in stating those facts, it, at the same time, charges

the Defendants with having concerted a fraud with Blachford, or with Blachford and Roe, for the purpose of obtaining payment of this balance from the new firm, which it was hopeless they would be able to obtain from Roe and Blachford, and, on that ground of fraud, thus charged, it asks for relief. The charges in the bill are those of fraud, by concert and combination between these parties. The case is brought into equity, not only on the ground of fraud, but also on the ground of complication of account; that, however, I do not particularly take notice of.

This Court has clearly a concurrent jurisdiction with all other Courts in matters of fraud; but the defence [168] which is made is this—that all the frauds which are here distinctly charged as such, that if the Plaintiffs were to make them out, they would furnish a defence at law, and therefore the Plaintiffs have no occasion to seek relief in equity. The Defendants here say, let the action be tried, you have pleaded the frauds, prove them, and you will have there the same relief which you ask for here. The answer to which is this: It is very true, that if I make out those frauds which would be a defence at law, I should succeed at law; and, though I have not distinctly charged fraud of any other kind, yet I have stated and alleged facts, which shew that there has been a fraud which would not be a defence at law, not being those direct frauds arising from falsehood, concert, and combination, which will be taken notice of there, but frauds which will only be taken cognizance of in a Court of Equity, namely, fraud arising from the negligence or want of caution of the parties dealing with the agents, directors or managers of the Joint Stock Company—such negligence and such want of caution as have enabled them to practise a fraud on those for whom they were acting, and which they would not have been able to have practised, if the Defendants here had not been guilty of such want of attention and such negligence as they have.

It is very true that there are courses of conduct which this Court construes to be fraudulent, and which may be used as a defence to a party sought to be charged with the consequence of them, which would not be taken notice of in a Court of law. It is very true also that those matters which have been called legal frauds might be taken notice of here; but relief is sought for on the ground of both species of fraud, namely, that which would be considered fraud in a Court of law, and that which would be held to be fraud in a Court [169] of Equity. The answer comes in, denying directly and positively all the charges of fraud which are particularly set out in the bill, and claims and insists, that the Defendants have a right to have those imputed frauds determined by an immediate investigation in a Court of law. They, however, admit that there may possibly be such things as this Court alone would consider a defence to their claim, but not admitting that anything of the sort exists.

This being a motion made upon the answer, which denies all direct or legal fraud, the order which I have to make on this present occasion cannot proceed, in the last degree, on that foundation. The question which I have to consider here is, whether there is not a probable case to be made out which requires investigation; and I think that this is a case that requires investigation as to that which is alleged to be a fraud in a Court of Equity. Then it is said by the Plaintiffs that the legal and equitable fraud are but one case, and that I must determine both together. It is certainly one case, but it is founded on two distinct portions—namely, the charges of direct fraud, and the charges of fraud which, though not direct and being innocently meant, might nevertheless relieve the party who is sought to be charged with the effect of it. Is it an imperative rule that I must have the whole tried at once? Where direct frauds are charged, I think they are much more likely to be fully investigated in a Court of law than here. Why, then, should not this Court relieve itself of that portion of the case which can be best determined in a Court of law? Why should not that part of this matter, which is capable of being better tried and determined in a Court of law, be there disposed of, reserving to the parties the benefit they may be exclusively entitled to in a Court of Equity? It comes, therefore, [170] to this, whether there might not be an injunction to stay execution, without staying the trial; and I think that this will be the most convenient mode of disposing of the matter.

The importance of trying the matter in this way is quite apparent. Suppose that, in the action, this legal fraud should be made out, then there would be an end of all the Plaintiff's claim—there would be an end of the necessity for this bill. On the

other hand, suppose there was to be a verdict against these charges of direct fraud, and that the Plaintiff in this cause was satisfied, after the evidence which had been produced, that these charges of fraud, which are so distinctly denied by this answer, could never be substantiated, would it not then be quite open to him to amend his bill, by striking out of it all those charges of direct fraud, and relying on those charges or those facts which tend to shew, as against these Defendants, that there has been that which has been called equitable fraud? Why is this suit to go on with such a complicated state of charges, when, even after the imperfect examination of evidence which we can have here, the result might very probably be to send the matter to a Court of law, and when, in this stage of the cause and action, those questions of direct fraud might, at once, be brought to a satisfactory conclusion?

I am disposed to permit this action to go on to a trial, and, if necessary, to make an order that there shall be no execution taken out upon it, or to take the undertaking of these parties, as I have done before, that they will not do anything upon it, either without the leave of this Court, or giving to the Plaintiff an opportunity of applying to the Court. There may have been such a course of conduct between these parties, that the Plaintiffs at law, though they obtain a verdict, may still [171] be restrained in this Court from enforcing it. I think, therefore, that I must allow the action to proceed in order that the matter may be tried; but I must not allow execution to be taken out until that verdict can be further considered here.

NOTE.—The Defendant at law pleaded fraud, *covin*, misrepresentation and collusion with other persons, but, on the trial of the action, the issues were found for the Plaintiffs. On the 6th of June 1844 a motion was made for liberty to proceed on the judgment, which, after full discussion of the circumstances of alleged equitable fraud, the Court granted.

[171] DAVIS v. BARRETT. Feb. 26, 1844.

A notice of motion and affidavit in support professed, in its title, to give the names of all the parties, but omitted one. The Court would not proceed, but gave leave to amend, and re-swear.

Mr. Burge, Mr. G. Turner and Mr. Hoare, were proceeding to open a motion in this case, when,

Mr. Kindersley objected, that the notice of motion and affidavit in support of it, which professed in its title to give the names of all of the Defendants, omitted the name of John Graham Clarke. He insisted that the motion could not therefore proceed.

THE MASTER OF THE ROLLS said the strict rule was, that there ought to be a correct title to the heading. He would not hear the motion, but would give leave to amend the notice of motion, and to re-swear the affidavit.

See *Salomon v. Stalman*, 4 Beav. 243.

[172] COUNTESS BERCHTOLDT v. MARQUIS OF HERTFORD. Jan. 19, 1844.

[S. C. 8 Jur. 50.]

By deed, £10,000 was settled on A. B. for life, with power to appoint to her children or their issue, and in default in trust for her children; power was also given to A. B. to appoint a life interest to her husband. Afterwards, by will, the settlor gave a similar sum "to be laid out for the *sole benefit* of C. D., in the same manner, as nearly as might be, as the £10,000" secured for A. B. by the deed. Held, that C. D. was entitled to powers of appointment in favour of her children, their issue, and her husband; but that the children took nothing, except through the power.

The testator, by a codicil dated the 10th of January 1834, gave as follows:—"I give to Lord Lowther, Sir Edmund Antrobus, Bart., and Edward Marjoribanks, Esq.,

£10,000 over and above the legacy tax, in trust to be laid out for the sole benefit of my ward Matilda, now Countess of Bercholdt, in the same manner, as nearly as may be, as the £10,000 I have secured on my Birmingham property for Charlotte Leopoldina Strachan (Countess Zichy Ferraris). Naples, 10th January 1834. This is meant over and above other legacies. August 1st, 1834."

The £10,000 referred to in the codicil was secured on the Birmingham estate in the following manner:—

By indenture, dated the 19th of October 1833, and made between the testator of the one part, and trustees of the other part, reciting that the testator had determined and agreed to make such provision for the Countess Zichy de Ferraris (then Miss Strachan) and her issue, and failing them, for her sister, the Princess of St. Antimo and her issue, as was thereafter mentioned, the testator granted to the trustees a perpetual rent charge of £400 a year, issuing out of his Birmingham property, upon trust, for the Countess Zichy de Ferraris, for her separate use for life; and after her decease, in trust for such of her children, or the issue of her children as she should appoint, and in default, in trust for her children equally. And in case of there being no child, or of their dying under 21 without leaving lawful issue living at their decease, then there [173] was a gift to the Princess of St. Antimo and her children and their issue similar to the preceding, with an ultimate limitation in favour of the settlor.

The deed contained a power for the Countess Zichy de Ferraris and the Princess St. Antimo to appoint all or any part of the £400 a year to any husband for life, to take effect on her death, and to precede the trust for her children.

The deed contained a power for the owner of the estate to exonerate it by payment of £10,000. The sum was to be invested in land, and was to be conveyed upon the same trusts, and with, under, and subject to the same powers, provisions, &c., as those declared respecting the £400 a year.

This bill was filed to have the trusts of the legacy declared.

Mr. Burge and Mr. Tripp, for the Plaintiff, contended that the Plaintiff was entitled for her separate use for life, with power to appoint to her children, and their issue, and to her husband, in the same way as was directed in favour of the Countess Zichy de Ferraris by the deed. They argued that these powers formed part of the benefits intended by the testator. (*Phipson v. Turner*, 9 Sim. 246.)

Mr. Gordon, for the children of the Plaintiff, argued that the Plaintiff had the power of appointing the fund to them.

Mr. Simpson, for the Plaintiff's husband, contended, either that the Plaintiff took the fund absolutely, or with the several powers of appointment.

[174] Mr. Kindersley and Mr. Schomberg, for the Marquis of Hertford. The Plaintiff takes a life interest only, and subject thereto, the marquis, as residuary legatee, is absolutely entitled to the fund. The legacy is to be laid out "for the sole benefit" of the Plaintiff: this excludes the notion that any other party is to take a benefit. It does not, in any way, appear, that the husband or children were objects of the testator's bounty.

THE MASTER OF THE ROLLS [Lord Langdale]. By the deed of 1833, the owner of the estate had the power of redeeming the charge of £400 a year, on payment of £10,000; and this sum was to be laid out on lands to be settled to the same uses, and with the same powers, &c., as the rent charge. It has been admitted, throughout the argument, that this redemption money is the sum referred to in the codicil by the description of the £10,000 "secured on my Birmingham property."

If the rent charge had been redeemed, and the £10,000 thus secured, had been laid out as directed, what interest would the Countess Zichy de Ferraris have taken? She would have had a life interest, with a power to appoint to her children or their issue, and a power to give a life interest to her husband. In default of her appointing, there would also have been a distinct independent gift to her children in conformity with the recital in the deed, of the settlor's intention to make a provision for her "and her issue." In the codicil nothing is said as to the children, but the legacy is to be laid out for the sole benefit of the Countess Bercholdt, in the same manner, as nearly as may be, as the £10,000 secured on the Birmingham property. Great stress has been laid on the word "sole;" and it has been argued, that because the legacy is to

be settled for the legatee's "sole [175] benefit," therefore any construction by means of which a beneficial interest may be taken by any other person must be excluded. No doubt the word "sole" must have its full effect and operation; but I am of opinion that the effect of that word is not such as is contended for by the Defendant. The £10,000 is to be laid out for the "sole benefit" of the Plaintiff, but "*in the same manner*," as nearly as may be, as the other £10,000 secured on the Birmingham property. How was that settled for the benefit of the Plaintiff? She had a life interest with these powers. A life interest is surely improved by the addition of a power to appoint to a husband and children.

I admit that there is no gift to the children, except through the power; but I am of opinion that the Plaintiff, in addition to her life interest, is entitled to a power of appointment over this legacy, in favour of her husband and children or their issue, with an ultimate limitation, in default of appointment, to the representatives of the settlor. I must declare so accordingly.

The costs must be paid out of the testator's estate.

[176] THE ATTORNEY-GENERAL v. THE CORPORATION OF LEICESTER.

Feb. 17, 19, 1844.

An agent assisting in a breach of trust is personally responsible.

A municipal corporation were trustees of a charity. They permitted their town clerk to receive and retain the trust monies, instead of seeing it applied to the purposes of the trust. Held, that the corporation and the town clerk were liable for the breach of trust.

In a suit to remedy a breach of trust, it is not, since the New Orders, necessary to make every party participating in the breach of trust party to the suit.

This was an *ex officio* charity information filed by the Attorney-General against the Corporation of Leicester, Mr. Burbidge, their former town clerk, and against the present trustees of one of the charities in question.

It appeared that Sir Thomas White, Robert Heyrick, and John Parker had, many years back, made several benefactions to the Corporation of Leicester, upon certain charitable trusts, by which they were, in effect, to employ the income in making loans to young men, repayable without interest, and, on repayment, the same sums were to be lent out again in a similar manner. The Corporation had, accordingly, for a considerable period, lent out these monies on bond; and it had been the practice for the outgoing mayor to hand over the balance of the funds to his successor, together with the securities; but for some years previous to the passing of the Municipal Corporation Act (1835) the monies had been received by Mr. Burbidge, the town clerk, and retained by him. He, however, paid interest to the mayor for the time being for his own use. No money was then handed over by the outgoing mayor to his successor; but an accountable receipt was given by the former to the latter.

The Corporation neglected to lend out the money according to the trust; and, at the passing of the Municipal Corporation Act, a large balance, alleged to amount to nearly £6000, remained in the hands of Mr. Burbidge, the town clerk. The new Corporation ap-[177]-pointed a new town clerk, and Mr. Burbidge claimed, under the Act, a large compensation for the loss of his office, the amount, which he alleged he could not get settled, exceeded the sum due from him.

It appeared that by deeds executed by Mr. Burbidge, in 1836, reciting that he had a considerable balance of the charity funds in his hands, he, Burbidge, conveyed his rights to the compensation, by way of mortgage for securing the balance due from him to the charity.

Mr. Twiss and Mr. Blunt, in support of the information, argued, that both the Corporation and Burbidge were liable for the breach of trust; the former as direct trustees, neglecting their duty and permitting the trust funds to be misemployed; and the latter having, with knowledge of the trust, received the trust monies and misemployed them for his own benefit.

Mr. Turner and Mr. Rolt, for the Corporation, contended that the Corporation had

not incurred any liability; that the receipt and misapplication was the individual act of the mayor, and not of the Corporation.

That the information was defective for want of parties, inasmuch as the several mayors of the borough who had participated in the alleged breaches of trust had not been made parties.

Mr. James Parker, for Burbidge, contended that he was a mere agent of the Corporation, and accountable only to his principal, and that he had a right to set off his claim for compensation against the monies for which he was accountable to them.

Mr. Busk, for the trustees of White's charity.

[178] *Wilson v. Moore* (1 Myl. & K. 146), *Attorney-General v. Wilson* (Cr. & Ph. 28), *Caffrey v. Darby* (6 Ves. 488) were cited.

Mr. Twiss, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. I will not trouble you to reply. I am very much surprised at the points which have been raised here, nothing being more clear than the principle on which this Court proceeds.

The Corporation of Leicester, either by original endowment or by acts of their own, appear to have been the trustees of several charitable funds, which were to be employed in making loans to a particular description of persons, which loans, when recovered from the borrowers, were to be again applied in a similar way. What has happened, in very many instances in this case, is this: the monies have been lent on bond and have been recovered, but, being recovered, they have not been lent out again, but have remained in the hands of Mr. Burbidge, the town clerk, who has employed them for his own benefit, and it is said, he has paid the interest thereon to the mayor for the time being for his own benefit. The argument is, that the consequences of this (than which a grosser breach of trust never happened) are to be entirely escaped from by the Corporation, by saying, "it was not the Corporation, but our mayor, who lent the money to our town clerk, and this was done without our authority and without any neglect on our part." That is the sort of defence which is set up by the Corporation.

[179] Now, in the first place, it cannot be disputed, that if the agent of a trustee, whether a corporate body or not, knowing that a breach of trust is being committed, interferes and assists in that breach of trust, he is personally answerable, although he may be employed as the agent of the person who directs him to commit that breach of trust. (See *Fyler v. Fyler*, 3 Beav. 550, and the cases cited.)

It is said there has been no neglect, for that somebody must have been employed in the business. It is true, that in a corporation, there is no single hand to receive a sum of money, therefore someone else must be employed to receive it, and here, it is said, the mayor was employed and was entrusted to do so. That might have been perfectly right, and if in the ordinary course of transactions, the mayor had been employed by the Corporation to receive the money, and, without any default of theirs, had misapplied it, I do not say the circumstances might not have been such as to exonerate the Corporation.

But what was done from year to year? Not superintending the employment of the money as they ought to have done, but, taking such representations as were made to them, the Corporation permitted the mayor, or the agent of the mayor, as it is said (though this was the agent of the Corporation as well as the agent of the mayor), to employ this money, from year to year, as they pleased, without taking, from time to time, those steps, which were always in their power, to ascertain how the money received by the mayor had been employed. Assuming it to have been right to permit the mayor to receive this money, was it enough for the Corporation to see that the mayor produced a receipt, neglecting altogether to super-[180]-intend the employment of the money according to the trust, and thus leave the mayor at liberty, for anything they knew, to allow the misemployment of the money, in the way in which it has been done in this case. There was great neglect. The Corporation of Leicester, whose servant it is said the mayor was for this purpose, ought vigilantly to have watched and superintended the employment of that money, which they placed in his hands; if they had so done, they would have known that this breach of trust had been going on. There has been a plain neglect on their part, and they are answerable for the consequences of that neglect.

I am surprised to find that there is any doubt in a case of this kind. There would be an end to all cases of breach of trust, if a trustee is to permit his agent to retain the trust money, from time to time, when his duty is to superintend and examine into the application of the money; and if, because he might have been right in allowing an agent to receive the trust money for him, he is to be considered guilty of no neglect in allowing such agent to retain it. It seems to me clear that the Corporation were answerable for the misemployment of the trust funds; and it is perfectly clear also that Burbidge is answerable, for he, the agent to the trustees, knew and was aware of it all, and he, for his own profit and his own advantage, employs this money in a way contrary to the trust, and at the same time pays to the mayor, contrary to the trust, as it would seem, the interest of this money for his own use. A more gross breach of trust, therefore, I hardly ever heard of than this seems to have been.

An objection has been raised as to parties. It has been argued that the several mayors who were cognizant of these breaches of trust ought to have been made [181] parties to this information. There has been a great deal of argument as to the propriety of bringing them before the Court in this information, to prevent their being brought here in other suits which may arise hereafter. The Attorney-General, as I understand this case, was in a situation to charge them all with these breaches of trust, personally and individually, if he thought proper. Is it the law of this Court, or is it not, that every person who participates in a breach of trust must be a party to a suit to remedy that breach of trust? A General Order was made not long ago which rendered it unnecessary to bring all the parties to a breach of trust before the Court. (1) I do not say these mayors did not join in the breach of trust; but supposing them to have joined therein, I conceive that if this General Order is to have any operation at all, it renders it unnecessary to make all persons who have joined in the breach of trust parties to a suit for the redress of that breach of trust. It is true that the consequence might be to render it necessary to file some other information; but the question is, whether the Attorney-General, complaining of the breach of trust, is to be compelled to make them parties to the present information; and I am of opinion that the order relieves him from that obligation.

I think, therefore, that both the Corporation and Mr. Burbidge are liable to repair this breach of trust; and that it was not necessary for the Attorney-General to bring those other parties before the Court; they may be liable, and may be personally called on, in another proceeding.

[182] The next question is, what are these parties answerable for? Having attended to the evidence in this case, it certainly does not appear to me that, at present, a charge has been made out against Mr. Burbidge to any greater extent than £2886, 10s. 10d., and I shall order him to pay that sum into Court. With regard to the rest, I think I may make a declaration that the Corporation is answerable to these charities for that sum and such other sums as may be found due from Burbidge to these charities on the taking of the account to be directed; but I shall not, at this time, considering the form of this information, make any order for the Corporation to pay that or any other sum into Court: that must stand over to a future occasion. An account must be taken of the several sums of money, and parts of this trust property which have been received by Mr. Burbidge in the manner stated in these pleadings; an account of the interest which he has paid on it; with liberty to the Master to state special circumstances; I must reserve further directions and costs.

I say, again, this matter might be much better arranged if payment could be had out of the compensation fund which is coming to Mr. Burbidge. It is certainly with no satisfaction that I make a decree of this sort; but, unless some arrangement can be made between the parties, as to the compensation, I have no other duty than to declare what seem to me to be the rights and obligations of the parties, and the decree must stand in the way I have pronounced it.

(1) 32d Order of August 1841, Ordines Can. 174. And see *Perry v. Knott*, 5 Beavan, 293; *Kellaway v. Johnson*, 5 Beavan, 319; *Allan v. Houlden*, 6 Beavan, 148.

[183] WOOD v. WOOD. Feb. 15, 1844.

[See *In re Betton's Trust Estates*, 1871, L. R. 12 Eq. 557.]

Where an estate is mortgaged, the equity of redemption, unless there appears a clear intention of making a new settlement, remains subject to the old uses, or to the trusts of the original settlement.

By a marriage settlement, a rent charge of £200 a year was secured to the wife for life, payable quarterly, with powers of distress, &c. To enable the husband to mortgage, the wife released her rent charge to the mortgagee. The equity of redemption was reserved to the husband, who covenanted to convey other lands on the trusts of the settlement. The husband, by his will, gave his real and personal estate to his brother, on condition that he would allow his wife £300 a year for life. Held, that the £200 a year remained a valid charge on the equity of redemption; and, secondly, that it was not satisfied by the £300 a year.

By the settlement made on the marriage of the Plaintiff Anna Wood with Nichol Wood deceased, and dated in 1835, Nichol Wood granted to the Plaintiff a rent charge of £200, issuing out of certain specified estates, to hold the same, from the death of Nichol Wood, during her life, for her jointure and in bar of dower or thirds, and payable quarterly, on the 25th of March, &c., with powers of distress and entry, and he covenanted to pay the rent charge, and granted a term of 100 years for securing the same by mortgage or sale.

In 1837, by indenture made between Nichol Wood of the first part, the Plaintiff, his wife, of the second part, the trustees of the marriage settlement of the third part, and Prothero (a mortgagee) of the fourth part, reciting the marriage settlement, and that Nichol Wood, having occasion to borrow the sum of £2000, had requested Prothero to advance him the same, which Prothero had agreed to do, upon having the several hereditaments, &c., thereinbefore mentioned, demised to him, freed from the annual sum of £200, and of the term of 100 years for securing the payment thereof; and reciting that it had been agreed between the parties thereto, that in order to effect the mortgage security for £2000, the several persons parties thereto of the second and third parts, respectively, should join therein, and that Nichol Wood should enter into a covenant with the several persons parties thereto, of the third part, to [184] grant some other hereditaments of a competent or equal value with the said messuages thereinbefore mentioned, for a term of 100 years, upon the like trusts, &c., as were mentioned and set forth in the marriage settlement, it was witnessed that Nichol Wood and the Plaintiff demised the principal part of the settled property to Prothero by way of mortgage for £2000 discharged and released from the jointure, subject to a proviso for redemption by Nichol Wood, his executors, administrators and assigns; and Nichol Wood covenanted with the trustees, to demise to them other hereditaments of equal value for 100 years upon the trusts, &c., of the marriage settlement.

Nichol Wood, by his will dated in 1838, bequeathed as follows: "I give and bequeath to my dearly beloved brother, Edward R. Wood, all my property, real and personal, on consideration he fulfils the following conditions. He is to allow my dear wife, Anna Wood, the sum of £300 per year, as long as she lives, and the little cottage at Pater; to pay all my just debts," &c. "If my dearly beloved brother will not undertake to do the above-mentioned articles, I wish all my property to be sold to accomplish them."

Nichol Wood died shortly after, and Edward R. Wood disclaimed.

This bill was filed by the widow against the Defendant (who was both heir and administrator, and had redeemed the mortgage) for the purpose of recovering the rent charge of £200 and the annuity of £300 a year.

Mr. Kindersley and Mr. Bevir, for the Plaintiff. First, although the Plaintiff joined her husband in the mortgage, and allowed the equity of redemption to be reserved to him, still she is, in equity, entitled to all her [185] previous rights upon

the equity of redemption. *Ruscombe v. Hare* (6 Dow, 1), *Jackson v. Innes* (1 Bli. (O. S.) 104).

Secondly. The gift of the annuity of £300 by the will is neither a satisfaction for the rent charge of £200 a year, nor a performance of the testator's obligation to secure it. *Haynes v. Mico* (1 B. C. C. 129), *Adams v. Lavender* (M'Clel. & Y. 41), *Devese v. Pontet* (1 Cox, 188), *Hales v. Darrell* (3 Beavan, 324). The slightest circumstances of difference will prevent the Court holding a gift to be a satisfaction or a performance. Here, there are most material differences between the two annual sums. The £200 a year is a rent charge secured on real estate, with powers of distress and entry, and with a term limited to secure it by sale or mortgage, and it is payable quarterly, on the usual quarter days. On the other hand, the £300 a year is a mere personal annuity, having none of these remedies; it is payable yearly, and on a different day, and it is accompanied with the obligation to pay the testator's debts. By directing payment of his debts, the testator evidently intended to be just; by the gift of £300 a year he was desirous of being generous.

Thirdly, the covenant of the testator, contained in the mortgage deed, formed a lien on the real estate, which he was then entitled to. *Wellesley v. Wellesley* (4 Myl. & Cr. 561), *Fremoult v. Dedire* (1 P. W. 428).

Mr. Turner and Mr. J. Wilson, *contra*. The widow having released her right to her rent charge in a portion of the settled estate, the rent charge has, by operation of law, become wholly extinguished. (3 Cruise Dig. (4th ed.) 301; 1 Inst. 148 a., 18 Vin. Abr. 504; *Butler v. Monnings*, Noy, 5.)

[186] The gift of the will, being equally beneficial, is a satisfaction or performance. *Weyland v. Weyland* (2 Atk. 633), *Walton v. Smith* (4 Mad. 325), *Peacock v. Glascock* (1 Rep. Ch. 46), *Mascal v. Mascal* (1 Ves. sen. 323), *Graham v. Graham* (*Ibid.* 262), *Brown v. Dawson* (2 Vern. 498, and Pr. Ch. 240).

There is a difference between satisfaction and performance; in cases of performance, the Court will disregard slight differences between the obligation and the thing given; *Garthshore v. Charlie* (10 Ves. 13). The rent charge being destroyed, the £300 a year is given in satisfaction of the obligation created by the mortgage deed. It is of a larger amount, and equally beneficial, and is a charge upon the testator's estate, and may be distrained for; *Buttery v. Robinson* (3 Bingh. 392).

THE MASTER OF THE ROLLS [Lord Langdale]. The testator in this case, by his will, directed an annuity of £300 a year to be allowed to his wife as long as she lived. The wife, by her marriage settlement, dated in 1835, had a rent charge of £200 secured to her by way of jointure, and the question is, whether the annuity of £300 is to be taken in substitution of the rent charge.

This case has been argued with a great degree of ingenuity. It is said, that previously to the date of the will, the wife had no security at all for the rent charge, except the personal covenant of the husband, and that the annuity given by the will must be considered a performance of that covenant; so that the question comes to this: what was the right of the wife previous to the [187] date of the will? Now the settlement executed before the marriage gave to the wife an undoubted right to the rent charge by way of jointure. After the marriage the husband had occasion to raise money on this estate; he could not conveniently do it by means of his own interest in the estate, independently of the interest belonging to his wife; he, therefore, procured his wife to join in the security.

It is established law that where an estate is mortgaged, the equity of redemption, unless there appears a clear intention of making a new settlement, remains subject to the old uses, or to the trusts of the original settlement. In this case, can there be any doubt as to the intention of the parties? The recital distinctly shews, that the wife had nothing more in view than to assist her husband in raising the money. The recital is, that Nichol Wood, having occasion to borrow the sum of £2000, had requested Prothero to advance him the same, which he had agreed to do, upon having the security of the wife. "And whereas it has been agreed, between and by all the said several parties hereto, that in order to effect the said mortgage security" (that is distinctly stated to be the purpose) the wife and trustees should join therein, and that Nichol Wood should enter into a covenant with the parties of the third part to settle other hereditaments, of an equal value with the hereditaments

mortgaged. Therefore all the purposes of the operative parts of the deed are clearly recited to be for carrying into effect the mortgage. How can I presume, as against the wife, that some other intention existed, and that the parties intended to create a new settlement, nay, further than that, that they intended wholly to deprive her of the benefit of the original settlement, and to substitute the mere covenant of the husband? I cannot presume that, for the mortgage was executed, not for the purpose of creating a new settle-[188]-ment, not in order to deprive her of any right, but for the mere purpose of enabling the husband to give a satisfactory security for the money he was desirous of borrowing. I think, therefore, that the Plaintiff has the same rights against the equity of redemption, which she would have had on the unincumbered estate if this deed had not been executed.

Having this equitable right, then arises the question whether it is satisfied. I am of opinion that there is no rule of this Court by which I can say that the gift by the will is to be considered a satisfaction.

It must be declared that the Plaintiff is entitled upon this estate, which is now released from the mortgage, to the rent charge of £200, and also to payment of the annuity of £300, if the state of the testator's assets will permit.

[188] COLYER v. CLAY. June 12, 1843.

[See *Scott v. Coulson* [1903], 1 Ch. 455; affirmed [1903], 2 Ch. 249.]

A fund was held on trust for one for life, with remainder between B. and C. equally, if living, with benefit of survivorship between them. B. sold his reversionary interest. At the time of the sale, C. was dead, but the fact was neither known to the vendor nor to the purchaser. Held, that the sale could not stand.

Extent of lien on a fund, where the grantor of an annuity agreed to sell to the grantee the fund on which the annuity was secured, and to repurchase the annuity, but, in consequence of a mutual mistake, the contract for the sale of the fund could not be specifically performed.

The testator John Willson, by his will dated in 1809, gave to trustees the sum of £2000, to be invested in the funds and held in trust for his wife for life, and after her decease, on trust to pay the said sum and dividends unto his nephew John W. Warren and his nephew John Willson, equally, share and share alike, in case they should be then alive; but if either of his said nephews should be then dead, then upon trust to pay the whole of the said sum unto the survivor of them, [189] his said nephews John W. Warren and John Willson to and for his own use and benefit.

The testator died soon after, and the £2000 was invested according to the trusts.

In June 1813 John Willson granted to the Plaintiff Colyer an annuity of £113 payable during his life, and he assigned all his reversionary or expectant interest in the £2000 upon certain trusts, for better securing the annuity. The deed contained a power of repurchasing the annuity, upon payment of £756 and the arrears.

John Willson fell into bad circumstances; the annuity being unpaid, a negotiation took place for the cesser of the annuity, and for the purchase by the Plaintiff, of John Willson's interest in the £2000, at a price to be fixed by an actuary. A case was accordingly, with the concurrence of both parties, laid before an actuary for his opinion. The case and the opinion were as follows:—

CASE. A., who is sixty-three years of age, has a life interest in £2000, which sum, at her death, is to be equally divided between the testator's nephews, B., who is forty-four, and C., who is twenty-four years of age, with benefit of survivorship. *Quære.* What is the present worth of B.'s interest, and what the value of C.'s? Considering the legacy duty of £2, 10s. per cent. to be deducted before they can receive their shares on the death of A.

OPINION. The present value of B.'s interest in the above reversions, after deducting the legacy duty is £500, 8s. And the present value of C.'s interest, after making the same deduction, is £589, 10s.

27th Oct. 1819.

WILL. MORGAN,
Equitable Assurance Office.

[190] The following contract was entered into between the parties :—

"I do hereby agree to sell to Mr. William H. Colyer, all my present and future interest and title in and to the sum of £2000, to which I am now, or may hereafter be entitled, under the will of my late uncle John Willson, at or for the price of £490; such sum to be deducted from the sum of £1416, 8s., due from me to him, and I also engage to secure to him the balance of £926, 8s., with simple interest, by my acceptance to his draft, and to execute to him a bond for that amount, whenever called on so to do.

"JOHN WILLSON.

"January 12th, 1820."

At the same time the following account was stated between the parties :—

"Balance of former account due to Mr. Colyer the 28th		
September 1815	.	£241 16
To four years' annuity to 29th September 1819	.	452 0
		<hr/>
		693 16
Cr. Property tax on half-year to April 1816	.	5 13
		<hr/>
		£688 3
Add advance (NOTE.—This meant the repurchase-money		
for the annuity)	.	700 0
Add one quarter's annuity to 28th December	.	28 5
		<hr/>
		£1416 8

"I acknowledge this account to be correct, E. E. January 12th, 1820.

"JOHN WILLSON."

By an indenture dated the 1st of February 1820, reciting that Willson was indebted to the Plaintiff in the [191] sum of £1416, 8s., and that he had agreed to sell him all his interest under the will, in satisfaction of £490, 10s. part of the £1416, 8s., it was witnessed that in consideration of the £490, 10s., Willson assigned to the Plaintiff, all that sum of £2000 bequeathed by the will. Notice of the deed was given to the trustee.

It turned out, that at the date of this deed John W. Warren was dead, he having died in January 1819; but the fact was unknown both to Colyer and to Willson.

In 1836 the testator's widow died, and this bill was filed in 1839, by Colyer, praying for a transfer of the whole fund; the Plaintiff offering, in case it should appear that John W. Warren was dead prior to the purchase, to deduct, from what was due, such further sum as the Court might deem right. But if the Plaintiff should not be entitled to the benefit of his purchase, then that he might be declared entitled to a lien on the trust fund for the arrears of the annuity and repurchase-money, together with interest, or that the annuity might be declared to be subsisting, and to be, together with the arrears, a charge on the trust funds.

It appeared, in the course of the proceedings, that in the year 1817 John Willson had executed a settlement of his reversionary interest in favour of his wife and children, but notice had not been given to the trustees.

Mr. Pemberton Leigh and Mr. Chandless, for the Plaintiff. The parties proceeded on a common error; neither of them was aware of the death of Warren; and in the case stated for the opinion of the actuary, the interest of Willson seems, in several respects, to have been incorrectly stated prejudicially to the Plaintiff. The Plaintiff, though he insists on his purchase, does not [192] seek to have the advantage which he did not contract for, but he is willing to pay an increased price proportionate to the improvement of the interest by the death of Warren.

The Plaintiff consented to give up his annuity on the faith of the purchase; if the purchase is set aside, the parties must be remitted to their original position, and the Plaintiff will be entitled to the benefit of his annuity, and to a lien on the fund for the arrears down to the present time.

As to the marriage settlement, it was never communicated to the trustees. It was unknown until the filing of this bill, and it is therefore void as against the Plaintiff, who gave notice of his deeds. To perfect an assignment of a trust fund, notice must be given to the trustees. *Dearle v. Hall* (3 Russ. 1), *Loveridge v. Cooper* (*Ibid.*), *Foster v. Blackstone* (1 My. & K. 297, and 3 Cl. & F. 456).

Mr. Campbell, for Willson, and Mr. Kindersley and Mr. Moore, for his wife and children, *contra*. This contract was entered into by Willson, under an entire misapprehension of his interest. In consequence of the death of Warren, he was entitled in reversion, not to a moiety, but to the whole, and the legacy was stated to be £2000 money instead of stock, which was then more valuable. This contract, therefore, having been entered into under a mistake, cannot be enforced as it stands, and the Court has no jurisdiction to enforce it as asked, namely, with such a variation, in its terms, as will entirely alter the nature of the contract.

The arrangement between the parties consisted of independent matters:—a repurchase of the annuity, [193] the settlement of accounts, and the purchase of the reversionary interest. If the latter be set aside, the former will still remain, and the Plaintiff, as we admit, will be entitled to a lien, but to the extent only of the £490, 10s. purchase-money and interest.

The principle of *Dearle v. Hall* does not apply to such a case as this, where no new consideration was given.

Mr. Rolt and Mr. Elderton, for other parties.

Mr. Chandless, in reply. If the transaction is to be set aside at all it must be set aside *in toto*. Where a lease is surrendered for the purpose of granting a new one, if the latter is invalid, the Court will set up the former.

June 12. THE MASTER OF THE ROLLS [Lord Langdale]. The Plaintiff having consented to give to the Defendants the same advantage, as if they had adopted a course of their own to set the contract aside, the question is, whether, having regard to the circumstances under which it was executed, this Court can, in any way, enforce it. I am of opinion that it cannot be enforced as it stands: to do so would be manifestly unjust, because both the parties entered into the arrangement under a common mistake, which is now admitted. As the deed of 1820 cannot stand, and as this bill is filed for the purpose, amongst other things, of having it declared that the Plaintiff has a lien, to some extent, upon the funds assigned by that deed, it becomes necessary to determine to what extent, in equity, the [194] Plaintiff is entitled to a lien, and how far the Plaintiff ought to be indemnified out of the fund.

I think it has been admitted, on all hands, that the Plaintiff is not to be dismissed out of this Court without having some relief, and various propositions have been stated to me as to the extent of the relief to which he is entitled. It is said that the reversionary interest, which he intended to purchase, was valued at the sum of £490; that he struck this sum off the amount of his debt, and that this, therefore, is the sum for which he ought to have a lien; that he ought to have a lien upon the fund for repayment to him of this £490, together with interest.

Next, it is said, that if I should be of opinion that the Plaintiff is entitled to anything more than that sum, he cannot be entitled to more than the sum which he agreed to give for the annuity, which was £700, and that this is the utmost extent of equity to which the Plaintiff can be entitled as against this fund.

Upon the other hand, the Plaintiff says, I am entitled to much more than that, I ought to be restored to the annuity to which I was originally entitled, and to have a lien upon this fund for the whole amount of all the arrears of that annuity, as an annuity now continuing and subsisting. I cannot say that I can agree with any one of these propositions. I think the Plaintiff is entitled to a lien for as much as he had a lien for at the time when this transaction took place. What was that? It is clear there was an arrear of the annuity to the amount of £452, and I think there was further in arrear the sums of £28, 5s. and £113, and besides this, there was the sum of £490 which was agreed to be taken for the purchase-money of this reversionary interest. My opi-[195]-nion is, that he is entitled to a lien for these sums: for the first three, because they were due to him, and constituted a lien on the trust fund at the time; and he is entitled to the fourth sum of £490, because that was the consideration, which, by way of diminishing the debt due to him, he agreed to give

for that which he supposed he had purchased at the time. He is entitled also to interest on these sums, and to the costs of suit. The Defendants will have their costs, and the residue must be transferred to the trustees of the settlement. (Reg. Lib. 1842, A. 2054.)

[195] EARL NELSON v. LORD BRIDPORT. Dec. 5, 12, 1843.

[S. C. 6 Beav. 295.]

Whether, upon an application to the Master for his certificate of the necessity of a commission to examine witnesses, it is necessary to produce before him the interrogatories upon which it is intended to examine the witnesses, *quære*. The practice in the Masters' offices in this respect differs.

The Plaintiffs and Defendants applied to the Master for a certificate for a commission to examine witnesses abroad, and they produced to him the proposed interrogatories. He certified, in both cases, that a commission was necessary to examine witnesses "*under the said interrogatories*," and orders were made "*accordingly*." The parties afterwards, by consent, obtained an order for a single commission, directed to a sole Commissioner. The Plaintiffs examined on fresh interrogatories. Held, that under the first orders the proceeding of the Plaintiffs was irregular; and, secondly, that it was equally so under the consent order. The Court, however, refused to suppress the depositions, but made the Plaintiffs pay the costs of the application, and gave leave to the Defendants to apply to be put on a footing of equality with the Plaintiffs.

In this cause, certain inquiries as to the law of Sicily and other matters having, by the decree, been directed to be made by the Master, it became necessary to have a commission to examine witnesses in Sicily.

The Defendants having, according to the custom of the Master's (Sir G. Wilson's) office, produced their interrogatories to him, the Master, on the 16th of [196] March 1843, granted his certificate that a commission was necessary to examine witnesses "*under the said interrogatories*," and by an order of the same date, reciting that the Defendants "*had accordingly exhibited interrogatories*" for the examination in support of their state of facts and charges, and that the Master had certified that a commission was necessary to examine witnesses in Sicily, under the said interrogatories, a commission was ordered accordingly, for the examination of witnesses on the part of the Defendants.

An order was made on the 8th of June 1843, which recited that it appeared by the Master's certificate of the 3d of June that the Plaintiffs had exhibited interrogatories for the examination of witnesses, and that it was necessary to examine witnesses in Sicily "*under the said interrogatories*," and that it was prayed that the Plaintiffs might take out a commission, &c., "*which upon hearing the said Master's certificate read was ordered accordingly*."

The parties afterwards arranged that one commission only should issue, and that one of the Examiners of the Court should be appointed sole Commissioner, and, by consent, an order was made on the 14th of July, whereby, after reciting the two orders of the 16th of March and the 8th of June, one commission only issued, directed to Mr. Plumer, the Examiner of the Court. This order, however, did not, in any way, direct that the examination should be "*under the said interrogatories*."

In the month of September 1843 the commission was executed in Sicily; the Defendants examined their witnesses upon those interrogatories alone which had been exhibited before the Master, but the Plaintiffs examined on interrogatories afterwards prepared in Sicily.

[197] A motion was now made, on the part of the Defendants, for the publication of their evidence, and for the suppression of the Plaintiffs' evidence, on the ground of the alleged irregularity in examining upon the new interrogatories.

In opposition to the motion, it was deposed that the interrogatories exhibited before the Master were not lodged in his office like other proceedings, nor was any

warrant taken out on leaving, and that it was not the practice in the offices of nine of the other Masters to require the interrogatories to be produced on applying for a certificate for a commission.

Mr. Pemberton Leigh and Mr. George Turner, in support of the motion. The Master has only certified to the necessity of examining witnesses under the interrogatories produced to him. The order of the Court for a commission is in conformity with that certificate, and limits the examination to those interrogatories. The Plaintiffs exhibited new interrogatories, a proceeding which was perfectly irregular, and this being a matter in which the Court acts with the greatest strictness, *Lord Mostyn v. Spencer* (6 Beavan, 135), the depositions, thus irregularly taken, ought to be suppressed. The Plaintiffs have had this advantage over the Defendants—their solicitors have communicated with the witnesses before preparing the interrogatories, while the Defendants, in obedience with the order, have limited their examination to the matters contained in the interrogatories produced before the Master.

Considering the delay and expense of a foreign commission, it is perfectly reasonable that the Master, [198] before he certifies, should see that the matters as to which it is proposed to examine the witnesses abroad are such as render it absolutely necessary for the purposes of justice to grant a commission; for that purpose he must see the interrogatories.

Mr. Tinney and Mr. Gardiner, for the Plaintiffs. The course of proceeding in Sir G. Wilson's office is not warranted by the practice of the Court. (See *Anon. Seton on Decrees*, 19, and 2 *Smith's Pr.* 163 (3d edit.).) The practice in the offices of all the other Masters is different. In nine of them it is not considered necessary to produce the interrogatories, and in the tenth (Master Senior's) the Master himself settles the interrogatories.

The production is useless, as the interrogatories, when exhibited, are in no way identified, nor is it pretended that the Master examines or settles them, as in the case of the examination of a party (see *Purcell v. M'Namara*, 17 Ves. 434), or of a witness previously examined. (See *Vaughan v. Lloyd*, 1 Cox, 313.) Anciently the interrogatories were annexed to the commission (*Forum Rom.* 126, *Cur. Can.* 243), and all commissions for the examination of witnesses were directed to be *super inter inclusis* (*Beames' Ord.* 30), and not *ministrand* (2 *Collectanea Juridica*, 202), but now the practice is for the Commissioners to examine on the interrogatories exhibited on opening the commission. (4 *Beavan*, 83, 84.)

Secondly, if the practice of the Master's office be regular, and the Plaintiffs be bound by the order of the [199] 8th of June, still that was superseded by the correct order of the 14th of July, which in no way limited the examination.

Thirdly, the Defendants' solicitors appear to have been aware of the proceeding; they have therefore, by their acquiescence, waived the objection.

Even if the Plaintiffs have been in error, the Court will not deprive them of their evidence by suppressing the depositions, but will make such order as justice to the Defendants requires. *Willan v. Willan* (19 Ves. 590) was also cited.

THE MASTER OF THE ROLLS [Lord Langdale]. It is not necessary to decide whether there ought to be an uniform rule in the offices of all the Masters, or whether the peculiar practice in the offices of Sir Giffin Wilson and of Master Senior ought to be extended to the other offices, or the practice in the remaining offices adopted by the former. It does not appear to me to be necessary to decide whether the practice in Sir G. Wilson's office is right or wrong, the question being, whether the order of the Court has been duly obeyed by the Plaintiffs, and if not, what is to be the consequence of the disobedience.

The Master was directed to make certain inquiries, and on consideration of the matter, he was of opinion, upon the application of both parties, that it was necessary that witnesses should be examined in Sicily, and he accordingly gave both to the Plaintiffs and to the Defendants certificates, that a commission was necessary to examine witnesses abroad *under the interrogatories pro-[200]duced to him*. The certificates extended no further than to these interrogatories, and the two orders of the Court granting commissions were in conformity with the certificates, and extended no further. It afterwards occurred, that it would be for the benefit of both parties that an Extraordinary Examiner should be appointed, and both parties agreed that

one of the Examiners of the Court should be appointed sole Commissioner; accordingly, by consent, an order was made appointing him. It is alleged that this order, made by consent, wholly superseded the others, and entirely altered the terms on which the examination was to proceed. I cannot concur in that interpretation of the order. If the parties had thought it necessary, nothing would have been more easy than to have procured an extension of the order, because my impression is, that the matter need only to have been mentioned to the Court, in the presence of all parties, and an examination on interrogatories to be produced to the examiner by both parties at the opening of the commission would have been ordered; but I am clearly of opinion that the order actually made, was founded on the certificates, and upon the interrogatories certified to have been produced to the Master.

What is said in defence of the course pursued by the Plaintiffs is reduced to three heads, first, that the order of July varied the previous orders and certificates. I am not of that opinion. Secondly, that the practice in the office of Sir G. Wilson is unreasonable and ought not to be sanctioned by the Court. Whether it is reasonable or not, is a matter to be considered on another and proper occasion. Certainly there is great inconvenience in having the practice of one of the Masters' offices varying from the rest, for it has a great tendency to mislead the practitioners. The question is, whether a party who has obtained such an order as the present, [201] when he might have obtained one more extended by a proper application to the Court, is to be held freed from the terms of it, while the other party has had the disadvantage of acting under the impression that he was bound by it.

Thirdly, it is said that the Defendants' solicitors had notice of the proceedings, but, under the circumstances, I do not think that I can allow that objection to prevail.

If I allow the Plaintiffs' depositions to be suppressed, and the depositions of the Defendants to be published, the consequence will be, that the Plaintiffs will be deprived of their evidence, a result which one cannot contemplate without regret. The Court is naturally anxious to have before it, all the evidence necessary to enable it to come to a satisfactory conclusion on the very difficult question of Sicilian law involved in this case. To decide such a question on evidence confessedly imperfect would be most unsatisfactory. I cannot make the order which is asked. The Defendants' solicitors have not stated whether they would have produced fresh interrogatories, if they had been aware that they could have done so. I will therefore give them an opportunity of stating, whether they wish to have any further examination of witnesses, and then I will determine who is to pay the costs of these proceedings.

Dec. 12. The Defendants' solicitors stated, that though they would most probably, like the Plaintiffs, have had a personal communication with the witnesses, previous to the preparation of the interrogatories, if they had been aware they might have done so, still, being ignorant of the evidence already taken, they were uncertain whether [202] further evidence could usefully be adduced on the behalf of the Defendants.

THE MASTER OF THE ROLLS. It is impossible to tell what injury has been done to the Defendants by this course of proceeding on the part of the Plaintiffs. The Plaintiffs, I think, ought to have pursued an opposite course, and if they had wished to exhibit fresh interrogatories, they should have made an application to the Court for that purpose, and have given notice to the other side.

I cannot make up my mind to suppress these depositions, but I must direct the costs of the application to be paid by the Plaintiffs, who have occasioned the necessity of making it. This order must be without prejudice to any application which the Defendants may think fit to make to the Court after the publication of the depositions.

[202] KILNER v. LEECH. Nov. 11, 1843.

[S. C. on different point, 10 Beav. 362.]

The ultimate limitation in a marriage settlement of a fund belonging to the husband was "for the next of kin or personal representatives of the husband, in a due course of administration, according to the Statute of Distributions." The husband left his wife surviving, and A. B., his next of kin, was a *feme covert*. In another suit, the fund had been treated as part of the residuary estate of the husband, and had been ordered to be paid over to two charities, who were residuary legatees. A bill being filed by the representatives of A. B., the next of kin, claiming the fund: Held, that the next of kin of the wife of the settlor and the charities were necessary parties, but that the representatives of the deceased husband of A. B., who had administered to his wife, were not necessary parties to the suit.

By a marriage settlement, dated in 1806, a sum of £5000 belonging to Mr. Allen was settled, in trust for Mr. Allen for life, with remainder to his intended wife for life, with remainder as Mr. Allen should appoint, and in default, "in trust for the next of kin or personal representatives of John Allen, in a due course of administration, according to the Statute of Distribu- [203]-tions." The settlement contained similar provisions and trusts, in the same event, as to the funds of the intended wife, giving her, in such case, a similar power of appointment, and in default her property was limited in trust for her next of kin or personal representatives in a due course of administration according to the Statute of Distributions.

The power did not appear to have been ever executed by Mr. Allen.

Mr. Allen by his will gave his residuary estate, upon trust for two charities, the Refuge for the Destitute and the Asylum for the Blind.

The testator died in 1825, leaving his wife surviving. At his death, Jane, the wife of Joseph Kilner, was his sole next of kin. Jane Kilner died in 1828, and her husband, having taken out letters of administration to her estate, afterwards died, and thereupon, the Plaintiff, the son of Jane Kilner, took out administration to his mother.

In 1832, after the testator's wife's death, an information of *The Attorney-General v. Clark* was instituted, at the relation of the treasurers of the charities, for the administration of the estate of the testator. In that suit, the accounts had been taken, and the funds apportioned, and the £5000, being treated as part of the residuary estate of the testator, had been ordered to be transferred to the charities.

This bill was filed by the personal representative of the sole next of kin of the testator, against the surviving trustee of the settlement, and the executors of the will of Mr. Allen, alleging that he had been hitherto ignorant of the purport of the settlement, and praying that he might be declared entitled to the £5000.

[204] Mr. Pemberton Leigh and Mr. Miller, for the Defendants, objected, that the bill was defective for want of the following parties; namely, first, the personal representatives of Joseph Kilner, the former administrator of Jane Kilner the next of kin; secondly, the next of kin of the testator's wife, who had an interest to contend, that they were entitled to participate in the fund, under the ultimate limitation of the settlement; and thirdly, the two charities, whom it was sought to deprive of the benefit of the proceedings in *The Attorney-General v. Clark* in their favour.

Mr. Kindersley, Mr. Jolliffe, and Mr. Turner, *contra*.

THE MASTER OF THE ROLLS [Lord Langdale]. It is objected that the Plaintiff, the present personal representative of Mrs. Kilner, has not always been so, and that her former legal personal representative is a necessary party; but that can only proceed on the ground that he has incurred some liability. I do not think he is a necessary party.

Next, it is said, that the next of kin of the wife are necessary parties, and considering the question which arises, whether the wife is to be excluded under the ultimate limitation of the settlement, I think that the prudent course will be to make her next of kin parties.

Thirdly, as to the charities. There has been an order in the other suit, for the transfer of the fund to them, and this bill seeks, in their absence, to take the fund from the parties already declared entitled to it. It is said that a mistake has been made by all parties, but whether that be so or not, there is the interest vested in the parties under the orders of the Court, and the former proceedings cannot be declared erroneous in their absence.

[205] BURRELL v. THE EARL OF EGREMONT. Dec. 8, 16, 18, 19, 1843;
April 17, 1844.

[S. C. 13 L. J. Ch. 309; 7 Jur. 587. Followed and explained, *Topham v. Booth*, 1887, 35 Ch. D. 607. See *Patten v. Bond*, 1889, 60 L. T. 585. Followed, *Lord Gifford v. Lord Fitzhardinge* [1899], 2 Ch. 32.]

A tenant for life, by his will and under a power, charged the settled estates with £25,000 for the portions of his younger children, to be raised by means of a term vested in trustees, payable at twenty-one, and to sink into the inheritance if a younger son should become an eldest, or die without issue before the day of payment. Subject in the first place, to the sums thereafter charged thereon by his will, he devised his fee-simple estates to his eldest son for life, with remainders over. He then "gave and bequeathed" an additional £25,000 amongst his younger children, "which several portions" were to be in augmentation of the "portions" already appointed, to be raised and paid to his said sons and daughters respectively, at such times, and under such conditions, and subject to such contingencies, and with such interest, as he had before directed and appointed their original portions by that his will. And he thereby charged his fee-simple estates thereinbefore by him devised to his eldest son, with the raising and paying the said "portions" and sums of money to his said sons and daughters respectively, at the times and in the manner aforesaid; and after giving certain pecuniary legacies, he gave the residue of his personal estate, after payment of his debts and legacies aforesaid, to his eldest son; and he provided, that if the personal estate should not extend to pay such of his debts as should not be charged on his real estate and his said legacies, then he charged his fee-simple estates to make good the deficiency, and he empowered his trustees to raise thereout, not only the sums thereinbefore charged on the said premises for his younger children and such deficiency, but all other sums necessary for the purposes of his will. Held, that the additional portions given to the younger children were a primary, if not an exclusive charge, upon the testator's fee-simple estates devised to the eldest son for life.

If a tenant for life pays off a charge on the inheritance, he is *prima facie* entitled to that charge for his own benefit; but he may, if he think proper, exonerate the estate. In the absence of evidence, the presumption is, that he pays the charge for his own benefit, and not for the benefit of the persons entitled in remainder; but evidence may shew the contrary conclusion to be true.

A tenant for life paying off a charge upon the estate, and in the same transaction merging the security, by taking an assignment connecting it with the legal estate of inheritance, *prima facie* puts an end to the charge; but something is required to manifest an intention to exonerate the inheritance. A simple payment of the charge, without more, is sufficient to establish the right of the tenant for life to have the charge raised out of the estate. He has no obligation or duty to make a declaration, or to do any act demonstrating his intention; the burden of proof is upon those who allege that in paying off the charge, he intended to exonerate the estate.

A. B., being tenant for life of the testator's real estates, subject to a charge of £25,000, and absolutely entitled to the residuary personal estate, paid off the charge, and obtained releases. At the time, he seemed to have conceived that, as residuary legatee, he was liable to pay the amount out of the personal estate, which was sufficient for that purpose. Nothing was done to keep the charge on foot. After the death of the tenant for life, it being determined that the £25,000 was a

primary charge on the real estate: Held, that it still subsisted as a charge on the settled estates, for the benefit of the personal representatives of the tenant for life.

In 1773 a tenant for life paid off a charge of £25,000 affecting the settled estates. He died in 1837, having in the meantime taken no steps for keeping the charge alive. Held, that notwithstanding more than twenty years had elapsed, and that there had been no part payment or acknowledgment, the charge still existed in favour of his representatives, and had not been defeated by the Statute of Limitations (3 & 4 W. 4, c. 27, s. 40). Held, also, that the statute cannot be applied to a case where there is no assignable person liable to pay the charge, no person who, by the delay, could be induced to suppose that the charge was abandoned or merged, and where the rent, out of which the interest of the charge ought to be paid, is receivable by and belongs to the same person who is entitled to the interest.

Principles on which this Court assumes that a tenant for life, who is also the owner of a charge on the inheritance, has duly discharged his duty of keeping down the interest on the charge.

The question in this cause was as to the right of the legal personal representatives of a tenant for life of real estates to recover, as against the remainder-[206]-man, the amount of charges upon the estate which had been paid off by such tenant for life. The circumstances which gave rise to the question, were shortly as follows:—

By the marriage settlement of Charles Earl of Egremont, dated in 1750, a term of years was vested in trustees for the purpose of raising, out of an estate in Yorkshire, the sum of £25,000 for the portions of his younger children.

By his will, dated in 1781, Charles Earl of Egremont, appointed this £25,000 *for the portions* of his younger children, and gave directions as to the payment of interest and the time of payment, and provided that if any younger son should become an eldest son, or if any younger son or daughter should die without issue, before the time of payment, his or her portion should sink [207] into the inheritance charged therewith, and not be raised or paid. He then devised his estates in Somerset, Dorset, and Cornwall (subject in the first place to the raising and paying the annuities and sums of money then affecting the same, or thereafter charged thereon by that his will, or any codicil he should thereafter think fit to add thereto), unto his eldest son George, and his assigns, for life, with various remainders over, under which the Defendant, the present Earl of Egremont, had become entitled to the estates in possession. He then gave as follows:—"I give and bequeath to my daughters Elizabeth and Frances the sum of £10,000 a-piece, and to my sons Percy Charles and Charles William £2500 a-piece, which several *portions* I will shall be in augmentation of, and as an addition to, the *portions* already provided for them by my said marriage settlement, and hereinbefore appointed to be paid to them as aforesaid, and shall be *raised* and paid to my said sons and daughters respectively, at such times, and under such conditions, and subject to such contingencies, and with such interest, as I have before directed and appointed their original *portions* to be raised and paid by this my will. And I do hereby subject and charge my manors, &c., and hereditaments in the several counties of Somerset, Dorset, and Cornwall hereinbefore by me devised to my eldest son, with the raising and paying the said portions and sums of money to my said sons and daughters respectively, at the times, and in the manner aforesaid."

After gifts of the mansion-houses, and of an annuity of £300, and of certain personal estate as heirlooms, the testator gave certain pecuniary legacies, which he directed to be exclusively paid out of certain particular parts of his personal estate. And then he gave all the residue of his personal estate, after payment of his debts and funeral expenses, and the legacies afore-[208]-said, to his eldest son; and he added a proviso, that if his personal estate should not extend to pay such of his debts as should not be charged on his real estate, and his said funeral expenses and legacies, then he charged his estates in Somerset, Dorset, and Cornwall, in aid and to make good any deficiency that might happen in his said personal estate. "And for that

end and purpose," he empowered the trustees to raise by sale or mortgage of the estate, and pay, "not only the sums of money and portions thereinbefore by him charged and secured on the said premises, for his younger children, and such deficiency as should happen in his personal estate to pay his debts and legacies," but also such sums of money as should be necessary for the other purpose in his will mentioned.

Earl George attained his age of twenty-one in the year 1772, and in May 1773 he, out of his own monies, paid the original and additional portions of his sister Lady Elizabeth, and on that occasion the real and personal estate of Earl Charles were released. In 1776 Earl George, out of his own monies, paid the original and additional portions of Lady Frances, and obtained a release, as heir of the body and executor of his father. In 1778 and 1781 respectively, he in like manner paid the original and additional portions of Percy Charles, and Charles William, who thereupon executed releases. (NOTE.—The deeds executed on these occasions are more fully stated in the judgment of the M. R., *post*, 227, 228, 229, 230.) During his life Earl George did not indicate whether he intended the additional charges paid off by him to merge for the benefit of those entitled in remainder or not.

Earl George died in 1837. By his will he, amongst other things, devised his hereditaments in the counties of Wilts, Somerset, Devon, Dorset, and Cornwall to the De-[209]-fendant Earl George Francis, and the heirs male of his body, and in default of such issue, unto the persons, and for such estates, as the estates in the same counties were, by the will of Charles Earl of Egremont, devised, after failure of the heirs male of his body.

This bill was filed by the legal personal representatives of George Earl of Egremont, seeking to have the £25,000, bequeathed, in addition, by the will of Earl Charles to his younger children, and which had been paid by George Earl of Egremont to his brothers and sisters, raised out of the real estates of which he had been tenant for life, and to which estates the present earl had now become entitled.

The Defendant resisted this claim on three grounds; first, he said, that the sum of £25,000 was a mere legacy, primarily charged on the personal estate of Charles Earl of Egremont, admitted by all parties to have been sufficient for its payment; and that as it was charged on the real estate as an auxiliary security only, and had been properly paid out of the personal estate, the residuary legatee had no right to a reimbursement. Secondly, that even if it were primarily charged on the real estate, still George Earl of Egremont did not intend, when he paid it off, to keep it alive, but to have it released, and that it had been released accordingly. Thirdly, that if the right claimed by the Plaintiffs ever existed, it was now barred by the Statute of Limitations.

Mr. Pemberton Leigh, Mr. Turner, Mr. Lee, and Mr. Piggott, for the Plaintiffs. The first question is, whether this £25,000 is a primary charge on the real estate. It is to be observed, that throughout the will of Charles Earl of Egremont, there is a marked distinction preserved between legacies and [210] portions. The original sum of £25,000, and the additional sum of £25,000 are called "portions," the other sums are called "legacies." The portions are to be "raised" and paid, terms peculiarly applicable to a charge on realty. The devise of the real estate is subject to the "raising" of the sums thereafter charged, and the testator afterwards expressly "charges" his manors, &c., "with raising and paying the said portions or sums to his said sons and daughters;" besides this, the gift of the personal estate is subject to the debts and "legacies," but not to the portions; and the charge in aid is only for the debts and legacies, and not for the portions.

Again, the additional portions of £25,000 are to be raised and paid to his said sons and daughters, respectively, at such times and under such conditions, and subject to such contingencies, as the original portions; so that if a child died without issue under twenty-one, the portion was to sink into the inheritance, which would not be the case if it were a mere legacy out of the personal estate.

Where there is an additional bequest, it is subject to the same incidents and contingencies, and is payable in the same manner, and out of the same fund, as the original gift; *Crowder v. Clowes* (2 Ves. jun. 449. And see *Day v. Croft*, 4 Beav. 561, and the cases there referred to). On the first point they cited *Reade v. Litchfield*

(3 Ves. 474), *Bootle v. Blundell* (19 Ves. 516), *Kirke v. Kirke* (4 Russ. 435), *Shipperden v. Tower* (1 You. & Col. (C. C.), 441), *Williams v. The Bishop of Landaff* (1 Cox, 254), *Jones v. Bruce* (11 Sim. 221).

Secondly, where a person seised in fee or in tail pays off a charge on the estate, it depends on his intention whe-[211]ther the charge is kept alive or not; if it be a matter of indifference, and he has expressed no intention on the subject, the charge is held to have merged; but where a party dies without any indication of his intention, the Court considers what would be most beneficial to him, and it is immaterial whether at law the charge has merged or not; *Forbes v. Moffatt* (18 Ves. 384): though it be merged at law, still it may be subsisting in equity. Here the party was not the owner of the estate, but was merely tenant for life; the presumption, in such a case, is in favour of the charge being preserved, and the onus of proof of the contrary lies on the remainder-man. It is not sufficient to shew a vague intention, but the Court must be satisfied that the tenant for life relieved the estate from the charge, with the intention of never claiming it, and, that, in fact, he intended to make a present of the amount of the charge to the remainder-man. In *Drinkwater v. Combe* (2 Sim. & St. 340), Sir John Leach said, "if a tenant for life pay off a charge upon his estate, the amount becomes a part of his personal property, unless he manifests an intention that it shall not do so." In *Trevor v. Trevor* (2 Myl. & K. 675) a tenant for life in remainder redeemed the land tax, and afterwards became entitled to the estate in fee, and devised it by his will: Sir John Leach said, "when Lord H. took the assignment of the land tax to himself, that act amounted to a declaration of his intention that the land tax redeemed should be part of his personal estate. It could not afterwards sink into the real estate without his expressed intention to that effect, and there is no evidence of any such intention. It continues, therefore, to be part of his personal estate."

[212] In the present case, Earl George never evinced any intention. The deeds shew that he was altogether ignorant of his rights, and by a mistake, originating during his minority, the personal estate was considered primarily liable. All the subsequent deeds proceed on the same error. The Court will relieve in such cases; *Earl of Buckinghamshire v. Hobart* (3 Swan. 186).

Lastly, it will be contended that the Plaintiffs' claim is barred by the Statute of Limitations (3 & 4 W. 4, 27, s. 40) which enacts, that no suit shall be brought to recover any money charged on land, but within twenty years "next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless, in the meantime, some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable or his agent, to the person entitled thereto or his agent; and in such case, no such action, or suit, or proceeding, shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given."

The first answer to the objection founded on this statute is, that this clause only applies where there exists a person to pay, and one to receive, the amount of the charge and the interest. It can only apply where it is capable of this qualification—that there is one person to demand and another to pay. Now it was quite impossible for Earl George both to pay and receive the interest: it would be absurd for George Earl of Egremont, by whom the interest was payable, or his agent, to give "some acknowledgment of the right thereto" to George Earl of Egre-[213]mont, "the person entitled thereto." According to the argument on the other side, however clearly Earl George might have declared his intention of keeping the charge on foot, it would have been impossible for him to do so; it may therefore be said that the right did not accrue until the death of Earl George. The second answer is, that interest has, in substance, been regularly paid. The Court will so assume, for where a person fills two inconsistent characters, he must be taken to have fulfilled the obligations of each. Thus where a mortgagee in possession purchases the interest of a tenant for life, it is assumed, that he keeps down the interest, and time does not run against the remainder-man. *Corbett v. Barker* (1 Anst. 138, reversed 3 Anst. 755), *Ashton v. Milne* (6 Sim. 369), *Raffety v. King* (1 Keen, 601), *Brocklehurst v. Jessop* (7

Sim. 438). Lastly, in cases of mistake, the time runs from the discovery, and is, like the case of fraud, provided for by the twenty-sixth section. *Brooksbank v. Smith* (3 You. & Col. (Exch.), 58), and this is a mistake which is relievable; *Denys v. Shuckburgh* (4 You. & Col. (Exch.), 42).

Mr. Tinney, Mr. Kindersley, and Mr. Lloyd, *contra*. First, as to the construction of the will of Earl Charles. It is quite an elementary proposition, that if a testator gives a sum of money, either as a legacy or as a portion or provision for his child, such gift is a mere pecuniary bequest payable out of the personal estate; if he adds that it shall be a charge on his real estate, the personal estate still remains primarily liable, and the real estate is only to be applied in aid of the personalty. On the other hand, if the gift be of a sum expressly to be raised out of the real estate, or if there be a devise of a real estate subject to, or charged with, or upon the [214] condition of making payment thereout, of a given sum, which sum is not otherwise bequeathed by the will, then the charge is exclusively on the realty. The Plaintiff who asserts that the personalty is exonerated, is bound to prove it; it is not sufficient for him to shew that there is a charge on the real estate, but he must do more: he must shew that the personal estate is exempted. The rule has been laid down differently by various Judges. Originally, express words were necessary to exempt the personal estate. (*Fereyes v. Robertson*, Bunb. 301, and *Dolman v. Smith*, Prec. Ch. 456.) This was afterwards altered. In *The Duke of Ancaster v. Mayer* (1 Bro. C. C. 462) Lord Thurlow thought that "a declaration plain or manifestation clear" was necessary. In *Brummel v. Prothero* (3 Ves. p. 113) the expression "irresistible inference" which was used, was commented on by Lord Alvanley, who said:—"As to the irresistible inference, I do not know what is meant by that. I admit, it must be such an inference, as leaves no doubt upon the mind of the person who is to decide upon it. It must be irresistible to my mind." In *Boole v. Blundell* (1 Mer. 219), Lord Eldon, in referring to this expression, says, "I can find no rule deducible from all that has been said on the subject, but this (which appears to be a rule supported by all the cases taken together), namely, that since it has been laid down that express words are not necessary to exempt the personal estate, there must be in the will that which is sometimes denominated 'evident demonstration,' sometimes 'plain intention,' and 'necessary implication,' to operate that exemption." In *Lord Inchiquin v. French* (Amb. 37) Lord Hardwicke remarks, "The general rule of law and equity is, that the personal estate is the first fund for payment of debts; and as to [215] proper legacies it is considered as the only fund, both in the ecclesiastical and in this Court; if, therefore, the personal estate is to be exempted from these charges, it must be so expressed, or it must appear from a plain necessary implication arising from the words of the testator; and in such case of an implication or plain intention, without express words, it must appear that the personal estate is given as a specific bequest in some shape." In *Samwell v. Wake* (1 Bro. C. C. 145) it was held that in order to exonerate the personal estate from the payment of debts and legacies, it is necessary, not merely to charge the real estate, but the will must exempt the personal estate. Lord Thurlow says, "I believe it is very clear, that here is not enough to exonerate the personal estate. The personal estate is the proper fund: in order to exempt it, the testator must express his intent. It is not sufficient to charge the real, but he must shew that his purpose is, that the personal should not be applied. The words to be attended to are those relative to the personal estate. He gives pecuniary legacies, and then, by a very loose clause, gives the residue to Samwell. I am called upon to construe the most large and loose residuary clause that ever was seen, in such a way as to change the natural order of payment. Where the intent is strongly expressed, and it is for near relations, old cases have carried the matter farther than good sense without precedents would have done." In *Tower v. Lord Rous* (18 Ves. 138) Sir William Grant thus states the rule: "The personal estate, being the proper and primary fund for the payment of debts and legacies, can be exempted only by express declaration or plain and unequivocal manifestation of intention. The question generally is, whether there is sufficient evidence of that intention. It is agreed, that neither a charge upon the land, nor a [216] direction to sell, nor the creation of a term for payment, will exempt the personal estate." So, Lord Redesdale in *McClelland v. Shaw* (2 Sch. & Lef. 544) says: "Except *Webb v. Jones* (2 Bro. C. C. 60) there is not, I apprehend, a single

case in which it has been held that personal estate was exempt from payment of debts and funeral expenses, without express words for the purpose; except where personal estate has been given as a specific legacy: for if it is given in terms which do not imply that it was intended as a specific legacy, it is not held to be exempt from the charges which the law imposes on it."

Apply these expositions of the law to the present case. The testator says, "I give and bequeath to my daughters, &c., the sum of £10,000 a-piece." This is a simple pecuniary legacy. Calling these sums "portions" amounts to nothing: they would be equally portions, whether payable or raiseable out of the personal or out of the real estate. Then it is said there is a charge of these sums on the devised estates; but all the cases shew that this is not, of itself sufficient. Next there is no specific gift of the residue, which according to the cases of *Bootle v. Blundell* and *Webb v. Jones*, is required. It is next said that the real estate is devised subject to the sums charged. No doubt it is, but that leaves the question, whether the real estate is primarily charged, or merely in aid of the personalty, perfectly open. Then as to the additional portions being paid out of the same fund, that rule applies only where there is a previous gift: here there is none: there is a mere appointment of the original portions, operating as under the settlement. Lastly, it is argued that the additional portions are to be subject to the same conditions and contingencies, &c. There is no difficulty in this, for the additional portions may be subject to similar [217] conditions and contingencies as the original portions, so far as they are applicable, and yet be payable out of the personalty. If the Defendant be right on this point the Plaintiffs' case entirely fails.

Secondly; suppose the personal estate exonerated, then as to the effect of the acts done by Earl George. The rule is thus laid down by Lord Thurlow in *Jones v. Morgan* (1 Bro. C. C. 218): "A tenant for life, in general, paying off a charge, without taking an assignment, is a creditor for the sum so paid; but the *smallest demonstration* that he meant to pay it off, will prevent his representative from coming for the money." Is there not something more than "the smallest demonstration" in the present case? Earl George, being tenant for life, with remainder to his own issue, it was quite natural for him, upon attaining twenty-one, and finding himself in possession of considerable personal estate, to release the family estate from the incumbrance for the benefit of those who might succeed him. When he paid off the charges, no transfer was made of them to a trustee for himself, as would have been done if he intended to keep them on foot; but they were absolutely released and merged in the inheritance. From 1772 to 1837 not the slightest trace appears of any intention to keep the charges on foot, or that Earl George even supposed them to be in existence, and no claim was made by anyone till his death.

Thirdly; the dispositions contained in the will of Earl George are quite inconsistent with the notion that he intended the settled estates in Somerset, Dorset, and Cornwall should remain charged with the £25,000, for he devises to the Defendant his own fee-simple [218] estates in those counties, clearly intending, so far as he could, to augment those estates which were to go with the title.

Lastly; the claim is barred by the Statute of Limitations, which is binding on Courts of Equity, and is positive in its terms. It enacts, that no suit shall be brought to recover any sum secured on land, but within twenty years after a present right to receive shall have accrued to some person capable of giving a release. Earl George having acquired the right, upon payment of the charges, and being then capable of giving a release, this period, therefore, expired twenty years after payment. Then comes the exception, "unless in the meantime some part of the principal money, or some interest thereon, shall have been paid or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable or his agent, to the person entitled thereto or his agent." None such was given, and therefore the claim is extinguished. The argument on the part of the Plaintiffs is strange: they say, that because a party cannot come within the saving clause or an exception of an Act, therefore he is not within the Act at all. Such cannot be the proper construction; but here it was very possible for Earl George to have preserved his right, either by having the charge assigned to a trustee, and giving an acknowledgment to them; or secondly, by calling on the trustees to

raise the money by a mortgage executed to a trustee of himself as tenant for life; or thirdly, by an application to a Court of Equity. The argument on the other side is inconsistent with itself; on the one hand, it is said, that interest could not be paid, and that, therefore, the case is not within the Act; and on the other, that it was paid by retainer, and therefore that the Act does not apply. The cases of *Corbett v. Barker* (1 Anst. 138, reversed 3 Anst. 755) and *Raffety v. King* (1 Keen, 601) do not apply; for there a third party had a right to call for the performance, by the tenant for life, of a duty: here the only duty of the party was to himself.

The case is next put on mistake, which, it is said, is equivalent to fraud; but that is not so. Cases of mistake are not excepted by the statute; if it were, the Court does not relieve in cases of mistake of law. *St. Paul v. Viscount Dudley and Ward* (15 Ves. 167), where a tenant for life of a manor took a surrender of a copyhold to himself and it merged. If it were otherwise, then, under the twenty-sixth section, the mistake or fraud might "with reasonable diligence have been first discovered" at the time when the charges were paid off. The charges have merged at law, and the Plaintiffs who represent Earl George, cannot, after sixty years' delay and acquiescence, be entitled to be relieved from the mistake.

Brooksbank v. Smith (2 You. & Col. (Exch.), 58) and *Denys v. Shuckburgh* (4 You. & Col. (Exch.), 42) were not cases under the present Statute of Limitations.

Mr. Lee, in reply.

THE MASTER OF THE ROLLS reserved his judgment.

April 17, 1844. THE MASTER OF THE ROLLS [Lord Langdale]. This bill is filed by the legal personal representatives of the late George Earl of Egremont against the present [220] earl, and it prays that an account may be taken of the principal money and interest alleged to be due to the Plaintiffs in respect of a sum of £25,000 charged on certain estates in the counties of Somerset, Dorset and Cornwall, by the will of Charles Earl of Egremont, the father of the late Earl George and the grandfather of the Defendant, and that the amount of what shall be found due may be raised by sale or mortgage of a sufficient part of the estates, and paid to the Plaintiffs.

By a settlement, dated the 26th of February 1750, and made on the marriage of Earl Charles, certain estates in the county of York were vested in trustees for a term of 600 years, in trust for raising by mortgage or sale £25,000 for the portions of his younger children.

In the month of July 1761 there were five children of the marriage, George, the eldest son, and four younger children: namely, Percy Charles, Charles William, and the Ladies Elizabeth and Frances, who were together entitled to the £25,000 provided for their portions by the settlement; and Earl Charles, by his will dated the 31st of July 1761, appointed the £25,000 as follows; viz., £10,000 to Lady Elizabeth; £10,000 to Lady Frances; £2500 to Percy Charles; and £2500 to Charles William.

By the same will, he devised his estates in Somerset, Dorset and Cornwall, to his eldest son, the late Earl George for life, with remainder over, by virtue of which the Defendant became entitled to those estates; and he gave to his daughters Elizabeth and Frances, £10,000 a-piece and to his sons, Percy Charles and Charles William £2500 a-piece, and calling these sums of money portions, he subjected and charged his estates in Somerset, Dorset and Cornwall, which he had devised to his eldest son with the raising and paying the same; and after [221] bequeathing certain legacies, he gave the residue of his personal estate to his eldest son. He appointed his wife and brother guardians of his children, and appointed his wife sole executrix until his eldest son George should attain twenty-one years of age, and after that time, appointed his eldest son George sole executor.

After the date of the will, the testator had a fourth son, William Frederick, the father of the Defendant, and, by a codicil dated the 22d of June 1763, he made provision for his son William Frederick, but the directions as to the portions which by his will he had given to his other younger children were not altered.

After the death of Earl Charles, his eldest son, being still a minor, the will and codicil were proved by the widow, who possessed the personal estate; but after Earl George attained his age of twenty-one years, he proved the will and codicil, and became the sole legal personal representative of his father Earl Charles.

The portions provided for his younger children by the will of Earl Charles were paid by Earl George out of his own money, and on the occasion of each payment, certain deeds were executed, and releases were taken from the sons and daughters to whom the payments respectively were made. The last payment was made in the month of January 1781, from which time it does not appear that any mention was made of the portions during the life of Earl George, who died on the 11th of November 1837, having made a will whereof the present Plaintiffs are executors.

The Plaintiffs contended, that by the will of Earl Charles the additional portions thereby given were exclusively or primarily charged on the estates in [222] Somerset, Dorset, and Cornwall, which were devised to Earl George for his life: that Earl George, the tenant for life, having paid the charge out of his own money, became, thereupon, entitled to the charge for his own benefit, and so continued during the whole of his life; and that the Plaintiffs, as his legal personal representatives, are now entitled to have the same raised.

On the other hand, the Defendant contends, first, that, according to the true construction of the will of Earl Charles, the estates in Somerset, Dorset, and Cornwall, were only charged in aid of the personal estate of Earl Charles, and not exclusively or primarily, with the payment of the additional portions; secondly, that Earl George, by his payment of the portions and his execution of the several deeds made on the occasions of such payment, declared his will and intention to be to exonerate the estates charged from the payment thereof, and that the estates ought to be deemed to be exonerated from the payment, even if the charge was, upon the construction of the will, an exclusive or primary charge on the devised estate, and not merely a charge thereon in charge of the testator's personal estate; thirdly, that even supposing the charge to be an exclusive charge on the devised estates, and that Earl George did not act to exonerate the devised estates, yet, as his right to the charge accrued in 1781, he ceased, upon the expiration of twenty years without payment of interest or any acknowledgment, to be entitled to sue for the charge, and the same cannot now be recovered.

Some question was made as to the effect of the will of Earl George, but it does not appear to me that it contains anything which affects the right or interest of either party.

[223] The first question is, whether, according to the true construction of the will of Earl Charles, the additional portions, amounting to £25,000, ought to be considered as general pecuniary legacies payable primarily out of the testator's personal estate, or whether they are to be considered as portions, exclusively or primarily charged upon and payable out of the estates in Somerset, Dorset and Cornwall, devised to Earl George for life. The words by which the additional portions are given and bequeathed, if taken by themselves, constitute distinct gifts, which would be primarily payable out of the personal estate. The Defendant relies mainly upon this, and upon there being no term or estate created for the purpose of raising the additional portions; but it is necessary to examine the whole scope and context of the will for the purpose of ascertaining the effect of it.

The testator begins his will, by reciting and confirming the settlement of his estates in York, Cumberland, and Sussex, made on his marriage: and he appoints the £25,000, thereby raisable by sale or mortgage, for the portions of his younger children, directing the whole to be raised and paid, as to £10,000 part thereof for his daughter Elizabeth, for part of her portion, as to £10,000, other part thereof, to his daughter Frances, for part of her portion, as to £2500, other part thereof, to his son Percy Charles, for part of his portion, and as to the sum of £2500, residue thereof, to his son Charles William as part of his portion; and after giving directions as to the payment of interest and the time of payment, he provided, that if any younger child should die without issue before the time of payment, his or her portion should sink into the inheritance charged therewith, and not be raised or paid.

The testator, after devising to his eldest son certain purchased estates in York and Essex, proceeds to devise [224] the estates out of which the Plaintiffs seek to raise the sum now in question, and he devises his estates in Somerset, Dorset, and Cornwall, "subject in the first place to the raising and paying the annuities and sums of money now affecting the same, or hereinafter charged thereon by this my will, or

any codicil I shall hereafter think fit to add thereto, unto my eldest son and his assigns for and during the term of his life." Then follow the various remainders over. It is observed as material, that no devise is made, otherwise than subject to the charges to be made thereon by the will. After completing the limitations of his estates in Somerset, Dorset, and Cornwall, he gave as follows:—"I give and bequeath to my daughters, Elizabeth and Frances, the sum of £10,000 a-piece, and to my sons Percy Charles and Charles William, £2500 a-piece.

No doubt, if the gifts had ended here, they would have been general legacies payable out of the personal estate, but in pursuance of the same sentence, and speaking of the sums so given, he proceeds to describe them as portions, thus: "Which several portions I will shall be in augmentation of, and as an addition to, the portions already provided for them by my said marriage settlement, and hereinbefore appointed to be paid to them as aforesaid." Now by the settlement, those portions were to be raised by sale or mortgage out of the York estates, and by his will he had directed them to be paid with interest to the sons at twenty-one years of age, to the daughters on attaining that age or marriage, and that if any younger son should become an eldest son, or any younger son or daughter should die without issue before the day of payment, the portion should sink into the inheritance. And as to these sums of money, which he calls portions, in augmentation of and addition to the others, he directs, that they "shall be raised and paid to his said sons and daughters respectively, at such times, and under such [225] conditions, and subject to such contingencies, and with such interest, as I have before directed and appointed their original portions by this my will. And I do hereby subject and charge my manors, &c., and hereditaments in the several counties of Somerset, Dorset, and Cornwall, hereinbefore by me devised to my eldest son, with the raising and paying the said portions and sums of money to my said sons and daughters respectively, at the times and in the manner aforesaid."

Considering the distinct and appropriate use which the testator makes of the word "portions"—that the devise of the Somerset estates is expressly made subject to the charges afterwards made thereon—that the gifts of the subsequent sums to the daughters and younger sons are expressly stated to be in augmentation of the portions, and are made payable at the same times, and subject to the same contingencies, and that then immediately the Somerset estates are charged with the raising and paying them, at the time and in the manner aforesaid, it appears to me that these several provisions are consistent only with the intention, that these additional portions should be raised out of the estates devised to the eldest son; and I think that the words in which the sums of money which constitute the subject of the charge are given, are not sufficient to throw the legacies, or to leave them a charge, exclusively or primarily, on the personal estate, unless the will should be found to contain other provisions tending to corroborate that conclusion. But the other provisions of the will, instead of having that effect, appear to me to have a contrary tendency. After the gifts of the mansion-houses and of an annuity of £300, and of certain personal estate as heirlooms, the testator gives certain pecuniary legacies, which he directs to be exclusively paid out of certain particular parts of his personal estate. And then he [226] gives all the residue of his personal estate, subject to his debts and funeral expenses and the legacies aforesaid, to his eldest son; and he adds a proviso, that if his personal estate shall not extend to pay such of his debts as should not be charged on his real estate, and his said funeral expenses and legacies, he charged his estates in Somerset, Dorset, and Cornwall, in aid, and to make good any deficiency that might happen in his said personal estate. I do not think that the legacies here referred to, comprise the additional portions before charged on the estates in Somerset, Dorset, and Cornwall, and we immediately afterwards find the testator mentioning the legacies and portions distinctly, and he proceeds thus, "And for the end and purpose" (that is for the purpose of making good the deficiency he was providing for), he empowers the trustees to raise, "by sale or mortgage of the estate, and pay, not only the sums of money and portions hereinbefore by me charged and secured on the said premises for my younger children, and such deficiency as shall happen in my personal estate to pay my debts and legacies, but also such sums of money as shall be necessary," for the other purpose in his will mentioned. Taking the whole of this will into consideration,

I am of opinion, that the effect of it is to make the additional portions given to the younger children, a primary, if not an exclusive, charge upon the estates in Somerset, Dorset, and Cornwall, devised to the eldest son for life.

We have next to consider the effect of the several acts done by Earl George with reference to the payment of the several portions to his brothers and sisters. If a tenant for life pays off a charge on the inheritance, he is, *prima facie*, entitled to that charge for his own benefit; but he may, if he think proper, exonerate the estate. In the absence of evidence, the presumption is, [227] that he pays the charge for his own benefit, and not for the benefit of the persons entitled in remainder; but evidence may shew the contrary conclusion to be true.

The Lady Elizabeth Alicia Maria was married to Mr. Henry Herbert in the year 1771, and upon that occasion, two instruments were executed, and an account stated; and by one of the instruments, it was recited, that the Lady Elizabeth was, by virtue of the settlement executed before the marriage of the late Earl Charles, and by his will, entitled to two sums of £10,000 each, amounting together to £20,000 for her fortune or portion, and that the said two sums of £10,000 and £10,000 were charged upon and to be paid out of the *real and personal estates* of Earl Charles; and by the other of the instruments, after reciting the settlement and the will of Earl Charles, it was further recited, that upon the treaty for the intended marriage, it had been proposed and agreed, that the several principal sums of £10,000 and £10,000 the original and additional portions of the Lady Elizabeth, so charged upon and payable out of the real and personal estates of Earl Charles, should be assigned as therein mentioned; and by the account then stated it appeared, that the interest of one sum of £10,000 was paid by the guardians of Earl George, and that the interest of the other sum of £10,000 was paid by the countess, the executrix of the late Earl Charles.

Earl George attained his age of twenty-one years on the 18th of December 1772; and on the 11th of May 1773 he paid the sum of £20,000, pursuant to an arrangement made on the marriage of his sister the Lady Elizabeth to Mr. Herbert; and upon that occasion, a deed was executed by and between Mr. Herbert and the Lady Elizabeth of the first part, the Earls of Pembroke, Ashburnham, [228] and Thomond, and Charles Herbert, of the second part, the Countess Dowager of Egremont and the Earl of Aylesford, of the third part, and George, Earl of Egremont, therein described as the eldest son and heir and executor of the will of his father Earl Charles, and also residuary legatee in the same will named, of the fourth part; and thereby, after reciting, amongst other things, that Earl George had attained his age of twenty-one years, and thereupon became entitled in possession to, and soon afterwards entered upon, the real estates limited and devised to him by the settlement and will of Earl Charles, and upon which, or upon part of which, the principal sum of £10,000, the *original portion* of the Lady Elizabeth, stood charged, and that the said Earl George, also, upon attaining his age of twenty-one years, became entitled to the residuary personal estate of his father, which had been accounted for and satisfied to him by his guardians; and that having entered upon his real estates and possessed himself of his father's residuary personal estate, he was desirous to pay off and discharge the several sums of £10,000 and £10,000, being the amount of the original and additional portions of his sister Lady Elizabeth, it was witnessed, that under the circumstances and for the reasons therein mentioned, the Earls of Pembroke, Ashburnham, and Thomond, and Charles Herbert, assigned the said two sums of £10,000 and £10,000 to Henry Herbert, and appointed Earl George, as executor, residuary legatee, and heir to his deceased father, and in every other right and capacity him thereunto requiring, to satisfy the same sums of £10,000 and £10,000 to the said Henry Herbert, and the same were accordingly paid; and the said Henry Herbert acknowledged the receipt thereof, in full satisfaction of the original and additional portions of the Lady Elizabeth, and of all claims and demands in respect thereof, upon the *estates real and personal* of [229] Earl Charles, or upon the Dowager Countess, and the Earl of Thomond, or either of them; and Henry Herbert released them, and all and singular the *estates real and personal* of Earl Charles, from the same, and covenanted to do any other act required for further releasing the same, and better extinguishing the same sums of money and all claims of Henry Herbert and Lady Elizabeth by reason thereof, or upon the estates of Earl Charles.

In the same month of May 1773, and by deed, dated the 11th of the same month, and made between Earl George, described as the eldest son and heir of Earl Charles, of the one part, and the Dowager Countess and the Earl of Thomond and John Drummond of the other part, after reciting, amongst other things, that there was standing in the names of the Earl of Thomond and John Drummond, the capital yearly sum of £2186, 7s. 5d. consolidated long annuities, which had been purchased out of the surplus produce of the real and personal estates of Earl George, during his minority, and were his absolute property in his own right, and that the portions of Lady Elizabeth had been paid, and that the Lady Frances, being in the eighteenth year of her age, and her portions being payable at her age of twenty-one years or day of her marriage, Earl George, in order to exonerate, as well the *residuary personal estate* of his late father, of and from the payment of the additional portion, legacy, or sum given to the Lady Frances by her father's will, and also the *settled estates*, and all other the estates real and personal of Earl Charles, of and from the *original portion* or like sum of £10,000 provided for Lady Frances by the settlement, and to secure and provide for the more immediate payment of the several portions or sums of money, when and as the same should respectively become payable, had proposed and agreed, that the yearly sum of £784, 6s. 3d. long [230] annuities, part of the yearly sum of £2186, 7s. 5d. long annuities before mentioned, should be appropriated and set apart to answer and pay the several portions of the Lady Frances, when the same should become payable; and after reciting, that for the same purposes, Earl George had proposed and agreed, that the yearly sum of £392, 3s. 2d. long annuities should be appropriated and set apart to answer and pay the portions and additional portions, by the settlement and will of Earl Charles provided for his younger sons Percy Charles, and Charles William. It was, by the said deed, witnessed, that the same long annuities should be appropriated and set apart for the purposes of the recited arrangement.

By another deed, also dated the 11th day of May 1773, after reciting the matters aforesaid, Earl George allowed the accounts of his mother and guardians, and released his claims as residuary legatee.

On the 9th day of July 1776 the Lady Frances attained her age of twenty-one years. Soon afterwards, the long annuities set apart to answer her portions were transferred into her name, and thereupon, by deed-poll dated the 29th August 1776, she acknowledged that she accepted the same in full satisfaction of her portions under the settlement and will of her father, and she released Earl George, as well in his own right, as in his character of heir of the body and executor of his father.

Percy Charles attained his age of twenty-one years on the 27th of September 1778, and Charles William attained his age on the 8th of October 1780. At these times respectively, the long annuities provided to answer the portions, were insufficient for the purpose: the sums required to make up the deficiencies were supplied by [231] Earl George, and the younger sons, Percy Charles and Charles William, upon receiving the long annuities and the sums to make up the deficiencies, i.e., upon receiving their whole portions, executed releases dated, as to one of them, on the 25th of December 1778, and as to the other of them, on the 31st of January 1781.

We cannot now know what Earl George might have said or done, if he had been told, that the charge of the additional portions exclusively or primarily affected the estates in Somerset, Dorset, and Cornwall: that he was under no obligation to pay the same out of his own money, and that paying the same he would be, or was personally, entitled to the benefit of the charge. Under the circumstances, it is possible, perhaps not improbable, that he might have desired and declared his intention to exonerate the estate; but, after a careful consideration of the deeds which were executed on the several occasions on which the portions of the younger children were provided for and paid, I am of opinion that the question was never brought to his attention. The original portions were known to be charged on the York estates, and were so treated; and there are expressions in the deeds which are to be explained with reference to them, and to the estates on which they were charged; but it seems to be clear, that Earl George conceived himself, as executor and residuary legatee, bound to pay the additional portions out of his own money, or the personal estate of which he was residuary legatee. He was ignorant that the additional portions were

properly and primarily chargeable on the real estates, of which he was tenant for life; and the nature of the charge being unknown, and unalluded to in the deeds, they contain no indication whatever of intention either to continue the charge or to exonerate the estate.

[232] A tenant for life paying off a charge upon the estate, in the same transaction merging the security, by taking an assignment, connecting it with the legal estate of inheritance, *prima facie* puts an end to the charge; but something is required to manifest an intention to exonerate the inheritance. A simple payment of the charge without more, is sufficient to establish the right of the tenant for life to have the charge raised out of the estate. He has no obligation or duty to make a declaration, or to do any act demonstrating his intention. The burden of proof is upon those who allege that, in paying off the charge, he intended to exonerate the estate. (See *St. Paul v. Viscount Dudley and Ward*, 15 Ves. 173.)

In this case, there is no evidence whatever, except that which may be derived from the execution of the several deeds which have been stated; and as it does not appear from those deeds that Earl George knew his rights, it cannot be collected from them, that he intended to waive, or in any way relinquish, his rights. The words of the deeds are fully satisfied, and are explicable only on the supposition that he did not know that he had any right to have the additional portions raised out of the devised real estate, and that he did understand it to be his obligation to pay them out of the personal estate or his own money.

If it had been necessary to shew, otherwise than by legal presumption, that Earl George intended to continue the charge, it would have been impossible to prove it, because it does not appear that he knew there was a primary charge, and the Plaintiffs could not have proved that he intended to continue a charge, the existence of which, as a primary charge, was unknown.

[233] The difference between the situation of the Plaintiffs and that of the Defendant is this—that there is a presumption in favour of the Plaintiffs and not in favour of the Defendant. In the relation which subsisted between Earl George and the estate, the law presumes, that in paying off the sum charged, he did not intend to exonerate the estate.

It may be true, that if Earl George had known the nature of the charge, and that he might have raised it for his own benefit, he might have thought fit to exonerate the estate; but this is no more than conjecture, and, in the absence of sufficient evidence, it cannot countervail a legal presumption, and I am under the necessity of concluding, that Earl George did not, by his acts, upon payment of the portions, exonerate the estates from the additional portions charged thereon by the will of Earl Charles, and that after the payment of the portions in the year 1781, Earl George was entitled to have the amount raised for his own benefit.

With respect to the Statute of Limitations, it was argued for the Defendant, that the right, if any, of Earl George to the charge on the land in respect of the portions, accrued, at the latest, on the 31st day of January 1781, when the last portion was paid. Releases having been given, it is said that the trustees could not have raised the portions at their own discretion, upon the demand of Earl George: that if he had desired to avail himself of the charge, and have it raised for his own benefit, he must have filed a bill against the trustees and the remainder-man; and that his right, in this respect, accrued sixty years before the present bill was filed. Earl George, it is said, if he had any right, was to be considered as in possession of an estate exonerated, with a right to reimpose the charge; and his right to [234] reimpose the charge is lost by neglect, non-claim, and lapse of time, under the statute. This argument, however, assumes, that the estate was exonerated, which is the point in question; but it is further said, that there is no pretence that any rent was ever applied, or intended to be applied, in payment of interest, so that Earl George, if he ever was entitled to the charge, received no interest upon it: that he received the rents, and applied them to his own use, without any regard to the charges; and that his acts, in that respect, ought not to be qualified for the benefit of his executors.

The statute (3 & 4 W. 4, c. 27, s. 40) enacts, that no suit shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, but within twenty years next after

a present right to receive the same shall have accrued, to some person capable of giving a discharge for or release of the same, unless, in the meantime, some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given, in writing signed by the person by whom the same shall be payable or his agent, to the person entitled thereto or his agent.

Now it is undoubted, that the right of Earl George to receive the charge accrued to him in the year 1781—that no subsequent acknowledgment of his right thereto was ever made, and that more than twenty years after the right accrued expired in the lifetime of Earl George. But it is argued for the Plaintiffs, that the clause in the statute cannot be held to apply to cases which do not admit of the qualification referred to in the same clause, [235] and that, under the circumstances of this case, Earl George ought to be deemed to have kept down the interest on this charge.

The clause of the Act assumes, that there is not only a person capable of giving a discharge or release, but also an assignable person by whom the charge is presently payable, or who is capable of paying the principal or interest of the charge, or of making an acknowledgment of the right thereto; but, in this case, there was a charge upon the estate which no assignable person was then liable to pay, and in respect of which no person was capable of making an acknowledgment that it was due, as, during the life of Earl George, it was necessarily uncertain who, at the time of his death, would be the person to take in remainder subject to the charge. It is further argued, that the statute can only apply to cases, where one person is entitled to receive and give a discharge, and another person is entitled to pay or capable of giving an acknowledgment of the right to the charge; and that if the statute were held to apply to a case like the present, it would apply to a case where the tenant for life had expressly declared his intention to keep the charge alive, or had procured a term to be vested in trustees for the purpose of keeping it alive, unless he had gone through the ceremony of paying money to the trustees, for the purpose of receiving it back from them under the name of interest on the charge. On the whole, it appears to me that the statute cannot be applied to a case where there is no assignable person liable to pay the charge, no person who, by the delay, could be induced to suppose that the charge was abandoned or merged, and where the rent, out of which the interest of the charge ought to be paid, is receivable by and belongs to the same person who is entitled to the interest.

[236] Before the charge was paid to the younger children, it was the duty of Earl George to pay or account for the interest to them, and to prevent any accumulation against the remainder-man. After the portions were paid (supposing Earl George to have become entitled to the charge for his own benefit), it was still his duty to prevent accumulation of interest against the remainder-man. Nothing is more common, than for a man to have, with reference to the same property, a right to receive the income, and a duty to apply the income, or to make payments out of it in a certain manner. If the property producing the income be absolutely his, subject only to a charge, in respect of which it is his duty to make payments of interest out of the income, and he becomes owner of the charge, there is an end of the duty to make the payments; but the duty to make the payments may not be a simple duty owing to the person entitled to receive interest. Where the estate in the property charged is limited, as in the case of a tenant for life, the duty of paying interest to the person entitled to receive it, may be connected with the further duty of preventing the accumulation of interest against the remainder-man; and where the owner of the rent has become owner of the charge, if the duty to prevent accumulation of interest upon the charge against the remainder-man continues, this Court will hold a tenant for life, owner of a charge on the inheritance, to have discharged that duty. It is presumed to be done, first, on the ordinary principle, that this Court will assume to be done that which the party might and ought to have done; secondly, to prevent any prejudice arising to the remainder-man by the accumulation of interest; and, thirdly, to prevent multiplicity of suits, and relieving the remainder-man, compelled to pay an accumulation of interest, from the necessity of suing the representatives [237] of the tenant for life, whose duty it was to pay the interest, for reimbursement.

It was contended, that if the duty to pay comprised no duty to any one but the

party entitled to receive, the Court would not interfere or in any way qualify the acts of the tenant for life, for the purpose of deeming the duty to be satisfied or not. I agree to that; but in the case of tenant for life, owner of a charge on the inheritance, it is not merely with reference to the party himself that the duty of paying the interest arises: he receives the income, and is entitled to the interest payable thereout; and when he has received the income, he is deemed to have paid or kept down the interest, not because of any duty which he owes to himself, but because he has a duty to another, *i.e.*, to the remainder-man, to prevent the accumulation of interest against him. If you suppose the charge to be a subsisting charge, there being no express payment of interest, no act by which the payment of interest can be proved, there would be an accumulation of interest against the remainder-man, if the law did not presume a duty to prevent it, and also a satisfaction or performance of that duty, by the person who received the income, by the due application of which the duty ought to have been performed. It is not, I think, necessary to assume as a fact (though this has been done) that the tenant for life must have received the interest of the charge, at the times when he received the rents of the estate. It is sufficient, that, by a rule of law, the tenant for life of an estate who is also the owner of a charge on the inheritance must, in favour of the remainder-man, be deemed to have kept down the interest of the charge out of the rents received; and I think that the remainder-man in whose favour this rule has been established cannot be permitted to contend, that the interest, thus [238] for his benefit deemed to have been kept down and paid, was, in fact, not paid, for the purpose of enabling him to say, that, under the Statute of Limitations, the right to sue for the charge is lost. Under these circumstances, I think that the case does not come within the purview of the Statute of Limitations.

Under the circumstances, and for the reasons I have stated, it appears to me that the Plaintiffs are entitled to the relief which they pray.

Declare, that, according to the true construction of the will of Earl Charles, the additional portions, amounting to £25,000, thereby given to the younger children therein named, constitute a primary charge on the estates by the said will devised to the testator's eldest son for his life; and that Earl George, the tenant for life of those estates, having paid the same additional portions to the persons entitled thereto, out of his own monies, became and was, and up to the time of his death continued to be, entitled to the same charge for his own benefit, and that the Plaintiffs, as his legal personal representatives, are now entitled thereto, as part of his personal estate. Take an account of what is due, and decree the amount to be raised.

The Defendant appealed, but the case was afterwards compromised, by the Plaintiffs making some concessions.

[239] EDMONDS v. PRAKE. Nov. 10, 17, 1843.

[S. C. 13 L. J. Ch. 13. See *Williams v. Higgins*, 1868, 17 L. T. 526.]

Executors employed an auctioneer, who received the deposit. After some necessary delay, the purchases were completed on the 17th of December 1831. The auctioneer failed to pay over the deposit. The executors acting under legal advice, took no legal proceedings against him till the 14th of March 1832, and the money was lost. The auctioneer was not, at the completion of the sales or afterwards, in circumstances to pay the balance. Held, under the circumstances, that the executors were not personally liable.

This was a suit instituted against the surviving executors, for the administration of a testator's estate.

By the decree, it was, amongst other things, referred to the Master, to "enquire and state to the Court, what sales had been made of the leasehold estates of the testator, and whether any and what deposits were left in the hands of the auctioneer, and to what amount, and under what circumstances.

The Master, by his report, found, that Messrs. Griffith, Hopkins & Cooper, formerly carried on business as auctioneers to a very large extent, and were considered to be men of high character, ability and integrity, and had been employed by the testator: that Griffith and Hopkins, having amassed considerable fortunes, relinquished the business to Cooper, who continued to carry it on down to January 1832, "and was considered, by people in his neighbourhood, to be a person of integrity and credit, and enjoyed a good reputation."

That the executors, being unable to let the leaseholds, employed Cooper to sell them by auction. That they were accordingly sold by him on the 30th of May 1831, and that the deposits, to the amount of £619, were paid to Cooper, the auctioneer; that delays in completing the purchases unavoidably occurred, but that ultimately, on the 17th of December 1831, the sales were completed; that Cooper did not attend on that occasion, and that the solicitors of the executors, by letter written [240] on the 21st of December, expressed their surprise at this, and appointed the next day for a meeting; that Cooper's son then attended, and stated that his father had made large advances on the faith of the completion of the sale of an estate, and that until he received that money, he could not pay over the balance of the deposits, and that he promised the Defendants to send his father's accounts to the executors' solicitors on the following day; that Cooper attended the next day, and his account being produced and examined, he was required to pay the balance; that he stated his inability to do so at that time, but that he had a sale of a large property shortly, by which he should receive a considerable sum, and should then be able to pay the balance due from him. That the executors consulted with their solicitors several times between the 30th of December 1831 and the 21st of January 1832, on the best means of obtaining payment of the balance due from Cooper; and that on the 21st of January 1832 the solicitors wrote to Cooper, stating, that if he did not come to a satisfactory settlement, they should be compelled to adopt coercive measures against him immediately; that Cooper did not send any answer, and that the executors frequently consulted with their solicitors, after they had written the last-mentioned letter, on their being unable to see Cooper, or obtain payment of the balance due from him; and that they instructed their solicitors to issue a bailable writ against Cooper, which was done on the 14th of March 1832, and a warrant was placed in the hands of a very active officer to execute, but that the officer was never able to discover Cooper. That the executors were unable to discover where Cooper was, for a period of upwards of six years, but that they had lately found that Cooper left his residence in the last week in January 1832, and went to Gravesend, and [241] subsequently into divers parts of England, where he continued to secrete himself for upwards of six years.

The Master also found that Cooper was not, at the time of the completion of the sales, or at any time subsequent, in circumstances to pay the balance so due from him.

The cause now came on for further directions, when the question was, whether, under the circumstances, the executors were or were not personally liable for the loss which had occurred.

Mr. Pemberton Leigh and Mr. J. J. Williams, for the Plaintiffs, contended that the executors were personally liable for the amount lost by the insolvency of the auctioneer; that they ought not to have left the money in his hands, and that they had not used due diligence in proceeding against him after his default in December; that to release a trustee or executor, where he employs an agent, it must be shewn that the money was not lost by any want of diligence. That here, from December to March, no active step had been taken to compel Cooper to pay the money; and which, if taken, might have proved successful.

Mr. Turner, in the same interest.

Mr. Tinney, *contra*. The executors are not liable; they left the deposit in the hands of the auctioneer, who acted as the agent of both parties. Up to December they could not do otherwise. After that time, they acted *bona fide*, under legal advice, and did all that could be done to re-[242]-cover the amount. Cooper seems to have absconded in January, and from the Master's report, it appears that Cooper was not, at the time of the sale, or any time subsequent, in circumstances to pay the balance due from him.

THE MASTER OF THE ROLLS [Lord Langdale]. There seems to be some difficulty in this case. The executors, in the discharge of their duty, were under the necessity of employing an auctioneer; and until the purchases were completed, the deposit remained in the hands of the auctioneer, as the agent for both the vendors and purchasers. There can be no objection against their employing this gentleman as an auctioneer. On the 17th of December 1831 the purchases were completed, and from that time the money belonged to the executors, and Cooper must then be considered to have held it for them. The auctioneer did not attend at the completion on the 17th of December, and on the 21st the solicitors wrote a letter, in which they expressed their surprise, and required explanation, and which was delivered on the 21st. The son attended next day, and informed the executors that his father could not pay the balance until he received monies which he had advanced on other sales. That being an unsatisfactory state of things, what ought the trustees to have done? This depended on the circumstances of the auctioneer. The matter goes on, nothing is effected until January 1832; there is, then, a threat of coercion, and in March a *capias* is sued out. Under all the circumstances, this might have been the most prudent course to pursue. I have great reluctance in charging the trustees. The estate has suffered, but not from the executors having improperly or inconsiderately employed this man, and the executors appear to have been acting under the [243] advice of their solicitors from day to day. I will look further into it.

Nov. 17. THE MASTER OF THE ROLLS. I have considered this case, and I think, under the circumstances, that the executors cannot be charged. They were under the necessity of employing an agent, and after the completion of the contract, they appear to have taken all the pains they could in the matter. Acting under legal advice, on which they seem to have relied, they pursued that which was considered the most prudent and proper course, and a loss has unfortunately arisen.

I have not been able to find any case in which, under similar circumstances, executors have been charged.

[243] SAMUDA v. LOUSADA. Dec. 22, 1843.

Power to appoint an annuity held, under the circumstances, to authorize the appointment of the principal sum invested in the funds for securing it.

A testator bequeathed an annuity of £500 a year to his daughter for life, and directed an investment in the funds for securing it, and after her decease, he directed the "annuity" should go as his daughter should by will appoint, and in default, the "annuity" should be applied towards the maintenance of her children till twenty-one, and then the "principal sum" to the children, with a gift over "of the said principal sum of money." Held, that the daughter had the power of appointing the principal sum.

The testator, by his will, dated in 1803, gave his daughter an annuity of £500 a year for the term of her natural life, and he directed his executors to invest in the public funds a sum of money "sufficient to produce, and effectually yield and secure the said annuity of £500 to his said daughter;" and after her decease, the testator "directed that the said *annuity or yearly sum* of £500 should go to and for the use of such person or persons, intents or purposes," as his said [244] daughter should by will appoint, and in default he directed "the said annuity or yearly sum of £500" should be applied for the maintenance and education of her children until they attained twenty-one, "and then upon trust, as to the *principal sum* so to be invested as aforesaid, and all interest due thereon, to and amongst" the children of his daughter living at her death, with a gift over "of the said *principal sum of money*," in case of her dying without leaving lawful issue, and intestate, or if the children should die under twenty-one.

The sum of £16,666, 13s. 4d. consols was purchased for securing the annuity, and the produce paid to the daughter for life.

The daughter by her will, dated in 1837, made an appointment of the £500 a

year, and, so far as she could or might, of the sum of £16,666, 13s. 4d. consols invested for securing that annuity.

This was a petition that the consols might be transferred to the Petitioner the appointee, on the trusts of the will of the daughter.

Mr. Pemberton Leigh, for the Petitioner, contended that the daughter had the power of appointing the principal sum. (See *Page v. Leapingwell*, 18 Ves. 463; *Haig v. Swiney*, 1 Sim. & S. 487.)

Mr. Turner, *contra*, contended that the testator had, by his will, made a distinction between the "annuity" and the "principal sum," and had given his daughter the power of appointing the annuity only, which would be limited to a life interest; *Blewitt v. Roberts* (Cr. & Ph. 274).

[245] Mr. Pemberton Leigh, in reply. This is a general power of appointment carrying the whole annuity. The subject of the power is the same as of the gift over in default of children.

THE MASTER OF THE ROLLS [Lord Langdale] held that the daughter was authorized to appoint the capital.

[245] BELCHER v. WHITMORE. March 29, 1844.

[S. C. 13 L. J. Ch. 247.]

Where the substantial equity of a Plaintiff's bill is denied by the answer, the Court will not, on motion, direct the preliminary enquiries, under the 5th General Order of May 1839.

A bill was filed to set aside a voluntary settlement, on the ground of the insolvency of the settlor, the insolvency being denied by the answer, the Court declined ordering, on motion, the preliminary enquiries as to the parties interested under the settlement.

This was a motion, before decree, for a reference to the Master to make certain preliminary enquiries under the 5th Order of May 1839. (Ordines Can. 136.)

In 1812, upon the marriage of Edward Whitmore with Frances his wife, a sum of £10,000 Reduced annuities was vested in trustees, upon trust for Edward Whitmore for life, and after his decease (in the events which happened) upon trusts for the children of the marriage.

In March 1835 Edward Whitmore was possessed of a policy of assurance, on his own life, in the Equitable, for a sum of £5000, which, by an indenture dated the 5th of March 1835, he assigned to trustees upon the trusts of his marriage settlement.

On the 1st of July 1841 Edward Whitmore and his partners became bankrupts.

[246] This bill was filed by the assignees of Edward Whitmore, alleging that at the time Edward Whitmore executed the deed of the 5th of March 1835 he was insolvent, and seeking to set it aside, as voluntary and executed for the purpose of delaying his creditors.

The bill alleged, that there were seven children of the marriage, one of whom had died an infant in 1840, and that one had married the Defendant Halsey, and that under some indenture of settlement executed previously to their marriage, Halsey and his wife claimed to be entitled to one-seventh share, or to some other interest, in the said policy of assurance.

The answer of Robert and George Whitmore denied the insolvency of the firm of Whitmore, Wells, Wells & Whitmore, and also of Edward Whitmore, previous to 1835; and Robert Whitmore also said, that having learned in 1835 that Edward Whitmore was about to be married again, and also that Caroline, one of his daughters, was about to be married to Mr. Halsey, he thought it advisable that the policy of assurance should be assigned to the trustees of the marriage settlement, as a better provision for the children of his first marriage, and in order that a larger settlement might be made on Caroline, the wife of Mr. Halsey, who was then about to be married. That, accordingly, upon the application of Robert Whitmore, Edward Whitmore, before any marriage was solemnized, agreed to assign the policy of

assurance, and, under those circumstances, did execute the deed of the 5th of March 1835, and, by an indenture dated the 11th of March 1835, Edward Whitmore appointed, among other things, that one equal seventh part of the monies to become payable on the said policy of assurance, should, upon the solemnization of the said intended marriage, become an interest vested [247] in the said Caroline Whitmore, and should be transferred and paid to her executors, administrators and assigns, as soon as conveniently might be after the decease of him Edward Whitmore.

A motion was now made by the Plaintiffs, under the 5th Order of May 1839 (Ordines Can. 136), for a reference to the Master, to inquire when Frances Whitmore, the wife of Edward Whitmore, died; what children there were of the marriage, when they were born, whether any were dead, when they died, and whether any such children, being a son or sons, had at the time of his death attained twenty-one, or being a daughter or daughters, had attained that age or been married, and who were the personal representatives of such child or children; and also to inquire, what children there had been born of the marriage of the Defendant Halsey and Caroline his wife, and when they respectively were born, and whether any of them were since dead, and if dead, when they respectively died.

Mr. Purvis and Mr. Pryor, in support of the motion, cited *Hawkins v. Hawkins* (1 Hare, 543).

Mr. Kindersley and Mr. Walpole, for the Defendants Robert and George Whitmore, resisted the proposed reference, contending that at the hearing the enquiries now asked might be found to be unnecessary; that the Plaintiffs must shew an existing necessity for the enquiries, before the Court would make the order; *Breeze v. English* (2 Hare, 118); that, as it was stated by the Defendants' answers that the assets of the settlor, in 1835, were sufficient to pay all demands upon his separate estate, [248] there was therefore, under that state of circumstances, no reason for asking for these enquiries; *Topham v. Lightbody* (1 Hare, 289), *Frost v. Hamilton* (4 Beav. 33).

Mr. Turner and Mr. Freeling, in the same interest. Edward Whitmore was solvent in 1835, and the invalidity of the assignment has not yet been established. The settlement was made by Edward Whitmore, the elder, in contemplation of a second marriage, and so far as relates to Mrs. Halsey, it was supported by a valuable consideration, and was not voluntary. The Plaintiffs, therefore, cannot ask for enquiries respecting the persons entitled under her marriage settlement, and have made no *prima facie* case to support their claim against it.

Mr. Purvis, in reply. The Plaintiffs have, specifically, by their bill, stated debts existing in 1835 and at the time of the bankruptcy, shewing that the firm was insolvent in 1835: they are not denied. This then is a *prima facie* case. Independently, however, of that, where a class of persons is interested, the Court requires that the preliminary enquiries should be made before it will determine any question relating to the property claimed by the class. Convenience requires that this should be done before the hearing, to prevent the cause then standing over; and this was the very object of this General Order.

THE MASTER OF THE ROLLS [Lord Langdale]. The order referred to was made for the purpose of accelerating a cause, and to give the Plaintiffs an opportunity of shewing, at the first hearing, that the proper parties were before the Court. In that respect the order has been effectual. The Court, however, will not direct preliminary enquiries, unless it be plain that they will serve some useful purpose, nor will the reference be made when the Plaintiffs shew no right to them.

The Plaintiffs in the present case claim to set aside a deed, on the ground that the assignor was insolvent at the time of its execution. This is the question to be litigated between the assignees and the persons claiming under the settlement, and can only be determined when all the facts are in evidence before the Court. The answer wholly denies the Plaintiffs' claim; and it cannot be known until the hearing whether the defence is sufficient to rebut the Plaintiffs' demand. At the hearing an enquiry would probably be asked, if the Plaintiffs then appeared to have a probable ground for relief, because the Plaintiffs could not have a decree against absent persons; but if the cause were before the Court upon evidence, and the Plaintiffs' right being denied, the evidence appeared satisfactory against the claim, the

Defendants would at once ask that the bill might be dismissed, and if that were done, the enquiries would turn out perfectly useless.

The Plaintiffs' case not being made out, and there being a direct denial by the Defendants of the Plaintiffs' title, the enquiries ought not to be directed, though they may hereafter turn out to be necessary.

No order can therefore be made as to the preliminary enquiries, for with the denial in the answer, the Plaintiffs have not shewn such an interest as to entitle them to [250] the reference. The costs must be reserved to the hearing.

See *Meinertzhagen v. Davis*, 10 Sim. 289; *Lee v. Shaw*, *Ib.* 369; *Logan v. Baines*, *Ib.* 604; *Wilson v. Applegarth*, *Ib.* 657.

[250] DALTON v. HAYTER. April 17, 1844.

A Plaintiff may set down a demurrer, for argument, without waiting for the Defendant to enter it with the registrar.

Whether, since the orders of 1841, it is necessary for a Defendant to enter a demurrer with the registrar within eight days at all, *quære*.

A Defendant neglected to enter his demurrer with the registrar within eight days, the Court refused to overrule it on that ground.

In this case, the Defendant filed a demurrer to the whole bill on the 21st of March 1844. The Defendant did not enter the same with the registrar within eight days, and the Plaintiff applied to the Master of the Rolls, *ex parte*, for an order disallowing it as of course under Lord Clarendon's Order. (Beames' Ord. 173, Sanders' Ord. 298.) This order is as follows:—

"Every demurrer shall express the several causes of demurrer, and shall be determined in open Court; and such pleas also as are grounded upon the substance and body of the matter, or extend to the jurisdiction of the Court, shall be determined in open Court, and for that purpose the Defendant is to enter the same with the registrar within eight days after filing thereof, or in default of such entry made, the same shall be disallowed of course as put in for delay; and the Plaintiff may then take out process to enforce the Defendant to make a better answer, and pay 40s. costs; and the same shall not afterwards be admitted to be set down or de-[251]-bated, unless upon motion it shall be ordered by the Court." (See *Jordan v. Sawkins*, 3 B. C. C. 372; *Bullock v. Edington*, 1 Sim. 481; *Hearn v. Way*, 6 Beav. 369.)

THE MASTER OF THE ROLLS declined making the order at present, but allowed the Plaintiff "to set the demurrer down for argument" within the twelve days allowed by the 34th Order of August 1841. (Ord. Can. 174.) This step to be, however, without prejudice to the Plaintiff's right to insist on the same objection when the demurrer was called on.

The demurrer, having been regularly set down by the Plaintiff accordingly, now came on for argument, when

Mr. Wood insisted that it ought to be overruled, in consequence of the neglect of the Defendant to enter it with the registrar. He argued that it was still necessary for a Defendant to enter a demurrer "with the registrar:" that a Plaintiff could not set down a demurrer "for argument" until the Defendant had so entered it: and that the non-entry by a Defendant would render it impossible for the Plaintiff to comply with the exigency of the 34th Order of August 1841, and set it down for argument within the twelve days. That the Plaintiff would be greatly prejudiced if he were not allowed the benefit, to which, according to the strict practice of the Court, he was entitled.

Mr. Kindersley and Mr. Beavan, *contra*. The entry "with the registrar" is a mere useless form, and is so considered by the officers of Court. It now consists merely of paying a shilling fee (Ord. Can. 108), and in no way ad-[252]-vances the hearing of the demurrer, which depends on the order to set it down "for argument," which may be obtained by the Plaintiff, immediately on the demurrer being filed, and without waiting until it has been entered with the registrar.

The object of Lord Clarendon's Order was this: formerly demurrers were referred to the Master, but by Lord Bacon's (Beames' Ord. 22, and Sanders' Orders, 115) and Lord Clarendon's (Beames' Orders, 173, and Sanders' Orders, 298) Orders, they were directed to be determined by the Court, and for that purpose a duty was imposed on the Defendant to enter them with the registrar. Now by Lord Cottenham's Order, a Plaintiff is bound to set the demurrer down for argument: this latter order has therefore superseded the former one, and the practice founded on it.

THE MASTER OF THE ROLLS [Lord Langdale]. I am very much at a loss to understand the object for which this objection is made. Cases have occurred in which a Defendant seeing an objection plainly appearing on the bill, has, purposely, allowed the Plaintiff to proceed with his bill, in order to turn him round on that very objection at the hearing; whereas, if such Defendant had demurred, the Plaintiff, by submitting and amending his bill, might easily have removed the objection. I have seldom heard it said, that it is for the benefit of a Plaintiff to prevent the hearing of a demurrer, for if the bill is defective, it is greatly to the advantage of a Plaintiff to have the objection pointed out to him, if it be fatal it will save all further expense, and if it can be cured, the Plaintiff has an opportunity of removing the defect by amendment.

[253] This demurrer was filed on the 21st of March, and by Lord Cottenham's Order, it became incumbent on the Plaintiff to set it down for argument within twelve days. It is said that the Plaintiff was desirous of setting it down at once, but was prevented, because the preliminary step of entering it had not been taken by the Defendant: that the Plaintiff was therefore compelled to wait till the end of the eight days, and the Defendant not having entered the demurrer with the registrar, the Plaintiff is entitled to have it overruled. When an application was made to me on a former occasion, I directed the objection to stand over, and gave leave to the Plaintiff to set down the demurrer for argument, without prejudice to his right to insist on his objection.

We are now in this situation:—The Defendant, alleging that he has cause of demurrer, is desirous of submitting it to the Court to-day. The Plaintiff says, No, I will take advantage of non-entry, and the demurrer must be overruled. Suppose all this were done, the Defendant would still be allowed to make a special application to be relieved, and to have the demurrer heard. How, therefore, any advantage can arise by refusing to hear the demurrer now, I cannot make out.

It is said that this course is warranted by the strict practice. Now, as to the practice, it is plain, that these demurrers were, in ancient times, referred to the Master. Lord Bacon's Order was made to prevent it, and directs that no reference upon a demurrer shall be made to the Masters, but that it shall be heard in Court. For that purpose it was necessary that it should be set down, but no provision for setting it down was made by Lord Bacon's Order; and the hearing, therefore, of the demurrer might be indefinitely delayed. To meet this, [254] the order of Lord Coventry was made (Sanders' Ord. 180), which evidently proceeded on the supposition, that the entry was for the purpose of setting it down to be heard by the Court; for the registrar, at the instance of the party demurring, was to "put it into the paper of causes after the hearings, assigning a speedy day to everyone in order."

This order was varied by Lord Clarendon's Order, directing demurrers to be determined in open Court, "and for that purpose the Defendant was to enter the same with the registrar within eight days after the filing." It was to be entered with the registrar, for the purpose, no doubt, of being set down to be heard by the Court. It is clear, however, from the subsequent practice, that the entering and setting down was not, afterwards, considered the same thing, for after entry with the registrar, another application was necessary to have it set down to be heard on the next day for hearing demurrers. (See the form of the order, 2 Turner's Prac. 278; 2 Newland's Prac. 332.) The rule was, that after a demurrer had been once entered with the registrar, either party might make application to have it set down to be heard in Court (1 Turner's Prac. 813), so that the preliminary duty of entering it with the registrar was to enable either party to have the demurrer heard in Court, and such was the invariable practice of the Court until the New Orders of 1841.

The 34th Order imposes on the Plaintiff the necessity of setting down the demurrer

for argument, within twelve days from the time *allowed* for filing the demurrer; not from the time of filing the demurrer or of the Defendant's entering it with the registrar, but from the time allowed for filing a demurrer. The question is, whether after this order, when the Court has imposed on the Plaintiff the penalty of having the demurrer to the bill allowed, unless he does a certain act within twelve days from a time described, you are to shift that period, and say that the Plaintiff shall not have twelve days from the time allowed for filing a demurrer, but from the time of the Defendant's entering it with the registrar. I was desirous of knowing what had been the practice since these orders came into operation, and I have been informed that demurrers have constantly been set down for argument here, without any regard to the entry. When the demurrer has been set down elsewhere, the practice may have been otherwise.

I am at a loss to say that the entry is necessary to enable the Plaintiff to do that act in default of which the demurrer is to be allowed, or that his compliance with the 34th Order is to depend on any act of the Defendant. I have some doubt, whether, since Lord Cottenham's Order, Lord Clarendon's Order is applicable, and whether any entry is now necessary; but, without determining that point, I must say that even if there had been an irregularity, I should, under the circumstances, give leave to the Defendant to correct it. It is for the benefit of the Plaintiff himself that the matter of the demurrer should be decided.

NOTE.—By the XLIV. General Order of the 8th of May 1845 pleas and demurrers need not be entered with the registrar.

[256] DAVIS v. PROUT. Nov. 10, Dec. 11, 1843.

Where, at the hearing, a cause stands over, with liberty to amend, and the bill is amended accordingly, a new *subpoena* to hear judgment must be served.

This cause came on upon the 10th of November 1843; on which occasion, the Defendant Prout did not appear, but a proper affidavit of service of the *subpoena* to hear judgment was produced.

The other Defendants who appeared having objected to the frame of the record, the cause was ordered to stand over with liberty to amend.

The bill was accordingly amended, and the cause again came on for hearing on the 11th of December, but no new *subpoena* to hear judgment had been served.

The Registrar observed that the cause could not proceed, there being no proof of service on Prout of a new *subpoena* to hear judgment.

THE MASTER OF THE ROLLS considered the objection valid, observing that if the other Defendants had not voluntarily appeared, the Plaintiff could not have obtained a decree against them, upon proof of the service of the former *subpoena* to hear judgment.

[257] PRINGLE v. CROOKES. Dec. 9, 22, 1843.

A Defendant took exceptions to the Master's report, and also presented a petition of rehearing, objecting to the original decree, on the ground of want of parties, and also to a part of that decree. The exceptions and rehearing came on together. Held that the Defendant was entitled to begin.

A testator directed his real estate to be sold by his Jamaica executors, and the produce remitted to A. and B., his English executors. B. and C. were the consignees and agents of the testator, and of his executors. The assets, including £2253, part of the produce of the real estate, were remitted from Jamaica to B. and C. on account of the executors in England, and the amount was entered to the credit of the estate of the testator. After the death of B., A. instituted a suit for an account of the receipts of B. and C., on account of the *personal estate* of the testator since his death, but the heir at law was not made a party. The bill specified the item of £2253

which the answer stated to be the produce of the real estate. The decree directed an account of the dealings and transactions in the bill mentioned, and of the receipts of B. and C. on account of the testator's *personal estate* since his death, and the Master, in taking the accounts, charged C. with the £2253. The Defendant C. obtained a rehearing of the cause, and excepted to the report, and contended, either that the decree was wrong in authorizing an account of the real estate in the absence of the heir, or that the Master had been wrong in including this item; but the Court overruled the objection.

The Defendant Crookes and his partner Todd were the agents and consignees in England of the testator, Robert Marshall of Jamaica.

By his will Robert Marshall directed his executors in Jamaica to sell his real and personal estate in Jamaica, and remit the proceeds to Great Britain, to his executors there; and he appointed Todd and the Plaintiff Pringle his executors in England. After the testator's death, his executors in Jamaica made their remittances to England (including therein the proceeds of the real estate in Jamaica), to the house of Todd and Crookes, intending them for the executors in England, viz., for Todd (who was a partner in the firm of Todd & Co.) and the Plaintiff Pringle.

This bill was filed after the death of Todd by Pringle, the surviving English executor, to have, as against Crookes the surviving partner, and against the executor of Todd the deceased partner, an account of the receipts and payments of Todd & Co. as such agents and consignees. The heir at law was not made a party to the suit.

[258] The bill, in praying an account of the receipts of Todd & Co. after the testator's death, asked only for an account of all sums of money received by them on account of his *personal estate* subsequently to his death. The bill, however, specifically stated several sums as having been received by Todd & Co., during their agency from the executors, amounting in the whole to the sum of £2253, 4s. 10d. The bill did not state that these sums were parts of the purchase-money arising from the sale of the real estate; but it distinctly appeared from the answer that they were received on account of such purchase-money.

By a decree of the Court of Exchequer, the Master was directed to take an account of all and singular the dealings and transactions in the bill mentioned between Todd & Co. and Robert Marshall deceased, and of all sums of money received by them on his account in his lifetime, and of all and singular the said dealings and transactions with them, and of all sums of money received by them, on account of his *personal estate*, since his decease.

The Master, in his report, stated the nature of the account, and that it continued to be an account current up to the death of Todd; and that the several sums, amounting together to the sum of £2253, 4s. 10d. were received by Todd & Co., and were entered to the credit of the estate of Robert Marshall in the same account current, and were payments on account of the purchase-money for the Ridge estate.

Before the Master's report had been made, the Defendant Crookes, having ascertained that the Master intended to charge him with the purchase-money which Todd & Co. had received and entered to the credit of Robert Marshall's estate, presented a petition of re-[259]-hearing, alleging that he was aggrieved by the decree, and he submitted that the cause ought to have been ordered to stand over, with liberty for the Plaintiff to amend his bill by adding parties thereto (meaning the heir at law of the testator), or that the accounts, by the decree directed to be taken, of the dealings and transactions with Todd & Co., since Robert Marshall's decease, and the payments consequential thereon, ought to have been confined to the *personal estate* and effects of Robert Marshall.

After the report had been made, the Defendant Crookes filed several exceptions thereto, and thereby, amongst other things, insisted, that the Master ought not to have brought the several sums amounting to £2253, 4s. 10d. into account, for that the payments were not made on account, of Robert Marshall's *personal estate*, but on account of his real estate, and the decree did not authorize any account thereof to be taken.

The cause now came on for rehearing and on the exceptions.

Mr. Pemberton Leigh, for the Defendant Crookes, claimed the right to begin.

Mr. Kindersley, *contra*, for the Plaintiff.

THE MASTER OF THE ROLLS [Lord Langdale]. The Defendant Crookes has the right of reply on his exceptions: he therefore is entitled to begin on the exceptions.

As to the rehearing, the objection to the decree is either one of want of parties or to a part only of the decree. In either case the Defendant will be entitled to reply. The Defendant must therefore begin.

[260] Mr. Pemberton Leigh and Mr. Montagu, for the Defendant, then contended that either the decree or the Master's finding must be erroneous, for if the decree warranted the accounts of the produce of the real estate, then it was wrong, being made in the absence of the heir at law: and, on the other hand, that if it did not warrant such account, then that the Master was wrong in including the £1253, 4s. 10d. in his report.

Mr. Kindersley, Mr. G. Turner, and Mr. Parry, for the Plaintiff, argued that the decree did not direct any account of the real estate. That the bill was not for the administration of the estate, but one for an account by a principal against his agent, and that it mattered not from what source the receipts of the agent on account of his principal had been derived.

Dec. 22. THE MASTER OF THE ROLLS. I have read the pleadings in this case, and I am of opinion that the bill neither required, nor in any way entitled the Plaintiff to a decree for the administration of the estate of the testator Robert Marshall, received by the Defendant Crookes and his deceased partner Thomas Todd.

The bill is not expressed with the clearness and precision which might have been wished, but Todd & Co. having been the agents and consignees of the testator in his lifetime, and of his trustees and executors after his death, the object of the bill was, to have, as against Crookes the surviving partner and against Todd the executor of the deceased partner, an account of the receipts and payments of Todd & Co., as such agents and consignees.

[261] If there had been greater doubt than there is upon the bill, such doubt would have been removed by the answer of Mr. Crookes and the first schedule thereto, which, with great clearness and propriety, set forth the nature of the transactions and accounts between Todd & Co., as the agents of Marshall in his lifetime, and of his Jamaica executors after his death.

It appears, that the executors in Jamaica, not only made to Todd & Co. consignments on account of the crops and produce of the estate, but also remittances on account of the monies arising from the sale of the estates, under the direction of the testator's will. The bill for some reason which has not been explained, in praying an account of the receipts from Todd & Co. after the testator's death, asks only for an account of all sums of money received by them on account of his *personal* estate subsequently to his death. The bill, however, specifically states several sums as having been received by Todd & Co., during their agency, from the executors, and the sums specifically stated amount, in the whole, to the sum of £2253, 4s. 10d. The bill does not state that these sums were parts of the purchase-money arising from the sale of the real estate; but it distinctly appears from the answer, that they were received on account of such purchase-money. There was no amendment, either of the statements or of the prayer of the bill, on that account; and the decree of the Court of Exchequer, in conformity with the prayer of the bill, directs the Master to take an account of all and singular the dealings and transactions in the bill mentioned between Todd & Co. and Robert Marshall deceased, and of all sums of money received by them on his account in his lifetime, and of all and singular the said dealings and transactions with [262] them, and of all sums of money received by them on account of his *personal* estate since his decease.

The Master, in his report, stated the nature of the account, and that it continued to be an account current up to the death of Thomas Todd, and that the several sums amounting together to the sum of £2253, 4s. 10d. were received by Todd & Co., and were entered to the credit of the estate of Robert Marshall in the same account current, and were payments on account of the purchase-money for the Ridge estate.

Before the Master's report was made, the Defendant Crookes, having ascertained that the Master intended to charge him with the purchase-money which Todd & Co. had received and entered to the credit of Robert Marshall's estate, presented a petition

of rehearing, alleging that he was aggrieved by the decree, and submitted that the cause ought to have been ordered to stand over, with liberty for the Plaintiff to amend his bill by adding parties thereto, or that the accounts, by the decree directed to be taken, of the dealings and transactions with Todd & Co. since Robert Marshall's decease, and the payments consequential thereon, ought to have been confined to the personal estate and effects of Robert Marshall.

After the report was made, the Defendant Crookes filed several exceptions thereto, and thereby, amongst other things, insisted that the Master ought not to have brought the several sums amounting to £2253, 4s. 10d. into account, for that the payments were not made on account of Robert Marshall's personal estate, but on account of his real estate, and the decree did not authorize any account thereof to be taken.

[263] The petition of rehearing and the exceptions are brought on together, and the Defendant Crookes puts his case, as to the £2253, 4s. 10d., thus:—He says the decree either directs the account of these purchase-monies to be taken, or it does not; that if it does, the decree is erroneous, and he desires to have it varied on a rehearing, and if he can obtain a rehearing, he submits to have the exceptions overruled. On the other hand, he alleges, that if the decree does not authorize an account of these purchase-monies to be taken, the report is erroneous, and he claims the benefit of his exceptions, and submits to have the petition of rehearing dismissed.

It appears, that the testator Robert Marshall, by his will, directed his executors in Jamaica, to sell his real and personal estate in Jamaica, and remit the proceeds to Great Britain, to his executors there, and by the accounts it appears, that the executors in Jamaica made their remittances to England, including the proceeds of the real estate in Jamaica, to the house of Todd & Co., who had been the consignees and correspondents of the testator, in his lifetime. The remittances being made by the executors in Jamaica, were intended for the executors in England; and it appears from the will, as well as from the nature of the transactions between the parties, that the consignees and correspondents in England, by whom the remittances were received, were, and considered themselves to be, accountable to the executors in England, one of whom was a partner in the firm of Todd & Co., and the other is the Plaintiff in this cause.

I do not now understand why the word *personal* estate was introduced into the prayer of the bill, and into the decree. It could not have been intended by [264] the Plaintiff to exclude from the accounts the very sums of which the receipt was charged by the bill; and if there had been any doubt as to these sums being intended, by the decree, to be included in the account, it might perhaps have been proper to vary the decree, by removing such doubt, and directing that the sums specifically mentioned in the bill, and which by the answer appear to have been proceeds of real estate, should be included in the account; but I am of opinion, that no such variation as is asked by the petition of rehearing ought to be made. It does not appear to me that any additional parties are required, or that the sums in question ought to be excluded from the account. For these reasons, I think that the petition of rehearing must be dismissed, and, for the like reasons, I think that the exceptions, if they are all grounded upon the objection that the sums amounting to £2253, 4s. 10d. are brought into the account, must be overruled.

[264] TROTTER v. WALMESLEY. Jan. 25, 1844.

The preliminary accounts of the testator's estate, debts, &c., being directed upon motion, it was ordered that the creditors who should not come in should be excluded the benefit of the order.

Mr. Turner and Mr. Jervis moved for a reference to the Master to make certain preliminary enquiries under the 5th Order of the 9th of May 1839. (Ord. Can. 136.) It was asked that the Master should ascertain the children of the testator, and, if found to be parties to the suit, then that he should proceed to take the accounts and advertise for creditors. They proposed that the order should contain a direction

that the creditors who should not come in should be excluded from the benefit of the order.

[266] Mr. Cooke, *contra*, argued that the latter clause ought to be omitted. In *Hornby v. Hunter* (1 Russ. 97) it was decided, that though an enquiry as to debts had been made before decree, yet the decree at the original hearing must nevertheless direct an account of debts; and in *Teague v. Richards* (11 Sim. 46), although an order for preliminary accounts and enquiries had been obtained in a suit for administering a testator's estate, yet the Court would not, on that account, restrain a creditor from suing the executors at law.

Mr. Turner, in reply, said that *Hornby v. Hunter* did not apply, it being a case before the New Orders.

THE MASTER OF THE ROLLS [Lord Langdale]. *Teague v. Richards* merely shews that preliminary enquiries were not, as against a creditor desirous of proceeding at law, considered to be of the same authority as a decree.

By inserting the clause in question there will be this advantage, that if the accounts are properly taken, an order for payment of the debts may be made at once by the original decree.

It was accordingly ordered, in the event of the proper parties being before the Court, that the Master should cause advertisements for the creditors of the testator to come in and prove their debts, and he was to fix a peremptory day for that purpose; and it was ordered "that such of the said creditors as should not come in and prove their debts by the day so to be limited, were to be excluded from the benefit of this order." (Reg. Lib. 1843, B. fol. 537.)

[266] ROBERTS v. JONES. April 15, July 3, 1844.

A Defendant filed a plea, but the Plaintiff neither set it down, nor took any steps for three terms. The bill was, on motion, dismissed with costs.

The Defendant, on the 23d of September 1843, filed a plea to the whole bill, but the Plaintiff did not set it down within three weeks, nor did he, in fact, ever set it down.

On the 21st of January 1844 the Defendant moved *ex parte*, that the Plaintiff might pay the costs of the plea and of the suit; but the Court then thought, that the Plaintiff ought to have notice of the motion, and have an opportunity of undertaking to reply. (7 Beavan, 57.)

On the 15th of April 1844 no step having been taken by the Plaintiff, Mr. Simons, for the Defendant, moved that the Plaintiff's bill might be dismissed, the Plaintiff having submitted to the plea. He referred to the 35th Order of the 26th of August 1841 (Ord. Can. 175), by which it is ordered, "That where the Defendant shall file a plea to the whole or part of a bill, the plea shall be held good, to the same extent and for the same purposes as a plea allowed upon argument, unless the Plaintiff shall, within three weeks from the expiration of the time allowed for filing such plea, cause the same to be set down for argument, and the Plaintiff shall be held to have submitted thereto."

[267] The Plaintiff not appearing, the order was made.

The registrar declined drawing up the order for dismissal, on the ground that it could not be done until the expiration of three terms from the time of filing the plea.

On the 3d of July 1844, three terms having expired,

Mr. Simons moved that the bill might stand dismissed with costs.

The Plaintiff not appearing,

THE MASTER OF THE ROLLS [Lord Langdale] made the order.

NOTE.—See Daniel's Orders, p. 76.

[267] MATHER v. SHELMERDINE. Jan. 11, 1844.

Pauper order discharged, the particular circumstances, tending to shew that the Plaintiff was not a pauper not being specifically denied.

The Plaintiff in this cause obtained, in November 1843, an order to sue *in form pauperis*, on the usual affidavit that he was not worth £5, his wearing apparel and the subject-matter of this suit excepted.

Mr. Follett now moved to dispauper the Plaintiff, upon affidavits which shewed that the Plaintiff had been for two years and was now carrying on the trade [268] of coach builder at Manchester, employing journeymen under him; and that he was "now possessed of a carriage, trade implements, furniture, and other goods worth £20 and upwards."

The Plaintiff, in reply, swore, that he had "been out of a situation for some time past, and was unable to earn sufficient to support himself and family, and would be glad to obtain £3 or £4 for all the furniture and working tools in his possession." He repeated "that he was not worth more than £5 over and above his wearing apparel."

There were other affidavits, shewing, but in general terms, the great poverty and destitution of the Plaintiff.

It appeared from affidavits in reply that, in July 1842, he had received £44 as a legacy.

Mr. Willcock, *contra*.

See *Romilly v. Grint* (2 Beav. 186), and *Boddington v. Woodley* (5 Beav. 555).

THE MASTER OF THE ROLLS [Lord Langdale]. I must discharge the order, and I proceed, on the omission of the Plaintiff, to answer the affidavit in support of the motion. The affidavits of the Plaintiff are no answer at all to what is stated by the Defendants; and I should act contrary to the established rules of the Court if I permitted the Plaintiff to continue to sue as a pauper.

[269] It is not because a man is poor that he is to be relieved from all the costs, but he must be poor to the extent and in the real sense of the affidavit.

Discharge the order with costs.

Affirmed 22d May 1844 by the Lord Chancellor.

[269] KERR v. GILLESPIE. (*Ex relations*.) Jan. 18, 1844.

[S. C. 13 L. J. Ch. 135; 8 Jur. 50.]

When, at the time of amending his bill, the Plaintiff has changed his residence, it should be stated by amendment; and this may be done notwithstanding the rule that subsequent facts are the proper subject of supplement and not of amendment. Pending the suit, the infant Plaintiffs and their next friend went abroad, and upon a subsequent amendment the fact was not noticed. A motion for security for costs was refused, there being no wilful intention to mislead, the residence abroad not being permanent, and no danger of losing the costs being suggested.

This bill was filed in December 1842, by two infants, by Mrs. Farley, their grandmother, as their next friend.

The infants and their next friend were originally resident in Canada; but came to this country in order to prosecute this suit. They were properly described in the original bill, as resident at St. Michael's Place, Brompton. The Defendant having put in his answer, the bill was amended on the 22d of November 1843, but no alteration was made in the address of the Plaintiffs and their next friend.

It was now moved, on the behalf of the Defendant, that the next friend might give security for costs, on the ground that the amended bill contained a misdescription of the present residence of the Plaintiffs and of their next friend; they being,

now and at the time of the filing [270] of the amended bill, resident abroad. It appeared that in January 1843 the infants and their next friend removed from Brompton to Kennington, and that in June 1843 the infants went to Boulogne for the purpose of education, where they had since remained. The next friend also went "temporarily" to Boulogne, for the purpose of occasionally seeing her grandchildren, and was staying there with her daughter, in lodgings at an hotel.

Mr. Gordon, in support of the motion, argued, that as the next friend had thought fit to misdescribe the residence of the Plaintiffs and of herself in the amended bill, and to live out of the jurisdiction, she ought to give security for costs. *Sandys v. Long* (2 Myl. & K. 487), *Simpson v. Burton* (1 Beav. 556, and see *Wray v. Hutchinson*, 3 Myl. & K. 235).

Mr. Rogers, *contrâ*. The address of the Plaintiffs and their next friend was perfectly correct in the original bill. It was unnecessary, and would have been improper to have inserted, by amendment, a fact which took place after the filing of the original bill, and which was therefore properly supplemental.

The parties are resident abroad only for a temporary purpose; there has been no intention of misleading the Defendant, and it is not sworn that any danger is apprehended of losing the costs. The Defendant has also, by acquiescence, waived any irregularity.

Mr. Gordon, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. The description of the residence was correct at the [271] time of the filing of the bill, but became inaccurate by the subsequent change of residence. Though by the rules of pleading you ought not to insert in an amended bill allegations of facts which have occurred subsequent to the filing of the bill, yet that rule does not appear to me to apply to the description of the residence of the Plaintiff, and I think that the Plaintiffs ought, by the amended bill, to have stated the actual residence of themselves and their next friend: however, the continuing the old address was an error which they might easily have fallen into.

There does not appear to have been any wilful intention to mislead; and though the next friend is now resident abroad, it appears that it is her intention to return, though the affidavit is somewhat vague as to the time when. There is no suggestion that the Defendant apprehends that there is any danger of his losing the costs.

I must refuse this application; but, under the circumstances, without costs, and without prejudice to any further application which the Defendant may be advised to make on the subject.

[271] GREEN v. BADLEY. GREEN v. TOMPSON. Jan. 23, Feb. 17, 1844.

On the application of the Plaintiffs a Six Clerk was appointed guardian *ad litem* for a Defendant, who was stated to be an infant, but was in reality of full age. A decree was made and the accounts taken on that footing. Held, that the proceedings were not binding on him, and the Plaintiffs were ordered to pay the costs of the Six Clerk.

This bill was filed in 1827 by two residuary legatees against the executors and trustees, and against the other residuary legatees, for the purpose of administering the estate of the testator. One of the parties interested in the residue was the Defendant John Tompson the younger.

By an order, made upon the motion of the Plaintiffs and on notice to the other parties, Mr. Vesey, the senior Six Clerk not towards the cause, was appointed guardian of the Defendant John Tompson the younger, who was stated to be an infant, for the purpose of putting in his answer, and by whom he might defend the suit. Mr. Vesey accordingly put in a common infant's answer, submitting his rights and interests to the protection of the Court.

The cause came on in 1829, when Mr. Vesey appeared for the Defendant John Tompson the younger, and a decree was made, under which the accounts and other proceedings were taken in the Master's office.

In November 1842 the cause came on for hearing on further directions, when it

appeared that John Tompson the younger, though treated as an infant throughout the proceedings had, at the institution of the suit, and at the time of the appointment of guardian, attained his age of twenty-one, and was upwards of thirty years of age.

The proceedings having been thus found to be defective, the Court gave leave to the Plaintiffs to file a supplemental bill, for the purpose of supplying the defect.

A supplemental bill was accordingly filed by the Plaintiffs, praying that they might have the benefit of the decree and proceedings as against John Tompson the younger, with liberty for him to surcharge and falsify the accounts of the trustees and executors, or that the decree made in the original cause might be [273] made in the present cause, and that all proper accounts and inquiries might be directed.

The trustees and executors submitted that their accounts ought not again to be taken, and insisted that John Tompson the younger had acquiesced in the former proceedings.

Mr. Kindersley and Mr. Lloyd, for the Plaintiffs, argued that John Tompson the younger was bound by acquiescence: that every opportunity had been given and would be given him to examine the accounts, and that no possible good could arise from taking them again.

Mr. Spence and Mr. Bazalgette, for John Tompson the younger, argued that he was not bound by the proceedings which had taken place in his absence.

Mr. Purvis and Mr. Renshaw, for the executors and trustees, insisted, that having regularly passed their accounts, in the presence of parties interested, and by whom they had been strictly scrutinised, they ought not to be retaken.

THE MASTER OF THE ROLLS said, that the proceedings in the cause having really taken place in the absence of John Tompson the younger were not binding on him; that the accounting parties were still liable to him, and that he might now file a bill to have the accounts taken again in his presence; but though the executors could not protect themselves from the claim of that Defendant, they might still refuse to account again to the Plaintiffs and the other persons in whose presence the accounts had already been taken. The difficulties, he added, were such, that the parties had better come to some [274] reasonable arrangement, which would prevent a very serious expense, and which, in all probability, would produce no good whatever to any party.

The cause stood over, and an arrangement was ultimately made for the payment of the costs of John Tompson the younger out of the Plaintiffs' share of the fund, and he then agreed to be bound by the previous proceedings.

Feb. 17. Mr. Romilly asked for the costs of Mr. Vesey.

Mr. Kindersley and Mr. Lloyd, *contra*.

THE MASTER OF THE ROLLS [Lord Langdale], being of opinion that the irregular proceedings had arisen from the negligence of the Plaintiffs, ordered them to pay the costs.

[274] GREEN v. BADLEY. Feb. 13, 14, 1844.

A case of breach of trust was alleged on the pleadings against trustees and executors for not having sold an estate, but at the first hearing the common accounts only were directed. Held, on further directions, that the Defendants could not be then charged with the breach of trust, and that inquiries could not be then directed with that object.

The testator devised his Sedgley Hall estate to his trustees in fee, on trust, that they should "within two years next after his decease, or so soon afterwards as they should be satisfied as to the quantity, quality, and nature of the mines and minerals, if any, lying in or under all, or any part or parts of the said lands and premises, or such other time afterwards, as they or [275] he, in their or his discretion, should think proper, absolutely sell and dispose of the said messuage," &c., and out of the proceeds, until the sale, and the produce of the sale, to pay the charges, and a debt of £1400 on certain trusts, and divide the residue as therein mentioned. . . . he appointed his trustees his executors.

The testator died in 1814.

This bill was filed in 1827 by some parties interested in the residue, praying the establishment of the will, the execution of the trusts, and the accounts of the real and personal estate received by the trustees, or which, "without their wilful default, might have been received."

The bill charged, that the trustees ought to have ascertained the mines and minerals under the estate, and ought to have proceeded to a sale thereof; that they had not proceeded to ascertain the mines, &c., until very lately, when they bored the said estate for that purpose, and that they had never taken any steps to have the said estate sold.

The cause was heard in July 1831, when a decree was made establishing the will, declaring the trusts ought to be performed, and directing accounts of the real and personal estate to be taken, and the Master was directed to enquire, whether it would be for the benefit of all parties interested in the Sedgley Hall estate that the same should be sold, reserving the mines and minerals.

The Master proceeded to take the accounts; but such of the parties interested in the produce of the estate as had been infants, having all become adult, he did not [276] proceed in the enquiry respecting it. He made his report, and when the cause came on for further directions, the estate had not been sold.

Mr. Kindersley and Mr. Lloyd, for the Plaintiffs, sought to charge the trustees for a breach of trust, in not having taken proper steps for ascertaining the minerals and selling the estate within a reasonable period. With that view they asked for enquiries.

Mr. Turner and Mr. Harwood, and Mr. Spence and Mr. Bazalgette, for parties in the same interest.

Mr. Purvis and Mr. Renshaw, *contra*, contended, that the point having been raised by the pleadings, the Plaintiffs could not, after the decree which had been made, extend the relief so as to charge the trustees and executors in the way proposed.

Mr. Lloyd, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. That the trusts of this will have not been duly carried into execution according to the intention of the testator admits of no doubt. The question now is, whether the trustees are to be charged with any of the consequences of the undue execution of the trusts. Considering that the testator directed, by his will, that the estates devised should be sold, that he died in 1814, and that we are now in the year 1844, and no sale has been made; considering further the mode in which this suit has been prosecuted, it cannot be matter of surprise that the parties interested in the estate are discontented, and should exert themselves to charge the trustees. The question is, whether on the present [277] occasion and in the present suit, they can be lawfully charged.

The testator, by his will, directed that the estate and minerals should be sold by the trustees "within two years from the time of his death, or as soon afterwards as they or he should be satisfied as to the quantity, quality, and nature of the mines and minerals (if any) in or under all or any part or parts of the said lands and premises, or at such other time or times afterwards as they in their discretion should think proper." It has been much discussed, whether this is an absolute direction to the trustees to sell, or one depending on their proceeding to ascertain the quantity and quality of the minerals. It is not, however, necessary to decide it. The estate was not sold when the bill was filed in 1827; and though it appears that some previous attempt had been made to bore in these fields to discover the existence of minerals, yet it does not appear to have been effectual or to have turned to any good account.

This bill distinctly alleges, that the estate ought to have been sold, that the trustees ought to have proceeded to ascertain the quantity and quality of the minerals, and it states they have not done so. The Defendants in their answer admit that they have not done so. The very things, therefore, which are now dwelt upon at such length, appeared on the pleadings at the original hearing.

The cause came on to be heard, and what was done? Was there any declaration that the trustees ought to have proceeded to a sale? So far from it, the Court took notice that there had been no sale, and referred it to the Master to ascertain whether

it would be for the benefit of all parties that a sale should take place. The Court therefore had before it upon the [278] pleadings this charge, and there were, at the hearing, persons capable of impeaching the conduct of the trustees in respect of it, yet they obtain this decree for an account scarcely differing from the most ordinary decree. When the parties came to take the accounts in the Master's office, the Master was not satisfied with the Plaintiffs being represented by the same solicitor as the Defendants, and directed the proceedings to be conducted by another solicitor, who became charged with the protection of the interest of the Plaintiffs; he had an opportunity of ascertaining what were the points in issue, and if he found that they were not properly put in issue, so as to enable his clients to obtain all the relief he thought them entitled to, he might, by the leave of the Court, have brought forward fresh charges by supplemental bill; but what he did was to adopt the proceedings, and to proceed to carry into execution the decree as he found it. I do not say that he was guilty of any neglect, but he could not act thus and afterwards claim other relief. If, from new circumstances, he considered his clients entitled to further or different relief, he ought to have come forward with a proper application to enable them to have it. I am of opinion that the Plaintiffs must be considered as having adopted the whole proceedings. I must consider this case as prosecuted by the same solicitor from beginning to end, and that the Plaintiffs are not entitled to any relief different from that given by the original decree and consequent thereon. By that decree the common and ordinary account was directed, and the Defendants could never have imagined that it was open to the Plaintiffs to have any such relief against them as that which is now asked. I do not think, under the circumstances, I ought to direct any such inquiry as that which is sought, for the purpose of charging the Defendants with the loss.

NOTE.—See *Garland v. Littlewood*, 1 Beav. 527.

[279] GREENWOOD v. ROTHWELL. Feb. 13, 1844.

[For other proceedings, see 6 Beav. 492; 7 Beav. 291.]

An estate subject to a mortgage was devised to executors for a term for payment of debts and subject thereto, to one for life, with remainder over. The executors joined in a transfer of the mortgage, and raised a further sum alleged to be necessary for payment of the debts. The tenant for life, with the concurrence of the executors, afterwards sold the property absolutely, and the purchaser paid off the mortgage. A bill being filed by the remainder-man to redeem the purchaser, on payment of the original mortgage only, and the cause being set down on an objection for want of parties: Held, that the Plaintiff was not, at present, bound to make the executors parties.

Costs of setting down a cause on an objection for want of parties reserved to the hearing.

The testator being seised of some property at Clayton, subject to a mortgage for £400 to Duckett, secured by a term of 1000 years, made his will in 1811, whereby he gave as follows:—"I will and direct that all my just debts, funeral expenses, the costs and charges of proving and registering this my will, and also the several legacies hereinafter by me bequeathed shall be paid and satisfied by my trustees and executors hereinafter named, out of my real and personal estate," and, after giving a legacy and annuity, he devised to Joseph Greenwood and James Northrop, their executors, &c., all his lands, tenements, &c., for the term of 1000 years, on trust to keep the premises in repair, to keep down the mortgage, and pay the residue to Ann Bentley for life, and subject as aforesaid, he gave the property in question to Jonas Greenwood for life, with remainder to his issue (as purchasers) as tenants in common in fee, and he appointed Joseph Greenwood and James Northrop executors.

The testator died soon after, and, at his death, Jonas Greenwood had several children living. The executors proved his will.

By an indenture, made in 1812, between Duckett of the first part, the executors of the testator of the second part, and Mann of the third part, reciting that £406 was due on the mortgage, and that the executors had requested Mann to lend them the sum of £550, as well [280] to enable them to pay off the said sum of £406 as also to enable them to discharge sundry other just debts, amounting together to the sum of £144, which remained owing to other creditors of the testator, the property in question was conveyed by Duckett and the executors, for and during all the then residue and remainder of the several and respective terms of years therein, subject to redemption on payment of £550.

In 1823 Jonas Greenwood, the tenant for life, agreed to sell the premises to Abraham Tempest for £400, and by deed dated March 1823, in consideration of £400 paid by Abraham Tempest to Mann in satisfaction of his mortgage, and for a nominal consideration, the property was absolutely conveyed by Mann and Jonas Greenwood and by Joseph Greenwood and James Northrop, the executors, to Tempest in fee. The mortgage term was assigned in trust for the purchaser, and the term of 1000 years created by the will was merged. Jonas Greenwood further assured the property to Tempest by fine with proclamations. Tempest laid out a large sum of money on the property; and in 1826 he mortgaged it to Messrs. Rawson, and in 1835 Tempest and Messrs. Rawson, in consideration of £3000, conveyed the property absolutely to the Defendant Rothwell.

Jonas Greenwood died in 1840, and his children thereupon filed this bill insisting that he was tenant for life only, and seeking to redeem on payment of the mortgage of £400 and interest. It was decided on a former occasion that Jonas Greenwood was merely tenant for life. (See 6 Beav. 492.)

The Defendant, by his answer, raised three objections for want of parties, two of which having been submitted [281] to by the Plaintiffs, it is unnecessary to state them. The third was as follows:—"That if the Plaintiffs should be decreed to be entitled to any right or relief in the premises, then the proper accounts ought to be taken of and concerning the said testator's estate and debts, and other matters connected therewith, in the presence of all the necessary parties to such accounts."

The cause was set down on the objection for want of parties, under the 39th Order of August 1841. (Ord. Can. 175.)

Mr. Turner and Mr. Thomas Turner, for the Plaintiffs. The real and personal representatives of the testator are not necessary parties to the suit. It is not suggested that any debt or legacy now remains unpaid. Where executors having a power to mortgage for payment of debts exercise it, the Court has never held that they were necessary parties to a redemption suit, unless the equity of redemption is limited to them. You cannot combine a suit to administer an estate with a suit for redemption. *Pearse v. Hewitt* (7 Sim. 471).

Mr. Roupell and Mr. Rogers, for the Defendant. The trustees and executors are necessary parties to this suit. The Plaintiffs claim subject to the debts and legacies, and are entitled to nothing until they are paid. The Defendant insists that the executors and trustees have properly sold under the powers contained in the will: if the Plaintiffs dispute the validity of the acts of the executors, such executors should be brought here to contest that allegation.

THE MASTER OF THE ROLLS [Lord Langdale]. The testator, by his will, charged his real estate, [282] which was subject to a mortgage, with the payment of his debts, and created a term of 1000 years, by means of which the amount was to be raised by his trustees and executors. It does not appear that anything was raised by virtue of this devised term; but after the testator's death, the trustees and executors joined in a transfer of the mortgage, and they on the same occasion raised an additional sum of £144, which it was stated was necessary for enabling them to discharge sundry debts of the testator. I do not mean to deny that Rothwell may be entitled to credit for any portion of the money which may have been applied in payment of the testator's debts. Supposing that to be so, it will form part of Rothwell's defence to the suit. He has a right to say to the Plaintiffs, "You are not entitled to redeem me on payment of £400, because a further sum of £144 has been raised and applied in payment of the debts of the testator." But has the Defendant a right to insist that this matter shall be brought forward by the Plaintiffs, whose claim is to have the estate subject only to the mortgage for £400? I think not, for

this is part of Rothwell's defence, which the Plaintiffs are not bound to bring forward.

The question of costs was discussed, and *Osborne v. Foreman* (2 Hare, 656), was cited.

THE MASTER OF THE ROLLS said he should reserve the costs until the hearing, when he should be better able to see into the real merits of the case.

[283] BELL v. DUNMORE. Nov. 25, 1843; Jan. 11, 1844.

Liberty given to file a supplemental answer to correct a date in the original answer.

On such an application the Defendant must account for the mistake, and the truth of the proposed answer, and the terms in which it is intended to file it, must be verified.

This was an application for leave to file a supplemental answer to correct an alleged erroneous date in the original answer.

The following is an outline of the case:—

In October 1826, Mr. Ord and the Plaintiff Mr. Bell, as his surety, executed a bond for £2000 to a Mr. Marston.

The firm of Shuttleworth, Ingram & Wartnaby (the Defendant), were concerned in the transaction for Ord and Marston. Marston died, and Wartnaby and Dunmore, his executors, having commenced proceedings at law on the bond against Bell, he filed this bill, to restrain the action and to be relieved from the bond, on the ground, first, that time having been given to the principal debtor, the surety had been thereby released; and, secondly, that payments had been made by the principal on account.

The bill alleged, that the solicitors were aware "that the £2000 was for the sole use of Ord, and that the Plaintiff received no part thereof, and joined in the bond to secure the payment of the £2000 solely as a surety for Ord, and the £2000 was received by Messrs. Shuttleworth, Ingram & Wartnaby, as the solicitors and agents of Ord, and applied by them, on his account; a large portion of it being retained by them in payment of debts and bills of costs due by him to the said firm, or the individual partners therein."

[284] The Defendants Dunmore and Wartnaby, by their answer, admitted the negotiation for the loan and the giving the bond in October 1826; and Wartnaby stated and Dunmore said he had been informed and believed, though he did not know the same of his own knowledge ["that the said sum of £2000 was paid by Marston to Shuttleworth in two instalments of £500 and £1500 in the months of April and October 1827; and that the said sum of £500 was paid by Shuttleworth, as the solicitor of both parties, to the Defendant Ord in the month of April 1827; and that the said sum of £1500 was, in the month of October 1827, carried over from the credit of Marston in account with the said firm of Shuttleworth, Ingram & Wartnaby, to the credit of Ord with the said firm"].

A motion was now made that the Defendants might be at liberty to file a supplemental answer, for the purpose of correcting a mistake in their answer, by substituting 1826 for 1827 in the above-mentioned paragraph which is contained between brackets. The notice of motion stated in terms the proposed supplemental answer.

The affidavit, in support of the motion, stated that the Defendants had made an unintentional mistake as to the date, the year 1827 having been by mistake inserted for 1826. That the date had been correctly stated in the original instructions for the answer, but, by mistake, incorrectly stated in the further instructions.

Mr. Kindersley and Mr. Faber, in support of the motion.

[285] They cited *Strange v. Collins* (2 Ves. & B. 163), *Tidswell v. Bowyer* (7 Sim. 64), *White v. Sayer* (5 Sim. 566).

Mr. Pemberton Leigh and Mr. Bates, *contra*.

They cited *Greenwood v. Atkinson* (4 Sim. 54).

THE MASTER OF THE ROLLS [Lord Langdale]. At present I am not able either to refuse or grant the application. The object of the Court is to allow neither party to obtain a victory at the expense of truth. There must be an affidavit of the truth of the intended answer and of the terms in which it is proposed to file it. The motion must stand over for a further affidavit.

Jan. 11, 1844. A further affidavit was produced in accordance with the requisition of the Court, and the motion was now renewed.

Mr. Kindersley and Mr. Faber, in support of the motion.

Mr. G. Turner and Mr. Bates, *contra*.

THE MASTER OF THE ROLLS. One question in this case is, when the consideration for this bond was paid. It is stated in the answer to have been in 1827; but, upon an examination of the entries in the books and documents, it is now distinctly sworn that this was a mistake, and that this took place [286] in 1826. When the cause comes on for hearing it will be important to ascertain whether it was in 1826 or 1827.

I should be sorry to let fall a word which might imply that the Court considers it a trifling matter to allow a party who has solemnly declared one thing, to put in a second answer quite inconsistent with his former solemn statement. I have felt it necessary to require the party not only to account for the mistake, but to produce the answer in the very terms and words he pledges himself to swear it. Not being satisfied on a former occasion the case stood over.

The Defendant, in a case like this, must shew that the fact alleged to be erroneous is material: that the error arose under such circumstances as not to fix him with the first statement; and he must also shew the terms in which he proposes to introduce the new allegation. (See *Haslar v. Hollis*, 2 Beavan, 236; *Smith v. Hartley*, 5 Beavan, 432, and *Whitcombe v. Minchin*, 1 Wilson, C. C. 1.)

If it appeared that this gentleman, in making the first statement on oath, had been speculating in his defence, and was now endeavouring to fit the allegations on the record with the evidence which he has since, from time to time, picked up, or if he came forward under circumstances which plainly shewed that he had been guilty of extraordinary negligence or temerity in pledging his oath to a particular statement, I might hesitate before I granted the application. When the proper time arrives, the matters now alleged will deserve serious attention, and may then hang heavily on the Defendant; but at present I cannot come to a conclusion on them.

[287] I do not say what would be the effect of the new statement. The Defendant has said that the payment was made in 1827, and if now, by leave of the Court, he be permitted to state that it took place in 1826, these two inconsistent statements will remain on record, and when the cause comes on for hearing, the effect of them will have to be considered.

It is to be observed that if the new allegation be introduced, the Plaintiff will have a full opportunity of amending his bill and of interrogating the Defendant as to all those new facts and circumstances with a view of throwing discredit on the new allegation. On the whole, it appears to me that the danger of doing injustice will be greater by refusing than by granting the application. The Defendant must, therefore, have the indulgence he asks upon payment of all the costs.

FORM OF ORDER.—After reciting that it had been moved that the Defendants might be at liberty to file a supplemental answer to the Plaintiff's bill for the purpose of correcting an error in the clause in their answer to the said bill, beginning in the 55th folio of the said answer, and ending in the 67th folio of the said answer, and which clause was in the words, &c. [stating it], "his Lordship doth order that the Defendants Dunmore and Wartnaby be at liberty to file a supplemental answer to the Plaintiff's bill, in the form of the draft signed by counsel and referred to in the affidavit of the Defendant Wartnaby, sworn, &c., as the exhibit marked with the letter A. And it is ordered that the Defendants pay the costs," &c.

[288] DAVIS v. PROUT. Nov. 9, 10, Dec. 11, 1843; Jan. 27, Feb. 13, 1844.

[See *Butler v. Butler*, 1885, 16 Q. B. D. 377.]

Property was given in trust "for the sole and absolute use" of a female infant. She afterwards married under age, and a settlement was made giving half to the wife for her separate use, and the other half to the husband. A bill was filed by the husband and wife, after the latter had come of age, against the trustees, seeking to charge them with a breach of trust. The Court thought the frame of the suit improper, but gave leave to amend; and the wife being, by amendment, made to sue by her next friend, a decree was made.

After publication, a bill filed by husband and wife was amended by making the wife sue by her next friend. Held, that the evidence was still receivable.

The testator, by his will dated in 1819, devised, &c., some real and personal estate to trustees, upon trust "for the sole and absolute use of his daughter Mary Ann Prout," in case she should attain twenty-one, with maintenance in the meantime, and with a gift over in case she should die before she attained twenty-one.

The testator died shortly after.

In 1839 the Plaintiff Mr. Davis married Mary Ann Prout, then a minor, and a settlement was thereupon made, whereby they covenanted to convey the property of Mary Ann Prout to trustees, upon trust, as to one moiety, to the separate use of Mary Ann for life, and as to the other half upon trust for Davis for life, with certain limitations to the children of the marriage.

Mary Ann Davis attained twenty-one in 1840, and in 1841 this bill was filed by Davis, his wife and the only child of the marriage, to make the trustees responsible for certain alleged breaches of trust.

Mr. Pemberton Leigh and Mr. Rogers, for the Plaintiffs.

Mr. Turner and Mr. Kinglake, and Mr. Kindersley and Mr. Tripp, for the Defendants, objected that no relief could be had upon the record as it was now [289] framed, for the property was held for the separate use of the wife, and therefore a suit in which the husband joined as Co-plaintiff could not be supported; *Wals v. Parker* (2 Keen, 59), *Reeve v. Dalby* (2 Sim. & St. 464). Here the property was given by the will "for the sole and absolute use" of Mrs. Davis, and this was equivalent to a gift for her separate use; *Ex parte Ray* (1 Mad. 199), — *v. Lyne* (Young, 562), 2 Roper on Husband and Wife, 164. That if there existed any question on the point, the interests of the husband and wife would be so conflicting, that they could not sue together as Co-plaintiffs.

That the settlement having been made during the infancy of the wife, was not binding on her; *Simson v. Jones* (2 Russ. & M. 374), *Johnson v. Johnson* (1 Keen, 649); and that therefore the whole property was still her separate estate.

Mr. Pemberton Leigh and Mr. Rogers, *contra*. The objection not having been taken by the answer, it is incompetent for the Defendants to insist on it at the present stage of the cause. Such technical objections may be valid if taken by demurrer, and yet the Court will not listen to them at the hearing, as in the instance of an objection for multifariousness. (See *Wynne v. Callander*, 1 Russ. 293; *Greaves v. Churchill*, 1 Myl. & K. 559.) In this case there is no misjoinder; for both the husband and wife have an independent interest in the fund, and a common interest to make the trustees responsible. When the fund has been recovered by this suit the Court will protect the interest of the wife. If the property were settled to the separate use of the wife by the [290] will so as to exclude the husband, still by the settlement, the husband has acquired an interest, and the wife has adopted the settlement after attaining twenty-one, which she had the power of doing, she being considered a *feme sole*, as to her separate estate.

THE MASTER OF THE ROLLS [Lord Langdale]. This is not the first time that this point has been raised before me. There can, however, be no doubt of the rule as now established. The difficulty in a suit constituted like the present is not so much in protecting the wife's interest against her husband, but because in such a

record the suit is considered as that of the husband alone; and if this bill were now dismissed on the merits, the wife might the next day file another bill for the very same object, and would not be bound by the former decree; this is the ground on which the present objection is to be decided. Though I have some reason to think that the object of the Defendants is to delay, I cannot refuse to listen to their objection.

There must be leave given to the Plaintiffs to amend and set the record right.

Jan. 17, Feb. 13, 1844. The Plaintiffs amended their bill by adding Mr. Jackness as the next friend of the wife; but the husband was still continued as a Co-plaintiff. The cause again came on for hearing.

It was again objected, first, that from the frame of the record no decree could be made. The following cases were cited in opposition to this objection: *Platel v. Craddock* (C. P. Cooper, 469, 481), where a bill being filed by husband and [291] wife in respect of a trust fund limited to the wife for her separate use, remainder to the husband for life, liberty was given to amend by adding a next friend to the wife, and a decree was made; and *England v. Downs* (1 Beavan 96).

Secondly, it was objected that an alteration having taken place in the title of the suit, the evidence taken could not be now read; *Bailey v. Dennett* (3 You. & C. 461. And see *Milligan v. Mitchell*, 1 Myl. & Cr. 443, and 3 Myl. & Cr. 72; *Giles v. Giles*, 1 Keen, 685).

THE MASTER OF THE ROLLS, after some hesitation, overruled the objections, admitted the evidence, and made a decree.

[291] GREENWOOD v. ROTHWELL. (*Ex relatione.*) March 14, 1844.

[S. C. 13 L. J. Ch. 226. For other proceedings, see 6 Beav. 492; 7 Beav. 279.]

Order for the production of title-deeds of a mortgagee who also claimed to be a purchaser of the equity of redemption, refused.

This was a motion for the production of deeds and documents relating to some property which was the subject of the suit.

John Mitchell, having mortgaged the property for 1000 years for securing £400 and interest, by his will, dated in 1811, directed all his debts, funeral and testamentary expenses and legacies, to be paid out of his real and personal estate, and he devised unto Joseph Greenwood and J. Northrop, all his hereditaments, &c., for the term of 1000 years, upon trust to keep the premises in repair, to keep down the interest upon the mortgage, [292] and to apply the residue for the maintenance of Ann Bentley for life; and subject thereto, in effect, he devised the property in question unto Jonas Greenwood for life, and after his decease to his issue as purchasers (6 Beavan, 492), and he appointed Joseph Greenwood and Northrop his executors, who proved his will.

By an indenture dated the 5th of March 1812, and made between the mortgagees of the first part, Joseph Greenwood and Northrop of the second part, and Mann of the third part, after reciting the mortgage, and the will of the testator, and that Joseph Greenwood and Northrop had requested Mann to lend them £550, to enable them to pay off the sum of £406 due upon the mortgage; and also to enable them to discharge sundry other just debts, amounting together to the sum of £144, which remained owing to other creditors of the testator, it was witnessed, that, in consideration of £406 paid to the mortgagees, and of £144 paid to Joseph Greenwood and Northrop by Mann, they, the mortgagees, assigned, and Joseph Greenwood and Northrop assigned and confirmed, the property in question to Mann, for the residue of the several terms of years therein, discharged from the proviso for redemption contained in the mortgage, but subject to redemption on payment to Mann by Joseph Greenwood and Northrop of the sum of £550 with interest.

By deeds dated in March 1823, after reciting the mortgage to Mann, the will of the testator, and that Jonas Greenwood had agreed to sell the premises to Abraham Tempest for the sum of £400, it was witnessed, in consideration of £400 paid to Mann in discharge of his mortgage, and for the nominal consideration therein mentioned, the property was conveyed by Jonas Green-[293]-wood, Joseph Greenwood and Northrop to Tempest in fee, and Mann assigned the mortgage term of 1000 years

upon trust for Tempest, and to attend the inheritance, and Joseph Greenwood and Northrop surrendered and merged the term of 1000 years created by the will of the testator.

Tempest afterwards expended considerable sums of money in building and in improving the premises.

By subsequent deeds, the property was conveyed to the Defendant Rothwell by way of mortgage to secure £3000, and the mortgage term of 1000 years was assigned to Alexander in trust for him, and to attend the inheritance.

The bill was filed by the children of Jonas Greenwood, praying a declaration, that under the will of John Mitchell, Jonas Greenwood took an estate for life only: that, subject thereto, the premises were limited to them as tenants in common in fee, and for a general declaration of the rights of the parties. It asked that Alexander might be declared a trustee for the Plaintiffs of the term of 1000 years, subject to such charge as Rothwell might be entitled to in respect of the mortgage for £400 due to Mann at the time of the conveyance to Tempest, and of any interest thereon, which the Plaintiffs offered to pay, and it prayed a conveyance to the Plaintiffs of the mortgage term of 1000 years.

The Defendant Rothwell, by his answer, said, he believed that the sum of £400 was, at the time of the purchase, the full value of the premises, that the purchase was made *bona fide*, and that the sale was made as a means of paying the debts of the testator, which, being charged upon the estate, authorized the trustees to sell [294] and make a good title to a purchaser. That the Plaintiff had acquiesced and permitted extensive improvements to be made upon the premises.

The Defendant also said that his mortgage contained other hereditaments than those claimed by the Plaintiffs, and insisted upon his right to retain the deeds. He also claimed to be a purchaser without notice, and insisted on the benefit of any want of notice in himself or others, and the benefit of the term of 1000 years vested in Alexander. The Defendant in a schedule set out the deeds, and insisted that until the Plaintiffs should establish their right to redemption, they were not entitled to any discovery or production of the title-deeds and documents prior to the will, nor to the production of the deeds or muniments relating to the mortgage.

Mr. G. Turner and Mr. T. Turner now moved for the production of the documents. The bill charges that the Defendant had notice of the Plaintiffs' claim; and the recitals in the several deeds shew, that the whole of the parties through whose hands the estate has passed must have had notice of the will of the testator, and of the title of the Plaintiffs. The cases of *Hardman v. Ellames* (2 Myl. & K. 732), and *Bolton v. The Corporation of Liverpool* (1 Myl. & K. 88), differ from the present; there the documents constituted the Defendant's title, without supporting that of the Plaintiff. Here the question is, whether the Defendant can protect himself by means of the term of 1000 years. At the utmost, the Defendant is only a mortgagee in respect of the original charge, with notice of the Plaintiffs' title, and this the Plaintiffs offer to pay. The mortgage made by the executors by [295] virtue of the will, had been discharged at the time of the purchase.

Mr. Roupell and Mr. Rogers argued, that the term of 1000 years created by the testator before his death had become vested in the Defendant for valuable consideration; and though Jonas Greenwood might be tenant for life only, still the Defendant was entitled to the estate during that term, as the trustees, for the purposes of the will, had a right to dispose of the estate for a term of 1000 years. That the £3000 borrowed of the Defendant upon the security of the property had been laid out in lasting improvements with the knowledge of the Plaintiffs. That the Defendant had no notice of the Plaintiffs' claim, and was entitled to withhold the deeds by virtue of his title as mortgagee until he has been fully paid.

THE MASTER OF THE ROLLS [Lord Langdale] said, that, consistently with the established rules of the Court, he was unable to make the order for the production of the deeds. That the cause could not be ultimately disposed of without inquiry; and though the effect would be to prolong the litigation, still the Court was not at present in a condition to make the order.

[296] CASTLE v. EATE. Feb. 19, 20, April 1, 1844.

[S. C. 8 Jur. 280.]

Devise to trustees in fee, upon trust to demise until the testator's youngest child attained twenty-one, and during the minority of such youngest child, to pay the rents to the testator's wife, for the maintenance of herself and children, and when and so soon as the youngest surviving child should attain twenty-one, to sell and divide the produce "between and amongst the testator's wife and all his children who should be then living in equal shares." And in case of the death of any child before the estates became saleable, his children were to take his share. The children all died under twenty-one without issue.

Held, that the wife was entitled to the whole estate.

The testator, Joseph Starbuck, by his will, dated the 23d of December 1826, gave his real estates to trustees in fee, on trust to demise and let the same until his youngest child or his youngest surviving child should attain the age of twenty-one years, and during the minority of such youngest or youngest surviving child, to pay the rents (after deducting necessary outgoings) to his wife for the maintenance and support of herself and of his children; and in case of the decease of his wife in the meantime, the rents were to be applied by the trustees for the sole benefit of his children. And when, and so soon as the youngest, or the youngest surviving child should have attained the age of twenty-one years, the trustees were to sell the real estate, and after paying the charges thereon and the costs, they were to pay, divide, and distribute the residue of the purchase-money, unto, between, and amongst the testator's wife and all his children *who should be then living*, in equal shares and proportions, to and for their, his and their, own benefit. And he provided, that if any of his children should depart this life before the estates should become saleable, leaving issue, the children should take the share of his parent.

The testator died in 1827, leaving his wife and two children, Alfred and Maria, surviving him. The two children both of them died under twenty-one years of age, without issue. Maria on the 16th of September [297] 1839, and Alfred on the 20th of February 1842; and in consequence of that event the testator's customary estate was claimed on the one side by the widow, who had since married the Defendant Eate; and on the other, by John Starbuck, who was the testator's customary heir.

Mr. Turner and Mr. Metcalfe, for the Plaintiffs, the trustees.

Mr. Kindersley and Mr. W. M. James, for the widow, argued that the words "then living," meaning at the time when the youngest child attained twenty-one, an event which could never happen, did not apply to the widow: that a share was, in effect devised to and became vested in her, at the testator's death, proportioned to the number of children then living, but which was capable of being enlarged, by the deaths of children without issue, before the youngest or the youngest surviving child attained twenty-one. That the gift was to a class, who, when ascertained, took as tenants in common; and in the event which happened, of all the children dying under twenty-one, there was no one to share with the widow, and therefore that she was entitled to the whole. That if it were said that the event had not happened on which the power of sale was to be exercised and the division to take place, then that the direction to demise would continue for ever, as the event on which it was to cease could never happen. That if she was not entitled to the whole, she must at least be entitled to the one-third, which became vested in her on the testator's death.

Mr. James Parker, for the customary heir, contended, that the only intent with which the testator directed a sale, was to divide the proceeds between his wife, and [298] at least some one child who had then attained twenty-one years of age, and that the only event on which a sale was to be made and the produce divided, was the attainment of twenty-one years of age by some one child, an event which had neither happened, nor could ever happen, all the children having died under age. That as the testator had not provided for the event which had really taken place, the devise failed, and that the customary heir was entitled to the estate.

Mr. Kindersley, in reply.

The following cases were cited: *Manfield v. Dugard* (1 Eq. Ca. Ab. 195), *Fearne on Cont. Rem.* 245, *Goodtitle dem. Hayward v. Whitby* (1 Burr. 228), *Boraston's case* (3 Rep. 19), *Doe dem. Satterthwaite v. Satterthwaite* (1 W. Black. Rep. 519), *Balsford v. Kebbell* (3 Ves. 363), *Murray v. Tancred* (10 Sim. 465), *Leake v. Robinson* (2 Mer. 363), *Hanson v. Graham* (6 Ves. 239), *Doe dem. Hayter v. Joinville* (3 East, 172).

April 1. THE MASTER OF THE ROLLS [Lord Langdale]. Several cases were cited, but no one of them appears to be applicable to the present case.

The event which happened, of all the children dying under twenty-one years of age, does not appear to have been distinctly contemplated by the testator, and the question is, what is the question of the will under the circumstances?

[299] It is of no importance to say that he intended no benefit to the heir, who, if entitled at all, takes by descent, without regard to intention; but the wife and children were the objects of the testator's bounty, and the devise was clearly intended for their benefit. They were to take the benefit, by dividing the proceeds of the sale, and the sale was postponed till the youngest attained an age, when he could be competent to dispose of his share. In the meantime, all the rents were to be paid to the wife, for the support of herself and her children. If the wife died in the meantime, no provision is made as to any share which might have been supposed to have been given to her, but all the rents are directed to be applied for the sole benefit of the children; and in like manner, if any child died in the meantime, no provision is made for such child, although such child might have attained the age of twenty-one years. Under these circumstances, it appears to me, that the money to arise from the sale was intended to be divided amongst such of the wife and children as should be living at the time of the sale, and that in the meantime, the rents were to be applied for the support of such of the wife and children as should be living. For these purposes, the intermediate support of the wife and children, and afterwards the sale of the estate and the application of the purchase-money, the estate was vested in the trustees; but the trust for maintenance and support ceased on the death of the last surviving child under twenty-one.

No doubt, the attainment of twenty-one by the youngest surviving child, was the event upon which the testator contemplated that the trust for maintenance and support would cease; but as he clearly intended a bounty to the wife during the maintenance of any child, and in the event, at least, of her being alive at the time of sale, [300] I cannot so construe the will as to exclude her in the event which happened. It appears to me upon the construction of the will, that the estate was to vest when the trust for maintenance and support ceased; and the wife being the only one of the *cestuis que trust* who was then living, I am of opinion, that, in the event which have happened, the wife is entitled to the whole estate.

[300] KINSHELA v. LEE. April 26, 1844.

A preliminary inquiry, under the 5th General Order of May 1839, as to who was next of kin, was refused, where the Plaintiff sued in his right of next of kin; but it was denied by the answer that he filled that character.

The Plaintiff by his bill claimed as one of the next of kin of the intestate, through Thomas Lee the son of the intestate's uncle.

The Defendants by their answer denied that the Plaintiff was one of the next of kin, and stated that the intestate's uncle never had any son Thomas.

Mr. E. M. Harrison moved for a preliminary inquiry under the 5th Order of May 1839 (Ord. Can. 136), as to who were the next of kin.

Mr. Toller, *contrà*. We deny all right of the Plaintiff.

THE MASTER OF THE ROLLS [Lord Langdale]. The Plaintiff's title and character being altogether denied, I cannot make this order for a reference.

NOTE.—See *Meinertzhagen v. Davis*, 10 Sim. 289; *Strother v. Dutton*, *Ibid.* 288; *Belcher v. Whitmore*, *ante*, 245.

[301] RICHARDSON, on behalf, &c. v. HASTINGS. Jan. 15, 1844.

[S. C. 13 L. J. Ch. 129; 8 Jur. 72. For other proceedings, see 7 Beav. 323, 354; 11 Beav. 17.]

To a suit seeking to wind up the affairs of a club or partnership, all persons interested must be made parties, though they are numerous; it is not sufficient for one to sue on behalf of the others.

A suit respecting a partnership may be maintained without praying a dissolution. A club was dissolved, and the committee were authorised to realize the assets and wind up the affairs. For that purpose the lease was vested in A. B., and C. A., and B., without the concurrence of the other members of the committee, sold the lease and property, and received the amount. A. B. and D. (another committee-man) signed the receipt, but A. and B. alone received the money. In a bill to make A. and B. account: Held, that C. and D. were not necessary parties.

This case came before the Court on general demurrer to the whole bill, the substance of the allegations of which was as follows:—

In 1836 the Alliance Club, consisting of 100 members, was formed, and for that purpose, a lease of a house in Pall Mall was taken, and a quantity of furniture hired. Rules were, as usual, made for the management of the club, and amongst them, one, by which Messrs. Hopkinson the bankers of the club were alone authorised to receive monies on account of the club. The managing committee were to consist of twenty, and every member was to be bound by the majority at a general meeting.

The pecuniary affairs of the club having become embarrassed, it was agreed, at a special general meeting, that the subscription should be raised, and that the furniture which had been hired should be purchased, with monies to be raised by subscription by way of loan amongst the members, and £400 borrowed of the bankers.

The Plaintiff Richardson, the Defendants Hastings, Emly, and twenty-one other members accordingly subscribed a sum of £805 for the purpose of purchasing the furniture, which was paid into the bankers on account of the club, and by an indenture of the 27th [302] of January 1838, made between Hastings, Emly, and Stewart of the first part, the several subscribing members of the second part, the owner of the furniture of the third part, the bankers of the fourth part, and the Plaintiff of the fifth part, it was agreed that the furniture should be vested in the Plaintiff upon trust (in case the club should pay the bankers the £400 in January 1839) for the club, but charged with the payment of the sums subscribed by the several members, and £1000 to the owner of the furniture; but in case of default in payment of the £400, then in trust to sell and pay the £400 and the other sums due to the owner of the furniture and the subscribing members, and pay the surplus to the committee for the use of the club, and it was also agreed that Hastings, Emly and Stewart should hold the lease in trust to secure the £400 and interest.

The furniture was accordingly purchased, and the lease vested in Hastings, Emly and Stewart.

The embarrassments of the club continuing, it was agreed, at a general meeting held on the 10th of May 1839, that the club should be that day dissolved: that the committee should dispose of the property of the club, and make such arrangement as they, in their discretion, might think fit, for winding up the affairs of the club: that each member should pay into the bankers a sum of £13, to be applied by the committee in payment of the debts of the club; and that the committee should return to each member any balance remaining after winding up the affairs of the club.

The Plaintiff, and sixty-seven other members, accordingly paid £13 each into the bankers, which amounted in the whole to £884.

[303] The bill alleged, that the Defendants Hastings and Emly, who were two of the committee, took upon themselves to act according to their own views, and upon their own individual authority, without consulting the committee in general, or any meeting properly summoned and constituted, or obtaining the sanction or advice of

any meeting of the committee; and that they, of their own mere will and without the concurrence or authority of the committee or any duly constituted meeting thereof, sold the lease, furniture, and other property of the club, and received the proceeds thereof, which they retained in their possession. It also alleged, that £1200 had been received by Hastings and Emly for the furniture, but that the receipt for the same had been signed by them and by Dobson, who was auditor of the accounts and one of the members of the committee. That the Defendants Hastings and Emly closed the account with the bankers of the club, and opened one in their own names with another banker, into which bank they placed, to their own account, all the funds which they had received belonging to the club. That besides these sums, Hastings and Emly had induced other members of the club to pay them their contributions.

The bill alleged, that the bankers and the owner of the furniture had been paid, and that the Plaintiff and the other members of the club who subscribed for the purchase of the furniture, and (subject to their claims) all the members of the club, were the only parties interested, as *cestuis que trust* of the furniture or the produce thereof.

The bill contained charges of misconduct on the part of the Defendants—that they had refused to account—and that the parties interested in the accounts and relief thereby prayed, and on whose behalf the [304] Plaintiff was now suing, were very numerous, and that no suit to which they were all made parties could be effectually prosecuted.

The bill was filed by Richardson, on behalf of himself and all other persons (except the Defendants) who, at the time of the dissolution, were members of the club, against Hastings and Emly, and it prayed an account of the monies produced by the sale of the furniture and received by the Defendants, and that what might be found due thereon might be paid to the Plaintiff, as trustee, and for the purposes mentioned in the indenture of January 1838, or otherwise that the same might be applied upon and for such purposes, under the direction of this Court. It prayed also an account of the other assets of the club received by the Defendants, which, after deducting all sums which had been properly paid or expended by them, on the account or on behalf of the club, might be paid by the Defendants into the bank of Messrs. Hopkinson & Co., to the credit and for the purposes of the club; or if this honourable Court should think meet, into the Bank of England, to the credit of this cause, or otherwise, that the same might be applied, under the direction of this Court, upon and for the purposes to which the same was properly applicable; and that an account might be taken of all such of the assets and effects of the club (if any) which remained unrealised and undisposed of, and also an account of all such debts and liabilities of the club due and remaining unsatisfied at the time of the dissolution thereof, as were unpaid and unsatisfied, and that proper directions might be given for the payment and satisfaction thereof, the Plaintiff and the other members of the club (other than the Defendants) being willing, in case the same should be necessary, to contribute rateably all such sum or sums [305] of money as might be necessary for such purpose; or if the assets of the club should be more than sufficient for the payment and satisfaction of the unpaid and unsatisfied debts and liabilities of the club, then that the residue thereof might be divided between the Plaintiff and the other parties who were members of the club at the dissolution thereof, or their personal representatives.

The Defendants filed a general demurrer for want of equity, and for want of parties, and thereby insisting that the other members of the committee, Stewart, the other members parties to the deed of 1838, the other subscribers to the furniture fund, and Dobson, were necessary parties.

Mr. Purvis and Mr. Hubback, in support of the demurrer, argued that the bill, in effect, sought to have the affairs of the club wound up, which could not be done, except in a suit to which all the members were made parties; *Evans v. Stohs* (1 Keen, 24. And see *Deeks v. Stanhope*, V.-C. E. 21st of March and 12th July 1844). That a suit could not be instituted by one of a class on behalf of the others, unless their interests were the same, and the relief sought was in its nature beneficial to all those whom the Plaintiff undertook to represent; *Gray v. Chaplin* (2 S. & St.

p. 272). That here the subscribers to the furniture fund were entitled to be first paid, and had manifestly an interest quite opposed to the general body of those members who had not subscribed, and which latter body ought in some way or other to be represented in the suit; *Richardson v. Larpent* (2 Y. & C. (N. C.), 507).

[306] That the parties were not so numerous as to entitle the Plaintiff to sue on their behalf; *Bainbridge v. Burton* (2 Beav. 539), where thirty-eight persons interested were required to be made parties.

That Stewart was a necessary party, being a trustee of the lease; and that Dobson, who had signed the receipt for the purchase-money for the furniture, and was liable for the amount, was also a necessary party to the suit.

Mr. Kindersley, Mr. Turner, and Mr. Cameron, in support of the bill. The demurrer on record does not insist that all the members of the club are necessary parties, as has been argued at the Bar. They are not, however, necessary parties, for the suit does not seek to have the affairs of the club finally wound up, but merely to compel the two Defendants who have received the assets of the club to account for and render them to the proper custody. If the latter part of the prayer of the bill be considered as asking a settlement of all the affairs of the club, such relief may, according to the recent authority of *Walkworth v. Holt* (4 Myl. & Cr. 619), be had in a suit constituted like the present, or, at all events, it may be waived at the hearing, and the relief asked confined to the first part of the prayer, namely, the account of the monies received by the Defendants. It is to the common interest of all the members that this common fund should be recovered.

The interest of the subscribers and non-subscribers to the furniture fund are no more conflicting than those of a mortgagee and the general creditors of a deceased party, in which case the mortgagee may sue on behalf [307] of himself and all other the creditors. *Greenwood v. Firth* (2 Hare, 241, note), *Skey v. Bennett* (2 Y. & C. (N. C.), 405. And see *Aldridge v. Westbrook*, 5 Beav. p. 193).

Neither Stewart nor Dobson are necessary parties; they have received no part of the assets, and are in no way accountable.

THE MASTER OF THE ROLLS [Lord Langdale]. There is no doubt of the Plaintiff's equity, but I am of opinion that this bill is so framed as by its nature to be defective for want of parties; it is in vain for the Plaintiff to say that he will stop and limit the relief to that which is first prayed. The prayer of the bill is, in substance, that the affairs of this concern may be wound up, which cannot be effected unless all the questions between the parties are first settled and decided. It appearing, therefore, upon the bill that questions may probably arise between those persons on whose behalf the bill purports to be filed, they cannot be settled in their absence.

At one time, the Court would not entertain a suit between parties in relation to partnership transactions, except upon a bill to wind up the partnership. That is not now the rule of the Court, for I think, and the cases which have been referred to corroborate that view, that the Court will, as between partners, entertain a bill to settle a question which may arise between them, without proceeding to wind up the concerns and affairs of the partnership.

One argument used in support of the bill is, that if it had stopped, and simply asked for the accounts against [308] these Defendants, and that they should pay the balance found due in such a way as to be under the control contemplated by the agreement between the members, the other persons would not be necessary parties. That may be so; but so long as there can be any question between the Plaintiff and those whom he proposes to represent, and which must be decided before the funds can be disposed of, so long I think the bill will be defective for want of parties. I think the case is so stated by the bill as not to preclude questions with respect to the several contributions.

I do not see why either Mr. Stewart or Mr. Dobson should be made a party to this suit, nor do I think that the Plaintiff would be prevented from calling these particular Defendants to account for their receipts in the absence of the other members, provided the bill stopped there, and did not go on to seek a final distribution of the funds and the winding up of the partnership. I shall disallow the demurrer for want of equity, and allow it for want of parties without costs, and I shall give the Plaintiff leave to amend the bill, either by adding parties, if he should

be so advised, or by altering the frame of the bill so as to make it appear that it is not necessary to add parties.

[309] THE GUARDIANS OF WIMBORNE UNION v. MASSON. April 23, 24, 1844.

Under the 13th Amended Order of 1828, the six weeks after the answer is to be deemed sufficient, within which a Plaintiff can obtain an order to amend, has reference to the answer to the original and not to an amended bill.

After a full answer the Plaintiff amended. The Defendant answered the amended bill. Six weeks had expired from the time when the first, but not from the time when the second answer was to be deemed sufficient. Held, that any further application for leave to amend must be made to the Court, and not to the Master.

This was a motion for liberty to amend the bill, and the question was, whether the application ought to be made to the Master, or to the Court in the first instance.

The bill was filed against Masson, and against another Defendant, who disclaimed, and was dismissed. After several ineffectual attempts, Masson, on the 27th of July 1843, put in a sufficient answer to the original bill. On the 7th of December 1843 the Plaintiffs obtained an order to amend, which they did accordingly.

On the 29th of January 1844 Masson, who was then the sole Defendant, put in his answer to the amended bill, which became sufficient on the 25th of March following. This answer having disclosed circumstances which rendered it necessary for the Plaintiffs to make E. C. a party to the suit, the Plaintiffs applied to the Court, in the first instance, for liberty to amend. The application was supported by the proper affidavit.

By the 13th Amended Order of April 1828 (Ord. Can. 8) it is provided, "That after an answer has been filed, the Plaintiff shall be at liberty before filing a replication to obtain, upon motion or petition without notice, one order for leave to amend the bill; but no further leave to amend shall be granted after an answer and before replication, unless the Court shall be satisfied," &c., and [310] it afterwards proceeds, "but no order to amend shall be made after answer and before replication, either without notice or upon affidavit, in manner hereinbefore mentioned, unless such order be obtained *within six weeks after the answer*, if there be only one Defendant, or after the last of the answers, if there be two or more Defendants, *is to be deemed sufficient*."

The 3 & 4 W. 4, c. 94, s. 13, enacts that the Masters in Ordinary shall hear and determine all applications for leave to amend bills, &c.; and the 20th Order of December 1833 (Ord. Can. 50) directs "that all special applications for leave to withdraw replication, as well as to amend bill, shall be heard and determined by such Master in rotation."

Under these circumstances the question was, whether the application ought to have been made to the Master in the first instance, and to the Court by way of appeal.

Mr. Turner and Mr. Lewin, in support of the application. The question is, whether, under the 13th Amended Order, the six weeks are to be reckoned from the time when the answer to the original or to the amended bill was to be deemed sufficient. If from the former, then the 13th Order is imperative, that no order to amend shall afterwards be made; and the Master having no authority to relax this rule (*Lloyd v. Wait*, 4 Myl. & Cr. 257; *Smith v. Webster*, 3 Myl. & Cr. 244), the application is properly made to the Court.

It has been expressly decided that the six weeks has reference to the answer to the original bill: *Haddelsea* [311] v. *Neville* (4 Beav. 28), and *Bertolacci v. Johnston* (2 Hare, 632); and although Lord Lyndhurst in *Wharton v. Swann* (2 Myl. & K. 362) said that the impression upon his mind was, that the term "answer," used in the 13th of the New Orders, referred to the answer to the amended bill, still, that is quite inconsistent with the decision of Lord Cottenham in *The Attorney-General v. Netherland* (2 Myl. & Cr. 604), and with *Davis v. Prout* (5 Beav. 375). If such were not the true construction of the order, a Plaintiff might amend indefinitely, as every fresh amendment would extend the time for making another.

Matchitt v. Palmer (10 Sim. 241) was also cited.

Mr. Willecock, *contra*. This application ought to have been made to the Master, for the six weeks must be counted from the period when the answer to the existing record, namely to the amended bill, is to be deemed sufficient; from that answer alone the necessity for a further amendment became disclosed. It has been so decided by Lord Lyndhurst in *Wharton v. Swann*, and recently by Sir L. Shadwell in *Wilson v. Wilson* (V.-C. E., March 12th, 1844). In *Haddeslea v. Nevile*, and *Attorney-General v. Nethercoat*, the decision of Lord Lyndhurst in *Wharton v. Swann* was not referred to.

Mr. Turner, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. In a former case I had occasion to observe, that by the 13th Order, the Court intended a protection for [312] each and every of the Defendants who had answered, and I retain that opinion.

As it is represented that there is unfortunately a conflict of authorities on the point, I will look at all the cases; but I do not see how it is possible to construe the word "answer" differently in the two parts of this General Order.

April 24. THE MASTER OF THE ROLLS said, he had examined the authorities, and that he was of opinion that the answer referred to in the 13th Order was the answer to the original, and not to the amended bill.

NOTE.—This decision has been since followed by Sir J. Wigram in *Dean v. Hickinbotham*, 24th July 1845.

[313] DALTON v. HAYTER. April 17, 1844.

[See *In re Nobbs* [1896], 2 Ch. 833.]

A person entitled to an equity of redemption cannot make the mortgagee a party to a suit respecting the mortgaged estate without offering to redeem; but where a mortgagor, by deed to which the mortgagee was not a party, had conveyed another estate to trustees to sell and pay off the mortgage, so as to exonerate the mortgage estate, it was held that a person interested in the equity of redemption might file a bill, not offering to redeem, against the mortgagee and trustees, to have an execution of the trust.

An estate was mortgaged, and by a deed to which the mortgagee was not a party, the mortgagor conveyed another estate to trustees to sell and pay off the mortgage, &c. A party interested in the equity of redemption filed a bill against the trustees and mortgagee to have an execution of the trusts of the deed; and it charged, that the parties to the trust deed did not intend to create any trust for the mortgagee, and that the trustees alleged that the mortgagee was interested in the matters in question, but the Plaintiff charged the contrary, and that he had no legal or equitable interest in the estate, not being entitled to any interest under the deed of trust, "but nevertheless he made some claim to be interested therein, the nature of which he ought to set forth." Held, that this statement of claim prevented a general demurrer by the mortgagee.

To sustain a demurrer for want of parties, the Defendant must shew that the absent person is a necessary party according to the case of such Defendant.

An estate was charged with a mortgage and with portions, and a term was vested in trustees for securing the portions. A second estate was conveyed on trust to sell and pay the mortgage and portions. In a suit for the execution of the trusts, the mortgagee objected that the trustees of the term were not parties; but the objection was overruled.

This case came on upon a general demurrer for want of equity and want of parties. The material statements of the bill were as follow:—

By a settlement executed in 1812 the Shanks estate was settled on Nathaniel Dalton for life, with remainder to Robert F. G. Dalton for life, with remainder to his first son in tail (the Plaintiff), with power to Robert F. G. Dalton to charge the

estate with £20,000 for his own use, and a term was limited to Lethbridge and Grant, in trust to raise £20,000 for the younger children of Robert F. G. Dalton.

Previous to 1824 the Shanks estate had been charged, under the power, to Ingram with £10,000 out of the [314] £20,000, and Robert F. G. Dalton being about to charge it with the remaining £10,000, an agreement was come to between Nathaniel Dalton and Robert F. G. Dalton, by which Robert F. G. Dalton, for valuable consideration, agreed to throw the two charges of £20,000 primarily upon the Bagber and Semley estates, to which he was entitled in reversion in fee expectant on the decease of Nathaniel Dalton.

Accordingly by indenture dated the 6th of April 1824, made between Robert F. G. Dalton, Nathaniel Dalton, and the Defendant Hayter, a trustee, the Bagber and Semley estates were conveyed to Hayter, subject to the life interest of Nathaniel Dalton therein, upon trust, on the death of Nathaniel Dalton, to sell, and apply the produce in payment of another mortgage of £10,000, charged exclusively on the Bagber and Semley estate, and vested in A'Court, and afterwards to pay Ingram the mortgage for £20,000, and then to pay the £20,000 for younger children's portions. The mortgagees were not parties to this deed. At the same time the Shanks estate was charged to Ingram with the remaining £10,000.

Ingram's mortgage for £20,000 became vested in the Defendant Beavan, and A'Court's mortgage on the Bagber and Semley estate became vested in Moody. Nathaniel Dalton having died in 1825, this bill was filed against Hayter the trustee, Moody the mortgagee on the Bagber and Semley estates, Beavan the mortgagee for £20,000 on the Shanks estate, and against the younger children. The trustees of the term of 1000 years for securing the younger children's portions were not made parties to the suit. The bill sought to charge the trustee for breach of duty in not having sooner sold the estate, and it prayed for a sale of the Bagber and Semley estates, and for the application of the produce according [315] to the trusts of the deed of 1824, but it sought no specific relief against the mortgagees, nor did it offer to redeem them.

The bill contained the following charges:—"That it was not, in any manner, the intention of the parties to the said indenture of the 6th of April 1824, to create any trust for the said Charles Ashe A'Court, or the said Christopher Ingram, or the younger children entitled to such portions as aforesaid, and charged on the said Shanks estate, but solely to exonerate the said Shanks estate from the aforesaid charges thereon."

"And the Defendant Hayter alleges, that the Defendants Moody and Beavan, and the brothers and sister of the Plaintiff are interested in the matters in question in this suit; but the Plaintiff charges the contrary to be true, and that the said last-mentioned parties have not any legal or equitable interest in the said Bagber and Semley estates, or the rents and profits thereof, not being entitled, in any way, to any estate or interest therein, or charge thereon, under the said indenture secondly hereinbefore stated, and dated the 6th of April 1824, but nevertheless they make some claim to be interested therein, the nature whereof they ought respectively to set forth."

To this bill the Defendant Beavan filed a demurrer for want of equity and want of parties.

Mr. Kindersley and Mr. Beavan, in support of the demurrer. Admitting, for the purpose of this demurrer, every allegation in this bill to be true, then it appears that the Defendant Beavan has no interest in the matters in question, or in the Bagber and Semley estates, but he merely "makes some claim to be interested therein." It is quite immaterial what claim he may make, if, for the [316] purposes of the Plaintiff's argument, he must be assumed to have no interest; "a general vague charge that a Defendant claims an interest in the matters in question in the suit, is insufficient to avoid a demurrer." *Plumbe v. Plumbe* (4 Y. & Col. 345). If it were otherwise the most perfect stranger might, by means of such a charge, be made a Defendant to any suit in equity. The Plaintiff seeks no relief against the Defendant; if he wishes to know his claims on the estate it is matter of discovery merely.

Secondly, no bill can properly be filed against a mortgagee by a party entitled to the equity of redemption, except for the purpose of redeeming him; *Tasker v. Small* (3 Myl. & Cr. p. 69); *Pearse v. Hewitt* (7 Simons, p. 479). It is the offer which the

party entitled to the equity of redemption makes to redeem, and which subjects him to be foreclosed, that raises his equity; without that, this Court will consider the mortgagee as absolute owner of the estate. Suppose this suit to go on, all the accounts will be taken, and then it will be found that the produce of the second estate is insufficient to pay off the first mortgage to A'Court; but even if there remained a surplus, a mortgagee is not bound to receive a payment in part. It will be said that the Defendant may be interested in the produce of the estate, but that will not make him a proper party. None can be properly parties to a suit for specific performance except the parties to the contract; the *cestuis que trust*, though interested in the produce, cannot be made parties; *Tasker v. Small* (3 Myl. & Cr. p. 68. And see *Wood v. White*, 4 Myl. & Cr. 460). It may then be said that he is interested in the account; but "a party is not to be brought before the Court to stand by that he may be bound by the account to be taken between two other persons;" *Ramsbottom v. Wallis* (Coots on Mortgage, p. 710, and Jacob, p. 352).

[317] Thirdly, the trustees of the term are necessary parties. If the younger children are necessary parties their trustees, who have the legal term, are also necessary parties to this suit.

Mr. Wood, *contra*, in support of the bill. The Defendant should have disclaimed, otherwise the Court must make a declaration of his right before it can administer the trusts. The Plaintiff, who is interested in the Shanks estate, and also in the Bagber estate, desires to have the trusts affecting the latter estate carried into effect, so as to exonerate the Shanks estate. He considered that the Defendant Beavan had no interest in the Bagber estates; but the trustee insisted he had and that he was a necessary party. It is said that a general charge in the bill that a party claims an interest is not sufficient to entitle the Plaintiff to an answer, but though a witness cannot be made a Defendant, yet, "if the bill charges he is interested, the Defendant must plead and support it by an answer denying that allegation, and cannot demur;" *Plummer v. May* (1 Ves. sen. 426), *Fenton v. Hughes* (7 Ves. 287). The present bill expressly states that the Defendant claims an interest, and at the same time denies the claim; the Defendant ought, therefore, either to disclaim or to set out his claim, if any exist.

He admitted that the general rule was that, ordinarily, a mortgagee could only be brought before the Court for the purpose of redemption, but distinguished this case, which was for carrying the trusts of a deed into execution, and which could not be done in the absence of the parties interested or claiming an interest.

He contended that the trustees of the term were not necessary parties.

[318] Mr. Kindersley, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. It seems by a deed executed in 1812 power was given to Mr. Dalton to raise a sum of £20,000 for his own use, and besides that, a term was created for the purpose of providing portions to the amount of £20,000 for his younger children. It is unnecessary to say anything respecting the limitations of the estate. In the year 1824, and by the execution of the power to raise £20,000, Mr. Ingram became the owner of the charge of £20,000 on the Shanks estate. Contemporaneously with this, other estates, called the Bagber and Semley estates, were conveyed to trustees, on trust to raise money to be applied, in the first place, in exoneration of the charges on the Shanks estate. It does not appear by these deeds, that the incumbrancer on the Shanks estate had any right to interfere, in any way, with the execution of the trusts relating to the Bagber and Semley estates, although, in one view of the subject, it might be said that the mortgage, though secured on the Shanks estate, was to be provided for by means of the trusts affecting the Bagber and Semley estates. After all, the legal right of the mortgagee rested solely on the Shanks estate as far as now appears.

This bill is filed for the purpose of carrying into execution the trusts relating to the Bagber and Semley estates, calling on the trustee to account for the receipts and proceeds in respect of a portion of the estate that had been sold, and praying a sale of that part of the estate which remains unsold, and that the money may be applied, according to the trusts, in exoneration of the Shanks estate.

[319] The trustee, being called upon to render his accounts and carry the trusts into execution, alleges, that the Defendant Beavan, who now represents Ingram, has

an interest in the execution of the trusts. The words as alleged in the bill are not so, but "that he has an interest in the matters in question in this suit." The matters in question in the suit are the matters relating to the execution of the trusts of the Bagber and Semley estates. Now this is quite contrary to the view which is taken of the matter by the Plaintiff; and accordingly the Plaintiff, after stating that this is alleged by the trustee, charges the contrary of these pretences to be true, and charges that Mr. Beavan has not "any legal or equitable interest in the Bagber and Semley estates, or the rents and profits thereof, not being entitled, in any way, to any estate or interest therein," that is, in the Bagber and Semley estates, "or charge thereon, under the indentures dated on the 5th and 6th of April 1824;" therefore distinctly charging he has no interest, "but nevertheless he makes some claim to be interested therein," that is to be interested in the Bagber and Semley estates, under these deeds, I cannot construe it in any other way "the nature whereof he ought to set forth."

Now to this bill there is a demurrer for want of equity, and the first ground of demurrer is, "I am a mortgagee on the Shanks estate, and you do not offer to redeem me." If the question in this cause related to the Shanks estate, I should say that this was a decisive answer to this bill, for I take it to be settled, that the owner of the equity of redemption cannot make a mortgagee a party to any suit in this Court, without offering to redeem him; but there is no part of this suit which has any regard to the Shanks estate, except only in this way, that the persons interested in the Shanks [320] estate desire to have an execution of the trusts relating to the Bagber and Semley estates, in order that the money to arise therefrom may be applied in exoneration of the Shanks estate.

But it is not attempted to support the bill on that alone. Mr. Wood has very properly admitted that a mortgagor cannot make a mortgagee a party in respect of his mortgage estate, without offering to redeem him. But he says this: you claim to be entitled; you have filed a demurrer to this bill, by which you admit everything which is distinctly charged: it is distinctly charged that you claim to be interested in this property, the Bagber and Semley estates under those deeds. You admit that for the purpose of the demurrer, and thereby at the same time admit, that the Plaintiff cannot have a sale of this estate and the execution of these trusts, otherwise than in your presence.

The answer given to that is, that this allegation is much too vague, and that the Plaintiff ought to have alleged the interest in some more distinct manner.

I am certainly very desirous not to introduce a rule by which persons can be brought into Court on mere vague charges of having an interest in the matter; but I think the most useful operation of Courts of Equity would be very much diminished, if persons were not under the necessity of disclosing the nature of their claims, which, on some occasions, they are unwilling and the Plaintiff is unable to state. The substance of the bill is this: the Plaintiff desires to have the execution of the trusts affecting the Bagber and Semley estates. He says, you, the Defendant, claim to be interested in them: I deny your claim altogether; but in order that I may be able to meet and rebut your claim and answer it, let me know the whole particulars of it.

[321] I must repeat the observation made in one of the cases cited, that I think the Defendant has a little "mistaken his way" in admitting his claim by the demurrer. It is not like the case of *Plumbe v. Plumbe* (4 You. & Coll. 345), a mere general allegation that he has some interest; but an allegation of an interest following in the same sentence the denial of being interested under those deeds. It is stated in this way. I charge you have no interest under these deeds, nevertheless you claim an interest; let me know what it is you claim. Under these circumstances, I do not think the demurrer can be allowed.

With regard to the other question as to parties: when a Defendant demurs for want of parties, he ought to shew, that, according to his own case, another party is wanted. The Defendant says, if I am made a party, there is another person, who, in relation to another part of the case, ought to be brought before the Court, in order that his interest may be administered. That, however, has nothing to do with this Defendant; he files this demurrer for his own benefit, and has nothing to do with

the following charge of £20,000 to be raised under the term created for that purpose. The demurring Defendant has nothing to do with this claim; he claims paramount to the term; but whether paramount or subsequent does not signify: he claims not at all under the term. I think the Defendant has nothing at all to do with it. It is argued that there will be a defect as to the parties at the hearing, and that the Defendant desires not to be delayed; but I think this demurrer cannot be allowed upon that ground.

It has been said that the Defendant may have other interests than those suggested by the bill; but I am of [322] opinion that the bill relates only to the interest he may have in these estates under the deeds; and if the Defendant answers that he has no interest whatever under these deeds, it seems to me, that in the present state of this record he will have answered the bill. If, on the other hand, he has other claims than those in respect of those deeds, it concerns himself to say, that this property is not to be disposed of in his absence; and when he sets forth that claim, he will, for his own security, have his interest stated in such a manner that he shall be protected.

The demurrer must be overruled; but I shall give no costs on either side.

NOTE.—An appeal to the Lord Chancellor is pending. [A note in the Addenda states that the parties entered into a compromise, and that the appeal was abandoned.]

[323] RICHARDSON v. HASTINGS. Feb. 22, 1844.

[S. C. 13 L. J. Ch. 142. For other proceedings, see 7 Beav. 301, 354; 11 Beav. 17.]

There are two general rules of the Court; first, that all persons interested in the subject-matter of the litigation ought to be parties; the second, that the Court always endeavours to do complete justice, so that the matters involved in the suit may not be left open to future litigation; but these rules are both occasionally departed from.

As to the necessity of the Court's modifying its rules and adapting its forms of proceedings to the altered circumstances of society existing at the present day.

A bill may be filed respecting a partnership without praying a dissolution.

In a continuing partnership, if a few have an interest in a particular subject adverse to all the rest, a bill may be filed against the few, by one on behalf, &c.

In the case of an insolvent partnership not formally dissolved, a bill may be filed by one or more on behalf of the rest against the governing body, to have the assets collected and applied towards the payment of the debts, without seeking to ascertain the rights and liabilities of the parties as between themselves, but leaving them open to future litigation.

By the rules of a club, the bankers were alone authorised to receive money on account of the club. Some of the members subscribed and purchased the furniture, which, by deed executed by the subscribers, was vested in the Plaintiff A. B., in trust to repay the amounts subscribed, and to pay the surplus to the committee for the benefit of the club. The club becoming embarrassed, was afterwards dissolved, and the committee were authorised to wind up the affairs. Two of the committee, C. and D., sold the furniture, and alone received the produce, together with other general assets of the club. A bill was filed by A. B. on behalf, &c., against C. and D., and E., a non-subscribing member, to recover the monies in the hands of C. and D., and praying that the furniture money might be paid to the Plaintiff, on the trusts of the deed, "or otherwise as the Court might direct," and that the general assets recovered might be paid to the bankers or otherwise, &c. Held, that the bill was not defective for want of parties, and that neither the other parties to the deed, nor the other members of the club, were necessary parties.

The demurrer in this case having been allowed (*ante*, p. 301), the Plaintiff amended his bill, and made a Mr. Welch, one of the members of the club who had

neither subscribed to the furniture fund, nor executed the deed of 1838, a Defendant thereto. By the amendment, he struck out that part of the prayer which implied a winding up of the affairs of the club; and limited the prayer to an account of the monies received by the Defendants Hastings and Emly from the sale of the furniture, and that the amount due thereon might be paid to the Plaintiff as trustee of the indenture of the 27th of January 1838, "or otherwise paid as the Court might [324] direct;" and for an account of the other club monies received by Hastings and Emly, and "that what should be found due from them on taking the said account, after allowing or deducting all sums which had been properly paid or expended by them on the account, or on behalf of the said late club, might be paid by the said Defendants into the bank of Messrs. Hopkinson & Co., to the credit and for the purposes of the said club, or otherwise as the Court should direct."

The Defendants Hastings and Emly again filed a demurrer to the amended bill similar to the former demurrer.

Mr. Purvis and Mr. Hubback, in support of the demurrer, argued, that the record remained, substantially, the same as on the occasion of the former demurrer; for the Court could not limit its interference to the recovery of the money, without proceeding to distribute it, and that for this purpose it was absolutely necessary that the conflicting rights of the different parties should be ascertained and declared. That consequently all the persons whose absence had been objected to on the former occasion were now, for the reasons formerly urged, necessary parties to the present record.

That all the persons who executed the deed of 1838 were necessary parties, and that the Plaintiff could not sue on their behalf; *Newton v. Lord Egmont* (4 Sim. 574); where it was held that all the persons who had executed a creditor's deed were necessary parties to a suit affecting their interests.

[325] That the parties were not so numerous that their presence could be dispensed with; *Harrison v. Stewardson* (2 Hare, 530); where the number was twenty.

Mr. Kindersley, Mr. Turner, and Mr. Cameron, *contra*, insisted, that the form of the record had been so altered, that the objection raised on the former occasion had been successfully removed; that the bill limited the relief sought, to a simple restitution of certain funds of the club, improperly retained by two of its members, and sought no administration, or distribution of the funds, nor any winding up of the concern; that it was for the general benefit of all parties that the fund should be recovered and placed in the proper custody, or as the Court might direct, and therefore, that the case was in its nature and prayer similar to *Hichens v. Congreve* (4 Russell, 562), where it was held, that some shareholders might file a bill on behalf, &c., to obtain a restitution of funds improperly applied by directors to their own use. So in *Holmes v. Henty* (4 Cl. & Fin. 99) on a bill filed by two trustees on behalf, &c., against some trustees of a savings bank, to make them responsible for a misapplication of the trust monies, it was even held (page 142), that it was unnecessary to make all the persons who concurred in the resolution for the misapplication of the trust monies parties to a suit for replacing it; but only those who actually took and misapplied the money. And that this case was governed by the decision of Lord Cottenham in *Wallworth v. Holt* (4 Myl. & Cr. 619).

That a bill to carry the trusts of a creditor's deed into execution might be filed on behalf of all the creditors [326] by one of them only where they have all executed the deed, but are very numerous; *Weld v. Bonham* (2 S. & St. 91). In *Newton v. Lord Egmont* the bill sought to have the priorities declared.

That the Plaintiff was trustee of the produce of the furniture, and that it was unnecessary to make his *cestui que trust* a party to a suit for recovering it; *Franco v. Franco* (3 Ves. 75), *Angier v. Stannard* (3 Myl. & K. 566).

Saville v. Tankred (1 Ves. sen. 101), — *v. Walford* (4 Russ. 372), *Richardson v. Larpent* (2 Y. & C. (N. C.), 507), *Calverley v. Phelps* (6 Mad. 229), and *Mitford* (p. 164) were also cited.

THE MASTER OF THE ROLLS [Lord Langdale]. All cases of this kind are attended with some degree of difficulty, and the conclusion to be arrived at depends on rather nice circumstances. The arguments in support of a demurrer of this kind have

generally a very strong foundation, because cases of this kind always deviate from two old and general rules of the Court; one is, that all persons interested in the subject-matter of the litigation ought to be parties; the other is, that the Court endeavours to do complete justice in every case, so that the matters involved in the suit may not be left open to future litigation.

Now the present bill is, to a certain extent, a departure from both these rules, because it is proposed to be prosecuted in the absence of parties interested in the suit; and it also proposes that the sums to be recovered [327] should be left at their disposal if they can agree, and if not, then that they may be left for future litigation. However, exceptions to the two rules which I have stated, have at all times been sanctioned. I recollect a treatise, in which one of the chapters was headed, "In what cases necessary parties may be dispensed with." The assumption that necessity could admit of any qualification may seem to imply that exceptions to the ordinary rule were admitted with difficulty.

It has however become necessary to extend the cases of exception, so as to keep pace with the progress and complications of the transactions of mankind; and everybody who reads what Lord Cottenham has said on more than one occasion, must be perfectly satisfied with the justice of his observation, and see how necessary it is for this Court, acting always within the limits of its jurisdiction, by an application of its powers, so necessary for the administration of justice, to adapt its forms of proceeding to the altered circumstances of society in our own times, and modify its rules so as to meet the changes of circumstances under which it is, at the present day, called on to administer justice. (See *Mare v. Malachy*, 1 Myl. & Cr. p. 579; *Taylor v. Salmon*, 4 Myl. & Cr. p. 141; *Walkworth v. Holl*, 4 Myl. & Cr. p. 635.) In no class of cases has the extension of the exception been more frequent than in cases like the present.

I cannot say that I entertain any doubt of the propriety of the decision which I made in *Evans v. Stokes* (1 Keen, 24). I still think that the winding up of a partnership implies a complete settlement of all the rights and liabilities as between the parties themselves; and as they may be in conflict with regard to these rights and liabilities, the [328] partnership cannot be finally wound up in the absence of all the partners. This may be attended with very great inconvenience, even to the extent of preventing the due administration of justice between the parties; but this appears to me necessarily to follow from the established rule of this Court, which I have stated, and which cannot be corrected without a general authority. It was at one time supposed, that in consequence of the second general rule, that complete justice must be done with respect to the subject-matter, the Court could not, and would not, interfere at all as between partners, unless the partnership was to be dissolved and finally wound up and settled; and there are several conflicting cases in the books on that subject, different Judges having entertained very strong opinions and very different views on that question. (1) I noticed, on the former occasion, that it now appears very clear that there is no such rule. It has been decided, that in a continuing partnership, if a few have an interest in a particular subject adverse to all the rest, and claim for themselves the benefit of that interest, a bill may be filed against those few, by one or more partners on behalf of themselves and all the rest. That is a remarkable instance of a case where all persons interested are not brought before the Court: however, it is not much more remarkable than the cases where one creditor or one legatee is permitted to sue on behalf of himself and many other persons and some other similar cases. The Court has even gone to this extent; in the case of an insolvent partnership not formally dissolved, it has permitted [329] a bill to be filed by one or more on behalf of the rest, against the governing body, to have the assets collected, and applied, as far as they would go, towards the discharge of the debts; and that without seeking to ascertain the rights and liabilities of the

(1) See *Forman v. Homfray*, 2 Ves. & B. 329; *Harrison v. Armitage*, 4 Mad. 143; *Marshall v. Colman*, 2 Jac. & W. 266; *Richards v. Davies*, 2 Russ. & Myl. 347; *Loscombe v. Russell*, 4 Sim. 8; *Knebell v. White*, 2 Y. & Col. (Exch.), 15; *Bentley v. Bates*, 4 Y. & Col. (Exch.), 182; *Miles v. Thomas*, 9 Sim. p. 609; *Fairthorne v. Weston*, 3 Hare, 387.

parties as between themselves, and consequently, leaving litigation as between those parties entirely open, after the debts have been paid : that is, it has sanctioned a suit which sought nothing but to compel a satisfaction *pro tanto* of the partnership debts, as far as the deficient assets would extend, and then leave all the members of the partnership exposed to such litigation as the unsatisfied creditors might choose to adopt for the recovery of the remainder of their debts ; and also leave the partners liable, as amongst themselves, to such suits for contribution as the particular circumstances of the case might render necessary.

In this case, it is alleged that the two Defendants, Hastings and Emly, have possessed themselves of property belonging to this club, which I must consider as a partnership : that one of the sums, namely, the furniture money, is subject to a peculiar trust, and the other monies are general assets of the partnership. They have possessed themselves of these sums of money, and refuse to account for them. This bill desires to recover them, not for the purpose of distribution by the Court through the means of this suit, but for the purpose of bringing them within the control of the governing body of the partnership, in order that they may be applied, under their control, according to the rights of the parties. That seems to me to be the nature of the bill. Can that be done? The Plaintiff and all the other members, except these two Defendants, must have an interest in having the money, which the demurrer admits to be in the Defendants' possession, brought [330] within the control of the club ; that is the common interest of all. How this money, when it is brought within the control of the club, ought to be applied is another matter. To ask to recover it and place it within the control of the club, and leave it there subject to litigation, is asking no more than was done in the case of *Wallworth v. Holt* (4 Myl. & Cr. 619), where matters were thus left. If, then, it is for the common benefit of all, except the two Defendants, that these funds should be recovered, why should it not be done? It is said that this is a case of dissolution. Very true ; and this shews that there ought to be a winding up and a final settlement. But how is it with a partnership after a dissolution and before the affairs of the partnership are wound up? The mutual connection between the partners is not dissolved with the dissolution of the partnership, because it must continue for the purpose of collecting the assets and winding up the partnership, and, until these matters are all closed, there is a *quasi* partnership, a mutual interest between the parties. (*Crawshaw v. Collins*, 15 Ves. 226.) One of the things required for the winding up of the partnership is, that the assets should be collected ; and it appears that two individuals have got into their possession assets which they retain adversely to all the rest, while it is the common interest that they should be collected and regularly applied towards the winding up of the partnership.

In the present state of the record the question is, whether the Defendants are to answer. I cannot determine, at this time, whether, in consequence of what may appear in the answer, it may not hereafter be absolutely necessary to make the parties referred to and other persons parties. Taking the statements of the bill as they now stand admitted by the demurrer, it does [331] not appear to me that I ought to allow the present demurrer ; but, overruling it, I beg to have it clearly understood, that it may appear hereafter that it is quite necessary not only to make the persons now pointed out, but other persons, parties ; for after this demurrer is overruled, the Defendants may still raise the same objection by their answer. I do not therefore mean to determine anything with respect to the necessity of making these persons parties hereafter.

Next, with respect to the objection to the form in which payment of these sums is prayed, I cannot construe it in the way in which it has been contended for. It is asked that the amount shall be paid "to the Plaintiff, or in such manner as the Court may direct." It is not clear that it ought to be paid to the Plaintiff, but that will be a question for discussion hereafter, and as the case now stands on the bill, admitted, as it is, by the demurrer, it seems indeed that it ought not to be paid to the Plaintiff. Then, in what way is it to be paid? "Otherwise as the Court may direct." It has been argued very ably, that the Court can direct nothing but the payment to the proper hands, that is, either to the creditors of this club, or to some person or other who may ultimately, on the winding up of the affairs of the club, be found to be the

proper person to receive it. I cannot say that I think so. This bill not desiring to have the partnership wound up, what I shall have to do at the hearing, will be to take care that it is paid to the persons who ought to have the management of it; and I shall ascertain that, when I see the answer of the Defendants, who no doubt will tell me to whom it ought to be paid, and when I know that, I can direct the payment.

It is very possible that these gentlemen may hereafter [332] shew, that they have nothing at all to pay, or they may admit that they have sums to pay, but allege difficulties with respect to the distribution of them after that payment shall have been made. I can conceive myself no difficulty in ordering these monies to be paid to the persons who, under the direction and control of the club or the governing body of the club, have a right to distribute them. If there should be occasion, an inquiry may be had on that subject, and the Defendants, desiring that it should not be paid to the Plaintiff, will afford me every assistance in determining to whom it ought to be paid, for the purpose of placing it under the control of the governing body of the club for distribution. The same observation applies to both sums of money: one will go to the furniture account, the other will go to the general account of the club.

I think I ought to overrule this demurrer; and I do so entirely without prejudice to the Defendants taking any objection for want of parties by their answer. If they put in an answer stating the objections and the grounds for supporting them, the cause may be set down to be heard, under the recent General Orders (Ordines Can. 175), on the objection for want of parties; and if not so set down, it may still appear at the hearing that the suit is defective for want of parties.

The demurrer must be overruled, but without costs.

[333] SCORE v. FORD. *April 26, 1844.*

Where trust money appears to have been invested on an improper security, it will, on motion, be ordered to be brought into Court within a given time; but if the case be proper, the period will be extended from time to time, to enable the Defendant to realize the security.

Where part of a residuary estate has been invested on an improper security, and the Defendant has an interest therein, the Court, on being satisfied that there is no existing claim on the estate, sometimes confines the amount to be paid into Court to the share of the Plaintiff.

An intestate died in 1826, leaving a widow and two infant children. The widow administered, and in 1840 executed a deed which stated that the assets actually realised amounted to £4000, of which she had appropriated to herself £700, and that the remainder had been invested on mortgages, which were specified. In her answer to a bill filed by one of the children in 1843, she stated that this was wholly erroneous, that the residue amounted to £1600 only, and that the Plaintiff had received £390 on account of her one-third. The answer stated that the debts had been paid, but the statements were most unsatisfactory. A sum of £700 appeared to have been lent on an improper security. The Court, on motion, ordered the whole £700 to be brought into Court.

In 1826 E. H. died intestate, leaving his widow and two infant children. The widow took out administration and possessed herself of the assets. The Plaintiff, as one of the children, was entitled to one-third of the residue. She attained twenty-one in 1838.

In March 1840 the widow married the Defendant Ford, and in May following a settlement was made, whereby, after reciting the death, &c., of the intestate, and "that the proceeds of the intestate's personal estate *actually realized* amounted to £4000," out of which the widow had appropriated to herself £700, and had purchased a house therewith, and had invested the residue upon three several mortgage securities, one of £1700 from Veevers, and two others which were specified, the share of the widow was thereby settled upon certain trusts for herself for life for her separate use, &c.

In 1843 one of the children and her husband filed this bill against the widow, her second husband and the other child, praying the usual accounts, the ascertainment of the residue, and payment of one-third to the Plaintiff.

[334] The principal Defendants, by their answer, represented that the statements in the settlement were wholly inaccurate; that the amount of the intestate's estate was, "through inadvertence and mistake," considerably overrated; and that the actual amount thereof which could be realised, after payment of the debts, &c., did not, "at the time the settlement was made, amount to the sum of £1200 or thereabouts." It stated that the debts had been paid, and that there remained a surplus of personal estate, amounting to £1600 nearly, but of which £400 had not been received.

It represented that £390 had been paid to the Plaintiffs, which was £10 less than the amount of the Plaintiffs' share of the assets stated to have been realised.

The explanation of the alleged errors in the settlement was of a most unsatisfactory nature, as were also the accounts of the assets, the statement of the application thereof, and the dealing therewith.

The answer stated, that the Defendant had lent £700 part of the assets on bond, which had afterwards been paid off, and had, by a peculiar mode of dealing, been lent on the security of a contingent reversionary interest in £1250 and a policy.

The answer to the amended bill rendered the matter still more unsatisfactory; and the Defendants stated therein, "that the sum of £1550 or thereabouts, instead of a sum of £1200 only or thereabouts, as in the former answer was erroneously stated, was, in truth and in fact, realized by the Defendant, in respect of the said intestate's personal estate, and not a sum exceeding £4000."

[335] A motion was now made for payment of the £700 into Court.

Mr. Kindersley and Mr. Wood, in support of the motion, argued, that as £700, part of the assets of the testator, had been lent by the administratrix on an improper security, it ought to be brought into Court, especially as the explanation given by the Defendants, in their two answers, were so unsatisfactory and irreconcilable, and were wholly inconsistent with the statement contained in a solemn instrument executed by them.

Vigars v. Binfield (3 Mad. 62), *Collis v. Collis* (2 Sim. 365), and see *Wyatt v. Sharratt* (3 Beavan, 498), *Meyer v. Montrou* (4 Beavan, 343).

Mr. Tiney, for the Defendants, *contra*, contended that the Plaintiffs' right, at this stage of the cause, must depend entirely on the admissions in the answer, and that the Plaintiffs were only entitled to have brought into Court such portion of the £700 as, by the admissions in the answer, belonged to them. He stated that the other child would appear and concur in this view of the case.

THE MASTER OF THE ROLLS [Lord Langdale]. I must order this sum of money into Court. The husband may find the settlement to which he was a party, a very unfortunate concern for him. In that settlement, this lady has represented the assets to be very large, and to amount to £4000; she has nevertheless put in her answer, saying, that the items specified in the settlement are all erroneous, but has [336] given an unsatisfactory explanation of the matter; I must, therefore, look at the other facts of the case. It is clearly admitted that she possessed £700, part of the assets of the intestate; that she lent that sum on a security, which the Court does not approve of; that she afterwards received it back, and again applied it in a manner which the Court could not sanction; and so far her liability to pay into Court is undoubted.

It is said, that I ought not to order the whole £700 to be paid into Court, because the Plaintiffs are only interested in part of it. There are certainly cases in which the Court, on being satisfied that there is no existing claim on the estate, and that the party against whom the motion is directed has clearly an interest in the fund, confines the amount to be paid into Court to the share of the Plaintiff. (*Rogers v. Rogers*, 1 Anst. 174.) This however depends on the peculiar circumstances of the case, and on the mode in which the matter is brought forward. Is this a case in which it can be assumed that the assets of the intestate are clear, or that £1600 are the whole of the assets? I cannot assume it.

Taking the whole together, I must order this sum to be paid into Court within a given time, and if the Defendants have the money outstanding on a security which they cannot realize, except by obtaining time, they must apply to the Court to extend

it. That is the common and constant practice of the Court. If trust money is traced into the hands of a party, and it is shewn that it has been improperly applied, it will be ordered to be brought into Court within a stated time; but if the case afterwards appear such, as to render a further indulgence just and prudent, the period is enlarged, from time to time, to enable the party to realize the security.

I must order the money to be brought into Court within six weeks; and, if a further extension of time be required, the proper course will be for the Defendants to apply, and, if the circumstances of the case justify it, the Court will then grant a further time.

[337] INMAN v. WHITLEY. Jan. 29, April 18, 1844.

A *feme covert* was entitled to a reversionary interest in a sum of money vested in her husband and another as trustees. By deed, expressed to be made between the tenant for life of the one part, and the trustees (including the husband) of the other part, the tenant for life, who alone executed the deed, declared that the trustees should hold the fund on certain modified trusts, whereby the wife's reversionary interest was made subject to her power of appointment by deed or will. The wife died, leaving her husband surviving, having appointed the reversionary interest away from her husband. The husband afterwards died, and the reversionary interest subsequently came into possession. The Court considered, that, under the circumstances, the husband ought to be deemed to have acquiesced in the arrangement, and accepted the trusts for the benefit of the wife's appointees; and Held, that the appointees of the wife were entitled as against the representatives of the husband.

On the 1st of January 1795 George Inman executed an indenture, whereby it was purported, that he appointed an estate at Blagdon to John Whitley and John Inman in fee, upon trust to apply so much of the rents as they should find necessary, for the support of his son George Inman for life, and, after his decease, to convey one moiety of the estate to Henry Inman in fee, and the other moiety to such uses as Sarah, the wife of John Inman (the trustee), should by deed or will appoint, and the surplus rents not required for the maintenance of George were to be equally divided between Henry and Sarah.

After the death of George Inman the father, the parties beneficially interested in the estate agreed amongst [338] themselves, that a recovery should be suffered of the estate, and that the same should be vested in the trustees, John Inman and John Whitley, and be sold. Accordingly, by certain indentures dated the 5th and 6th of November 1795, which were executed by George Inman the son of the first part, Henry Inman and his wife, John Inman and Sarah his wife, and John Whitley of the second part, Robert Blake of the third part, and Peter Cox of the fourth part, and by a common recovery suffered in pursuance of such deed, the estate was vested in John Inman and John Whitley in fee, on trust to sell and invest the purchase-money on Government or real securities, which securities were to be held in trust to apply the interest for the maintenance of George Inman the son for his life, and, after his decease, the trustees were to stand possessed thereof, in trust for Henry Inman and Sarah Inman, in equal parts or shares, or in trust for their respective executors, administrators or assigns, in case they, or either of them, should die in the lifetime of George.

The estate was sold, and the clear purchase-money, amounting to £1050 was paid to John Inman. Some time afterwards, an indenture, dated the 24th day of February 1802, and purporting to be made between George Inman the son of the one part, and John Inman and John Whitley of the other part, was executed by George Inman alone. That indenture, after reciting the deeds of 1st of January and 6th of November 1795, and that George Inman was desirous that the purchase-money should be settled agreeably to the intention of his father, witnessed, that George Inman declared, that the purchase-money of £1050 should be vested in John Inman and John Whitley, on trust, to apply the income, or so much thereof as should be necessary for the support

and maintenance of George for his life, and, after [339] his decease, to stand possessed of one moiety thereof for the benefit of Henry Inman, and of the other moiety to the use of such person as Sarah Inman should, by deed or will signed and published in the presence of three or more witnesses (and which will she was to have power to make), limit or appoint; and, in default of such direction, limitation or appointment, to the use of the said George Inman. And if the income arising from the £1050 should be more than sufficient for the maintenance of George, the trustees were empowered to divide the surplus equally between Henry and Sarah.

On the 3d of September 1807 Sarah Inman, by her will of that date, and executed in the presence of three witnesses, and purporting to be made in execution of her power under the deed of the 24th of February 1802, appointed the interest of the principal sum belonging to her under that deed, to her husband John Inman for his life, and, after his death, she gave and appointed the principal sum so belonging to her to John Inman of Minehead, and she appointed her husband John Inman executor of her will.

Sarah Inman, having made this will, died in the year 1812, leaving her husband surviving her. He did not prove her will, but died in the year 1813, having first made his own will, whereby he appointed John Whitley and James Tucker executors, and they, having proved his will, became his legal personal representatives.

In the meantime, viz., in the year 1809, Henry Inman died, and Catherine Inman became his legal personal representative.

George Inman lived till the year 1838, and, supposing the several instruments to have been valid, John Whitley [340] was surviving trustee, on trust to apply so much of the income as was required for the maintenance of George, and to pay any surplus to Catherine Inman as executrix of Henry, and to John Inman of Minehead, as legatees of Sarah, in equal shares, and, on trust, after the death of George, to divide the principal money equally between Catherine and John.

On the 15th April 1819 John Inman of Minehead, by indenture of that date, made between himself of the one part, and the Plaintiffs William Southcote Inman and Anna Victoria Little (then Anna Victoria Inman) of the other part, assigned to them as tenants in common, the moiety of the principal sum of £1050 to which he was entitled under the will of Sarah Inman, and all surplus monies payable in respect of such moiety.

Mr. Whitley, the surviving trustee of the deed of 1802, died in the month of December 1831, and was represented in this suit by the Defendant Edward Whitley.

James Tucker, the surviving executor of the will of John Inman the husband of Sarah, having died, the Defendants John Inman Tucker, William Tucker, and John James, became the legal personal representatives of the same John Inman.

Upon the death of George Inman, in August 1838, the Plaintiffs claimed the benefit of the assignment of the 15th of April 1819, and this suit was the consequence of the claim being resisted by the legal personal representatives of John Inman.

The question in the cause was, whether this deed was binding on John Inman the husband: and it should be stated, in reference to this point, that John Inman was [341] the active trustee; that, previous to the execution of the deed of 1802, he alone had received the purchase-money of the estate: that he retained it in his possession, and the amount was, after his death, paid out of his assets.

It appeared also that the deed of 1802 was prepared by John Whitley, the trustee and the solicitor of John Inman, that the costs of it were afterwards retained out of John Inman's estate, and that the deed of 1802 and the will of Mrs. Inman were found in the possession of John Whitley after his death.

Mr. Turner and Mr. Chapman, for the Plaintiffs. The circumstances shew that John Inman acquiesced in the arrangement of 1802, and all his interest in the fund became bound by the trusts of the deed.

Again, he was a trustee under the deed. He acted under the deed and accepted the trusts, and neither he nor his representatives can now repudiate them. It is no answer for a trustee to say that he has not executed the deed of trust; if he has acted under it, and shewn his acceptance, he is equally bound by the trusts.

There is also a question of election.

Mr. Kindersley and Mr. Freeling, for the representatives of John Inman, insisted,

that Sarah Inman had no power of disposing of her share in the fund by will; for at the date of the deed of 1802 she was a married woman, and incapable of altering her reversionary interest in a chose in action. (*Purdew v. Jackson*, 1 Russ. 1; and *Honner v. Morton*, 3 Russ. 65.) That the deed of 1802 was ineffectual, and not binding on her husband, [342] who had not executed it. That, even if he had acquiesced in it, still it could not be obligatory on him, unless it were binding on all the other parties, for otherwise there would be no mutuality; yet it was plain that if the wife had survived her husband, the deed would have been wholly ineffectual as to her. That if she were not bound by the deed, her appointees, claiming under her, could not insist on its performance.

That the deed, on the face of it, shewed that the arrangement was wholly on the part of George Inman; and that there was no trace of any contract on the part of John Inman or of his wife.

Mr. William James, for the representatives of John Whitley.

Mr. Turner, in reply.

April 18. THE MASTER OF THE ROLLS [Lord Langdale]. The deeds of January and November 1795 are admitted, and it is also admitted, that the deed of the 24th of February 1802 was executed by George Inman the son, and it appears that a will, to the effect stated, was executed by Sarah the wife of John Inman.

It is further admitted, that John Inman, during his life, principally managed the trust: that the estate was sold: that £1050 was the amount of the clear purchase-money—and that it was received by John Inman alone, who did not invest it, but that he made the payments to George Inman, and that, after his death, the amount was retained out of his assets by John Whitley, the other trustee, who was also one of his executors.

[343] It appears, also, that John Inman employed John Whitley as his solicitor, and although the evidence is not quite free from ambiguity, I think it shews that the deed of 24th of February 1802, giving the power to Sarah Inman, was prepared by John Whitley, and that the expense of preparing the same was charged to, and deducted out of the estate of John Inman, after his death. The deed itself and the will of Sarah, were found in the possession of John Whitley, who was the executor of John Inman, and the surviving trustee.

It was alleged, for the Defendants, that under the deeds of November 1795, George Inman was entitled to have the whole income applied for his support during his life, and that subject to his life interest, one moiety of the principal was absolutely vested in Sarah Inman. That neither George Inman nor John Inman and his wife had any power or authority to alter the nature of the reversionary interest vested in Sarah, and consequently, that the power alleged to be given by the deed of 24th of February 1802 was not well created.

But it appears to me, that as against the husband of Sarah and with his consent, the interest which Sarah had under the deed of 1795 might well be modified in the manner intended by the deed of 1802. By that deed, executed for reasons and under circumstances of which no sufficient explanation is given, but which may probably have been executed for the purpose of making the trust on which the purchase-money was to be held, more conformable to the trust created by the deed of January 1795, George qualified his life interest, in a manner beneficial to Sarah, and the deed contained a limitation of a moiety of the principal which was prejudicial to the contingent interest which John had in the reversionary interest of his wife. I think that with John's [344] consent, this limitation, as well as the power of disposition given to his wife, might be valid. The real question seems to be, whether John did, in fact, consent to it; and however little moral doubt there may be on the subject, yet, as he did not execute the deed to which he was a party, the Defendants found their resistance to the Plaintiffs' claim, principally, upon the defect of evidence that John ever did anything to deprive himself of the right, which, under the deed of 1795, he had to his wife's interest, in the event which happened of her dying in his lifetime.

The evidence is indeed extremely defective. I can attach but little importance to the letters which have been produced, and the entries from the books of Whitley afford of themselves but little information, and are in fact erroneous.

If any further information could be hoped for, I should be willing to direct inquiries respecting the custody of the deed of 1802, and of the will of Sarah, and the concurrence of John in the arrangements intended to be thereby made. But upon the case as it now stands, resting upon the instruments and the presumptions arising from the relations between the parties, and the facts that John Inman acted principally in the execution of the trusts, and that the deed and will were found in the possession of the executor of John, I think, that in the absence of further inquiry and information, John must be deemed to have acquiesced in the arrangement, and accepted the trust for the benefit of his wife's appointees.

[345] BARWELL v. BROOKS. May 7, 1844.

[For subsequent proceedings, see 8 Beav. 121.]

Within twelve months after payment of a bill of costs, a client presented a petition for its taxation, but the petition having specified no items of overcharge, no order could be made. The twelve months having then expired, the Court refused to allow the petition to stand over, for the purpose of amendment, by specifying the items.

A solicitor's bill having been paid on the 15th of April 1843, a petition was on the 11th of April 1844 presented for its taxation under the 6 & 7 Vict. c. 73. The petition did not specify any items in the bill of which the correctness or propriety was challenged. The petition came on upon the 7th of May, and, as no taxation could be ordered on account of this omission,

Mr. Kindersley asked that the petition might stand over, with liberty to amend by specifying the items complained of.

Mr. Turner. Twelve months have now elapsed since the payment, and no order can therefore be made for taxation. (*In re Downes*, 5 Beav. 425.) The Court will not, by allowing the petition to stand over, extend the time limited by the statute. The Petitioner will not be without remedy; his present solicitor is liable for neglecting to state the items.

THE MASTER OF THE ROLLS [Lord Langdale]. I must yield to this objection, and I am inclined to think that I must not give leave to amend. After payment, the items complained of ought to be distinctly stated in the petition. In a former case I came to the conclusion that it was sufficient to present the petition for taxation within the twelve months (*Sayer v. Wagstaff*, 5 Beav. 415); but if the Court were to permit a party to present an ineffective [346] petition, and then, after the expiration of twelve months, allow him to make out a substantive case by amendment, it would be in effect enlarging the time limited by the statute.

As at present advised, I think that to obtain a taxation after payment the client must present an effective petition within the twelve months, and that a petition on which no order can be made cannot, after the twelve months have expired, be allowed to be amended for the purpose of making it effective.

On a subsequent day,

THE MASTER OF THE ROLLS said he remained of the same opinion.

[346] BRADSTOCK v. WHATLEY. June 5, 1844.

After a delay of between six and seven weeks, the Court declined, *ex parte*, to grant to the Plaintiff liberty to enter an appearance for a Defendant under the 8th Order of August 1841.

The *subpoena* in this case was served on the 20th of April 1844, and on the 5th of June following (after an interval of between six and seven weeks), the Plaintiff applied *ex parte* for liberty to enter an appearance for the Defendant under the 8th Order of the 26th of August 1841. (Ord. Can. 165.)

Mr. Bevir, in support of the application.

THE MASTER OF THE ROLLS [Lord Langdale] said, that, after the delay which had occurred, he could not make the order; but [347] the Plaintiff might either serve a *subpoena* again or give the Defendant notice of the application. (See *Edmonds v. Nicoll*, 6 Beav. 334.)

The Plaintiff afterwards served the Defendant with notice of the motion, and the order was thereupon subsequently made.

[347] M'KEVERAKIN v. CORT. June 12, 1844.

The solicitor of the Suitor's Fund appointed, under the 28th Order of the 26th of October 1842, guardian *ad litem* of a lunatic Defendant not so found by inquisition.

Mr. Baily, for the Plaintiffs, moved, under the 28th Order of the 26th of October 1842 (Ordines Can. 217), for the appointment of a guardian *ad litem* of the Defendant John Cort, who was a lunatic, but had not been so found by inquisition. He cited *Brooks v. Jobling* (2 Hare, 155).

It appearing, by affidavit, that the Defendant was of unsound mind, that the *subpoena* had been served, and that no writ *de lunatico inquirendo* had been issued against the Defendant,

THE MASTER OF THE ROLLS appointed Mr. Johnson, the solicitor of the Suitor's Fund, guardian to the Defendant John Cort, by whom he might appear and answer the Plaintiff's bill and defend the suit. (See note to *Needham v. Smith*, 6 Beav. 130.)

[348] HEWETT v. FOSTER. June 26, 1844.

[S. C. 8 Jur. 769. Explained and distinguished, *Easton v. Landor*, 1892, 62 L. J. Ch. 164; [1892], W. N. 176. Held, not to be modern practice, *In re Skinner* [1904], 1 Ch. 289.]

A trustee was declared liable for a breach of trust, and was ordered to pay the costs up to the hearing. He complied with the decree. Held, that he was entitled to his costs of the subsequent proceedings for clearing and distributing the fund.

The Defendant Hewett was the sole executor of the testatrix, and Foster and Hewett were trustees of the residue for the Plaintiffs.

They committed a breach of trust, by selling out the trust fund and lending it to the Defendant Hewett. At the original hearing they were decreed to replace it, and to pay the costs (6 Beavan, 259), which was accordingly done. It was referred to the Master to ascertain whether any of the debts, funeral expenses, and legacies of the testatrix were unpaid: to ascertain the class of children entitled, and whether their father was of ability to maintain them. The Defendants attended these inquiries before the Master.

The cause came on for further directions, and the question was, whether the trustees were entitled to their costs subsequent to the decree.

Mr. G. Turner and Mr. Beavan, for the Plaintiffs, suggested that, as the whole litigation had been created by the breach of trust, the trustees were not entitled to the subsequent costs.

Mr. Chandless, for other parties.

Mr. Kindersley, for Foster the trustee, was not heard by

[349] THE MASTER OF THE ROLLS, who said that he thought the trustee clearly entitled to have his subsequent costs. (See *Pride v. Fooks*, 2 Beavan, 430.)

[349] NIXON v. FEW. July 3, 5, 1844.

Whether a guardian *ad litem* can be assigned to an infant resident *within* the jurisdiction, without bringing him into Court or by means of a commission, *quære*.

Mr. Simpson applied for an order for the appointment, without their personal appearance in Court or a commission, of a guardian *ad litem* to infants. Some of them were resident within, and some out of the jurisdiction. (*Shuttleworth v. Shuttleworth*, 2 Hare, 147; *Smith v. Palmer*, 3 Beav. 10.) As to those resident within the jurisdiction, he cited *Drant v. Vause* (1 Y. & C. (C. C.), 580; and see *Hill v. Smith*, 1 Mad. 290; and *Green v. Badley*, *antè*, p. 271), as an authority for the application, in which case such an order had been made by the Lord Chancellor.

THE MASTER OF THE ROLLS [Lord Langdale]. I will speak to the Lord Chancellor on the point. It is every day's practice to bring infants into Court for the purpose of assigning them guardians. I feel reluctant to make the order at the present moment.

Mr. Simpson again mentioned this case.

July 5. THE MASTER OF THE ROLLS said he had not been able to communicate with the Lord Chancellor; but that he [350] had no objection to make the order as to the infants who were out of the jurisdiction, for that had frequently been done before. That as to the infants who were *within* the jurisdiction, it was evident that if, without some special grounds, the order was made, the old practice of bringing infants into Court for the purpose of assigning them guardians would be entirely subverted.

Mr. Simpson said he would be contented with an order limited to those who were out of the jurisdiction, and the order was so made.

NOTE.—See 27th Order of 26th October 1842, Ordines Can. 217.

[350] THOMPSON v. THOMPSON. July 5, 1844.

A sole Plaintiff became insolvent. His assignee filed a supplemental bill, but before appearance, obtained an order to dismiss the supplemental bill alone, without costs.

Held, regular.

Before appearance, a Plaintiff may dismiss his bill without costs.

The original bill was filed by Sarah Thompson. She became insolvent, whereupon her assignee filed a supplemental bill, but before the Defendant had appeared thereto, the assignee obtained an order for dismissing the supplemental bill without costs.

Mr. Kindersley and Mr. Hardy moved to discharge the order, insisting that it was wrong to dismiss the supplemental bill without dismissing the original bill at the same time. They complained that the Defendant had been put to expense by this mode of proceeding.

Mr. Elderton, *contra*.

Horlock v. Priestley (8 Sim. 621) was referred to.

[351] THE MASTER OF THE ROLLS [Lord Langdale] said, that before the supplemental bill had been filed, the Defendant might have moved that the assignee should file a supplemental bill within a given time, or that the bill should be dismissed. (See *Lord Huntingtower v. Sherborn*, 5 Beav. 380.) That, by dismissing the supplemental bill without costs, the Defendant was left in the same situation as before, and that he did not see any irregularity in dismissing the supplemental bill without costs, there having been no appearance entered at the time. (1 *Smith's Prac.* 422; *Wyatt's Pr. Reg.* 60, 61.)

By arrangement, it was agreed that the original bill should also be dismissed without costs.

[351] ATTORNEY-GENERAL v. MULLAY. *June 24, July 6, 1844.*

Where the husband alone incurs a forfeiture under the Marriage Act (4 G. 4, c. 76, s. 23), the Court has no authority to order any settlement of the wife's property on the issue of the wife by any subsequent marriage.

The Defendant, John Mullay, having married Catherine Cooper in fraud of the Marriage Act (4 G. 4, c. 76), an information was filed by the Attorney-General, under the twenty-third section of that Act, to have it declared that John Mullay had forfeited all interest in the present and future property of his wife, and to have the same properly settled.

At the hearing, such forfeiture was declared, and it was referred to the Master to ascertain the property, and to approve of a proper settlement. (4 Russ. 329.) The Master had approved of a settlement whereby the property was settled exclusively on the wife, and the issue of her present marriage.

[352] Mr. Lovat and Mr. Sheffield appeared for the different parties.

THE MASTER OF THE ROLLS inquired whether there ought not to be some provision made for the issue of any future marriage of the wife, and said he would read the Act before he approved the settlement.

July 6. THE MASTER OF THE ROLLS [Lord Langdale] said that on reading the Act he found that under the circumstances of this case it prevented his making any provision for the issue of any second marriage, and the settlement must therefore be executed as approved by the Master.

NOTE.—By the twenty-third section, where the marriage of a minor is procured by a false oath or knowingly without the consent of the parent or guardian, the Court, upon the information of the Attorney-General, may declare a forfeiture of all interest in any property accruing to the party so offending by force of such marriage, and to order the property to be secured "for the benefit of the innocent party, or of the issue of the marriage, or of any of them, in such manner as the said Court shall think fit," &c, "and if both the parties so contracting marriage shall, in the judgment of the Court, be guilty of any such offence as aforesaid, it shall be lawful for the said Court to settle and secure such property, or any part thereof, immediately for the benefit of the issue of the marriage, subject to such provisions for the offending parties, by way of maintenance or otherwise, as the said Court, under the particular circumstances of the case, shall think reasonable, regard being had to the benefit of the issue of the marriage during the lives of their parents, and of the issue of the parties respectively by any future marriage, or of the parties themselves, in case either of them shall survive the other."

[353] RADBURN v. JERVIS. *July 5, 8, 1844.*

Whether the modern rule of practice, that motions of course may be made on any day in or out of term, is universal, or is subject to any qualifications, *quære*.

The Master having made his general report,

Mr. Willcock, at the expiration of eight days, moved to confirm it absolute. The motion was made out of term, on a day which was neither a seal day nor the continuation of the seal. He cited *Lord Harborough v. Wartnaby* (1 Phil. 364), in which the Lord Chancellor is stated to have laid down, that all motions of course may be made out of term, as well as in term, on any day, whether a seal day or not.

THE MASTER OF THE ROLLS said he had some reluctance in making the order, but that if the Lord Chancellor had laid down the rule as broadly as it was stated, he would follow it with pleasure. That he was, however, desirous of communicating with the Lord Chancellor on the subject.

July 8. Mr. Willcock again mentioned the case, and admitted that the rule must receive some qualification, as where the personal liberty of a party would be affected; but he said that this case was not of that description.

THE MASTER OF THE ROLLS [Lord Langdale] observed, that he thought that the generality of the rule ought to receive some qualification; that, though there did not appear to be any great objection to its application to the present case, still he did not like to go on acting upon this general [354] rule, without knowing whether it was to receive any qualification; and that therefore he would not make the order at present.

The case was not mentioned again.

[354] RICHARDSON v. HASTINGS. June 7, July 31, 1844.

[S. C. 13 L. Ch. 416. For other proceedings, see 7 Beav. 301, 323; 11 Beav. 17. Followed, *Hopkinson v. Lord Burghley*, 1867, L. R. 2 Ch. 449.]

One member of a club, on behalf of himself and the rest, sued two other members, to recover back monies belonging to the club. It having been determined that the other individual members were not necessary parties: Held, that the Defendants could not resist the production of documents in their possession, on the ground that the other members had an interest in them.

A Plaintiff ought not to use for any collateral purpose, documents ordered by the Court to be produced for the purposes of the suit.

This case is reported on the argument of the demurrers. (*Ante*, p. 301 and 323.) The Defendants put in their answer, admitting that they had in their possession a number of documents relating to the matters in the bill mentioned. The answer, however, stated, that the Plaintiff "was the attorney of Plaintiffs, in several proceedings at law, instituted by different creditors of the Alliance Club, at the instigation of the Plaintiff or his partner, against the Defendants as members of the committee of the said club," which proceedings were afterwards more particularly stated, and one of which actions was stated to be still pending. They claimed to have such particulars protected from the inspection of the Plaintiff under the authority of the Court.

Mr. Cameron now moved for the production of the documents.

Mr. Purvis contended, first, that the other members were equally interested with the Defendants in the documents, and that an order for production could not be made in their absence. Production was refused in *Murray v. Walter* (Cr. & Ph. 114), and in *Lopez v. Deacon* (6 Beavan, 254), where the documents were in the possession of an agent, on behalf of the Defendant, and persons not parties to the cause. (See *Taylor v. Rundell*, Cr. & Ph. 111.)

Secondly, that the object of the Plaintiff was not to use the documents for the legitimate purposes of this suit, but to assist in the actions brought, and to be brought, by the creditors against the Defendants.

Mr. Cameron, in reply. The question of want of parties has been disposed of by the decision on the demurrers. The Plaintiff sues on behalf of himself and all the other members; therefore every person interested in the documents is before the Court.

As to the other point, the Plaintiff is willing to undertake not to use the documents for the purposes apprehended by the Defendants.

THE MASTER OF THE ROLLS having, during the argument, referred to *Few v. Guppy* (Hare on Discovery, 124, and Wigram on Discovery, p. 245), said he would consider the points.

July 31. THE MASTER OF THE ROLLS [Lord Langdale]. In this case, I think that the Defendants are bound to produce, or to permit, the inspection of the documents [356] in their possession. I think that they cannot refuse the production on the ground that other persons not parties to the cause have an interest in them, it having been determined that those other persons are not, under the circumstances of this case, necessary parties to the cause.

It was objected that the Plaintiff is an attorney in actions brought against the Defendants by different creditors of the club whose affairs are the subject of this suit,

and that he may use the documents sought to be produced, as evidence of the demands which those creditors have against the club.

I think that the Plaintiff ought not to use the documents for any such collateral object; and as he has offered, if I should think it right, to undertake not to use the documents, or any copy of them, for that purpose, I shall make the order for the production or inspection of these documents, on his undertaking to that effect.

[357] SMITH v. THE EARL OF EFFINGHAM. *March 11, 13, May 6, 1844.*

[S. C. 8 Jur. 479. Affirmed on appeal, July 6, 1846, see subsequent proceedings, 10 Beav. 378, 589.]

In 1817, a tenant for life of freehold estates, subject to long outstanding terms, granted a personal annuity to the Plaintiff, secured by warrant of attorney, on which judgment was forthwith entered up and docketed. Afterwards, in 1818 and 1819, he created other incumbrances, two of which were by demises of the estate. The Plaintiff did not sue out any *elegit* till 1822, when he did so. The inquisition being duly returned, he commenced an action of ejectment, which he discontinued, in consequence of the outstanding terms. In a suit to which the Plaintiff was no party, the priorities of the other incumbrancers were declared. The Plaintiff, within twenty years from the last payment of the annuity, filed this bill against all the other parties, to have it declared that he was entitled to stand as first incumbrancer; that the decree, &c., might be altered, or that the Plaintiff might be at liberty to proceed at law, and that the Defendants might be restrained from setting up the terms. One of the defences was, that the Plaintiff's annuity was usurious. The Court held that the Plaintiff was not barred by the proceedings in the suit, and retained the bill for a year, giving the Plaintiff leave to bring an action for the recovery of the freehold, and restraining the Defendants from setting up the terms; and also (though not specifically asked by the bill) from setting up the Statute of Limitations. The Court also refused to interfere with the application of the rents in the meantime, or to grant inquiries as to the validity of the Plaintiff's charge, holding that *prima facie* credit was to be given to the judgment, and that if the Defendants had any equitable case to make against the judgment, they ought to adopt proceedings of their own to establish that

fact. In a suit in which the priorities of different incumbrancers on an estate were determined, a receiver had been appointed. A. B., who claimed to be first incumbrancer, not having been made a party to that suit, filed a bill of his own to establish his right. Held, that the receiver was not a necessary party, and but for the decision in *Lewis v. Lord Zouche*, 2 Simons, 388, he would have been considered an improper party.

This bill was filed by Mr. Smith and Mr. Dudgeon, claiming to be the first incumbrancer on the estate of a Mr. Primrose, which was subject to a number of other incumbrances, and had been dealt with in a suit to which the Plaintiffs had not been made parties. The material circumstances were as follows:—

The Defendant, Francis Ward Primrose, was tenant for life of the freehold estates in question, subject, however, to an outstanding satisfied term of 500 years, and also to another outstanding satisfied term of 1000 years. He was also entitled to a copyhold estate, in respect of which the Plaintiff made a claim by his bill; but which, having been abandoned at the Bar, it is not necessary further to notice.

[358] The Defendant, Mr. Primrose, being so entitled, in consideration, as it was said, of £2660, to him paid by the Plaintiff Dudgeon, executed an indenture dated the 15th of November 1817, and thereby granted to Dudgeon an annuity of £380 for the life of the grantor, and by the deed covenanted to pay the annuity. On the same day, Mr. Primrose executed a power of attorney, authorising certain persons, by confession or otherwise, to suffer judgment to be entered up against him, in an

action of debt, for £5320 and costs, at the suit of Dudgeon, subject to defeasance on due payment of the annuity.

Pursuant to this warrant of attorney, judgment was signed, and the docket entered on the 15th of December 1817.

Under these circumstances, Mr. Dudgeon having the judgment, and under it a general security, but no specific lien on the land, Mr. Primrose granted another annuity to William Brown, and by indenture, dated the 9th of December 1818, made between Mr. Primrose of the first part, Brown of the second part, and Edward Howard of the third part, Primrose, in consideration of £5000 paid to him by Brown, granted to Brown a rent charge of £600, chargeable upon and yearly issuing out of his freehold and copyhold estate, for 100 years if Primrose should so long live, with power of distress and entry, and a demise to Howard, as trustee, for better securing the annuity. On the death of William Brown, the annuity became vested in the Defendant, Robert Brown, his representative, who was, by the bill, alleged to be a trustee thereof for the Defendants the Earls of Effingham and Rosebery, and William Harvey.

[359] Again, on the 2d of August 1819, Primrose, by indenture dated on that day, in consideration of £350 paid to him by Henry Pearson, granted to Pearson an annuity of £50 for the life of the grantor, and covenanted to pay the same; and for the securing that annuity, Primrose executed a warrant of attorney to confess judgment, which was accordingly entered up in or as of Hilary term 1820. This annuity had become vested in the Defendant, James Henry Mann.

On the 16th of August 1819 Primrose, in consideration of £700 paid to him by Richard Brydges, granted to Brydges an annuity of £100 for the life of the grantor, and covenanted to pay the same, and, for better securing the payment thereof, executed a warrant of attorney to confess judgment, which was accordingly entered up in Hilary term 1820. This annuity had become vested in the Defendant James William Smith.

And on the 7th of December 1819 Mr. Primrose executed an indenture of that date, made between himself of the first part, Edward Howard of the second part, John Waite of the third part, and James Gibbs of the fourth part, and thereby, in consideration of £1400 paid by Waite, granted to Howard, in trust for Waite, an annuity of £200 for 100 years, if Primrose should so long live; and for the purpose of better securing the same, demised his freehold estate to Gibbs for ninety-nine years, if Primrose should so long live, on trust for securing the payment of the annuity. It was said, that after the death of John Waite, this annuity and the securities for the payment thereof were assigned to the Defendant Mr. Bateman and Mr. Shepherd, for the benefit of the Earls of Rosebery and Effingham and William Harvey.

[360] Thus, it appeared, that before the year 1820, Mr. Primrose had granted five several annuities, of which three, viz., the annuities granted to Dudgeon, Pearson, and Brydges, were secured by grant, covenant and judgment only, whilst the two annuities, granted to Brown and Waite respectively, were secured by demises of the estate.

Dudgeon's annuity was paid up to the 15th of November 1820, but afterwards became in arrear; and it was in this state of things, and on the 6th of November 1822 that Dudgeon, by Mr. Alderson, his attorney, caused a writ of *elegit* to be issued on his judgment, and there having been a writ of inquisition duly returned, he commenced an action of ejectment to recover possession of a moiety of the land. It was said, that this action to recover possession of a moiety of the land was stopped, in consequence of a discovery of the outstanding terms to which the life-estate of Mr. Primrose was subject. However this might be, the action was *non prosequi* in Hilary term 1826, and it did not appear that Mr. Dudgeon took any further step for enforcing payment of his annuity. He assigned it to his Co-plaintiff Smith in November 1838, and this bill was filed on the 7th of March 1839, between eighteen and nineteen years after the last payment of the annuity made to Dudgeon.

In the meantime, however, a bill was in 1823 filed in this Court by Robert Brown, the executor of William Brown, the grantee of the annuity of £600, and by the Earls of Effingham and Rosebery, William Harvey, Lord Dalmeny, and by

Messrs. Bateman and Shepherd, against Howard and Gibbs, Shaw, Hermon and Chappel, George Walpole Clement, Anthony Pierce, Henry Pearson, Richard Brydges, and Mr. Primrose, whereby, after stating the deed of the 9th of December 1818, and a deed [361] endorsed thereon, dated the 7th of March 1822, it was prayed, that the freehold estate of Mr. Primrose, for the residue of the demise created by the indenture of the 9th of December 1818, might be assigned, and that all the right and estate of Howard under the same indenture might be assigned and conveyed to such person as the Plaintiff Robert Brown should direct, and that all proper parties might join in the necessary deeds for so doing; and that Howard and Gibbs might be decreed to execute the indenture of the 7th of March 1822, and to deliver up to the Plaintiff, Mr. Jones Bateman, all the deeds belonging to the estate; and that all necessary declarations might be made and directions given.

This bill was three times amended; and it was not brought on to be heard till the 26th of July 1830, before which time, and in Easter term 1829, Brydges, to whom the annuity of £100 had been granted, filed his bill, praying for a declaration that the estates in question were subject to a charge or lien in his favour, or that he might, by aid of the Court, have the benefit of his judgment.

On the 26th of July 1830 it was by the Vice-Chancellor declared, in both the causes, that Brown, in respect of his annuity of £600, was entitled to possession of the deeds anterior to his deed of charge, and the Defendants, Shaw, Hermon and Chappell, were ordered to deliver the same deeds to Brown, and the Defendant Howard was ordered to assign, to such person as Brown should direct, the term of ninety-nine years vested in him, and Howard and Gibbs were ordered to execute the deed of the 7th of March 1822. And it was declared that Brown had the first charge on the life interest of Primrose, under the indenture of the 9th of December 1818; that Mr. Bateman, in trust for the Earl of Rose[362]-bery, had the second charge on the same life interest, under the indentures of the 7th of December 1819 and the 7th of March 1822; that Brydges, a Plaintiff in the first, and a Defendant in the second cause, had the third charge, by virtue of his judgment; and it was declared, that a conveyance, dated the 22d of May 1821, was subject to such charges. Certain accounts were ordered, and further directions reserved.

After the Master's report, and after certain supplemental bills had been filed, the causes came on to be heard again; and by a decretal order, made on the 23d of July 1832, after directing the application of a balance found to be in the hands of the Earl of Effingham and Mr. Harvey, it was ordered that Brown should continue in possession of the estates, and out of the rents retain, in the first place, certain costs, and in the second place, the annuity to which he was entitled under the indenture of the 9th of December 1818, and, in the third place, to pay certain costs of the Earl of Rosebery, Mr. Bateman, Mr. Shepherd, and of Lord Dalmeny; and, in the fourth place, to keep down the annuity created by the indenture of the 7th of December 1819; and, in the fifth place, to pay to the representatives of Brydges their costs of the suit; and, in the sixth place, to keep down the incumbrance under the judgment obtained by Brydges in Hilary term 1820; and, in the seventh place, to pay to Henry Pearson his costs of the suit; and in the eighth place, to keep down the incumbrance of Henry Pearson, under his judgment obtained in Hilary term 1820.

By a subsequent order, dated the 31st of May 1837, Gardiner Chapman was appointed receiver of the estates, and he was directed to receive the rents and apply them [363] in the manner directed by the order of the 23d of July 1832.

It should be stated that Messrs. Howard and Gibbs acted for both parties in the grants of the several annuities, and that Mr. Alderson acted as attorney and solicitor for Dudgeon in the matter of the *elegit* in 1822, and for the Plaintiffs in the suit of *Brown v. Howard*.

On the 7th of March 1839 Smith and Dudgeon his assignor, filed this bill against Mr. Primrose and the several persons claiming to be incumbrancers on his life-estate. The bill alleged that the Plaintiffs in the two previous suits had, from fraudulent motives, omitted to make him a party to those suits, though they had notice both actual and constructive (through their solicitors) of his incumbrance; and it prayed for a declaration that the Plaintiff Smith was entitled, in equity, to stand as first

incumbrancer on the estates for his annuity and the arrears thereof, and that an account might be taken of what was due for such arrears, and that for the purpose of paying the same and securing the future payment of the annuity, the interest of Mr. Primrose in the estates might be sold, or that the Plaintiffs might be let into possession. The bill also prayed that Chapman, the receiver, who had been appointed receiver of the same estate in the other cause, might pay to Smith the balance of rents in his hands, and might be discharged.

The bill also prayed that it might be taken to be a bill in the nature of a bill of review, and supplemental to the said cause of *Brown v. Howard*, and the causes connected therewith, and that, if necessary, the decrees and orders of the 26th of July 1830, the 23d of July 1832, and the 31st of May 1837, and the other orders, might be reviewed or varied; or that the Plaintiffs [364] might be permitted to proceed at law for the recovery of the said annuity of £380, and the arrears thereof, notwithstanding the order of the 31st of May 1837, and the appointment of receiver, and that the Defendants might be restrained from setting up the said terms or either of them, or any other legal estate, at such proceedings at law; and that the receiver might, in the meantime, be directed not to make any payment to any of the Defendants in this cause, and for further relief, &c.

The Defendants, amongst other things, insisted on the invalidity of the Plaintiffs' security, and that it was usurious.

Sir William Follett (Solicitor-General), and Mr. Wilcock, for the Plaintiffs (the arguments are *ex relatione*), abandoned all claim on the copyhold estates; but contended that it was not necessary to prove that the Defendants had actual notice of the Plaintiffs' judgment; for Gibbs acted as solicitor for both the grantor and the grantees of the annuities; and that therefore the Defendants must have had notice, actual or constructive, and could not protect themselves by getting in an outstanding legal estate; *Maddox v. Maddox* (1 Ves. sen. 60); that the annuities were granted at comparatively short intervals; and "where one transaction is closely followed by and connected with another," notice to the solicitor is notice to the client, and it will not be restricted to one transaction; *Hargreaves v. Rothwell* (1 Keen, 154), *Fuller v. Bennet* (2 Hare, 394). That, where a judgment is entered up against the owner of lands of which the legal estate is outstanding in a trustee or mortgagee, a purchaser with notice of the judgment will be bound [365] by such notice, although the creditor may not have taken out execution on his judgment; *Tunstall v. Trappes* (3 Sim. 286).

That the lapse of time since the annuity was granted was no bar to this suit, within the provisions of the Statute of Limitations (3 & 4 W. 4, c. 27, s. 40), as the Plaintiffs' annuity had been paid up to the 15th of November 1820, and the bill was filed on the 7th of March 1839.

That it was alleged by the Defendants, that the transaction under which the Plaintiffs claimed was usurious; but that there was no evidence to support that allegation. That it was also alleged, that the Plaintiffs' judgment had not been revived by *scire facias* as required by the statute of Westminster (13 Ed. 1, c. 18), but a clause in the warrant of attorney made any revival unnecessary; *Morris v. Jones* (2 Barn. & Cres. 232), *Hiscocks v. Kemp* (3 Adol. & Ellis, 676), and *Morgan v. Burgess* (1 Dowl. Prac. Ca. 850, N. S.), where the agreement not to revive was made by parol.

That the non-registration of the Plaintiffs' judgment as required by the late statutes (1 & 2 Vict. c. 110, s. 19, and 2 & 3 Vict. c. 11), was immaterial, as the Defendants had notice, and, on the assignment of Mr. Brown's annuity, a bond of indemnity, dated the 1st of October 1830, had been taken by the Earl of Effingham and William Harvey against the Plaintiffs' claim.

That an *elegit* having been sued out by the Plaintiff, and an inquisition and return made, Tidd's Practice (Tidd's Prac. 1036, 9 Ed. c. 41), [366] he had a right to stand as the first incumbrancer; *Neate v. The Duke of Marlborough* (2 Myl. & Craig, 407), *Lord Dillon v. Plaskett* (2 Bligh, 239, N. S.). That the discovery of the outstanding terms of 500 and 1000 years had induced him to enter a *nolle prosequi* in the actions of ejectment which he had commenced. As to these outstanding terms, that Mr. Primrose, as tenant for life, had no power to direct any assignment of them to be made for the benefit of any of the Defendants, so that Mr. Brown and Mr. Waite

had no right to protection from them; they were equitable incumbrancers with notice of the Plaintiff's judgment, and yet in the suits instituted they had arranged the priorities of their incumbrances without reference to the judgment of the Plaintiff. That a party coming to this Court for relief upon a legal title could not be driven back to a Court of law; and that any person obstructed by the receiver in pursuing his rights might come to this Court for relief, and make such receiver a party; *Lewis v. Lord Zouche* (2 Simons, 388). The Plaintiff therefore asked for an account of the rents for six years; and that the receiver might pay to the Plaintiff one-half of the rents of the freehold estates until his annuity was satisfied; and that the Plaintiff might be declared entitled to a lien, and that the other incumbrancers had notice of the Plaintiff's claim. If this was not granted, the Plaintiff then asked that the legal impediment to proceedings at law might be removed, and that the Plaintiff might be allowed to substantiate his claim, without disturbing what had been done under the former decrees; that the Defendants might be restrained from setting up the Statute of Limitations; and that the receiver might pay the rents into Court.

[367] They also cited *Townshend v. Askeu* (referred to in 3 Myl. & Cr. 410, note, and in 2 Sugden's Vendors (10th ed.), 394, note (n.)), and *Stileman v. Ashdown* (2 Atk. 477).

Mr. Tinney, for Mr. Chapman the receiver, appointed in the causes of *Brown v. Howard* and *Brydges v. Howard*, contended that he was not a necessary or proper party to this suit, and asked for the immediate payment of his costs.

Mr. Cooper and Mr. Cooke, for Robert Brown, the personal representative of William Brown. Neither the Plaintiff's warrant of attorney nor the judgment, though docketed, constituted a lien either in law or equity upon the equitable estate; Powell on Mortgages (vol. ii. (6th ed.), 608), Sugden's Vendors (vol. ii. (10th ed.), 385). They only enabled the Plaintiff to establish a lien, but no lien was obtained till after Mr. Brown's annuity was granted, for Mr. Brown's annuity was granted in 1818, and no execution was sued out by the Plaintiff till the 6th of November 1823. From 1820 till the 7th of March 1839, no steps were taken by the Plaintiff to compel payment, and the delay is a sufficient ground for refusing relief; *Champion v. Rigby* (1 Russ. & My. 539, and Tamlyn, 421, affirmed by Lord Cottenham, 20th March 1840), *Gregory v. Gregory* (Coop. 201, Jac. 631). This Court had already refused to interfere to restrain the receiver from paying the rents as directed in the other suits; *Smith v. Lord Effingham* (2 Beav. 232).

The 1 & 2 Vict. c. 110 (sect. 19), required that all judgments should be registered; otherwise, they are not to affect lands, as to purchasers, mortgagees, and creditors who [368] were further protected by the 2 & 3 Vict. c. 11 (sects. 2 and 5), from all judgments not registered. In *Simmons v. Pettit* (V.-C. E. 19th February 1844) a bill was filed by a mortgagee to foreclose his mortgage, he failed in his attempt to tack a judgment; which, though prior in date, had not been registered at the time of a subsequent mortgage. In this case, therefore, the Plaintiff ought to have registered his judgment, before he applied to this Court for assistance. The judgment roll also ought to have been proved complete, and the award of an *elegit* ought to have been added. Chitty Prac. (4th ed. 283), Runninton on Ejectment (page 330), Adams on Ejectment (2d ed. 267), Selwyn's Nisi Prius (vol. ii. 745, 8th ed.), Starkie's Evidence (vol. ii. 410, 3d ed.), *Ramsbottom v. Buckhurst* (2 Mau. & Sel. 565), *Neale v. The Duke of Marlborough* (3 My. & Craig, 407, 409, 413, 416, 417).

There is no evidence to shew that the Defendants had notice of the Plaintiff's judgment at the time they advanced their money. They may therefore protect themselves by an outstanding estate: Sug. Ven. and Purch. (vol. iii. 418).

This can only be considered as an ejectment suit to recover a moiety of the estate; but even under the Statute of Frauds (29 Car. 2, c. 3), execution might be sued out against the lands in the hands of a trustee at the time of execution sued. Under the circumstances, therefore, the Court will do no more than remove the terms out of the way of any proceeding at law; and as the Plaintiff is no more than an execution creditor, it will make no [369] order affecting the rents. In *Sharp v. Key* (8 Mee. & Wels. 379), where rent became due after the delivery of a writ of *elegit* to the sheriff, but before the inquisition was taken thereon, it was held that the execution creditor was not entitled to the rent.

Mr. Corrie, for James Henry Mann, complained that the decree made in the suits of *Brown v. Howard* and *Brydges v. Howard*, declaring the priorities of the incumbrancers, was erroneous, and submitted that it ought now to be reviewed and varied; *West v. Skip* (1 Ves. sen. 244), *Hamilton v. Houghton* (2 Bligh (O. S.), 169). He contended that Mr. Mann was entitled to stand prior to Messrs. Waite and Brydges, who had notice of his claim. He also cited *Foster v. Blackstone* (1 Myl. & Keen, 297), *Davis v. Lord Strathmore* (16 Ves. 419).

Mr. Kindersley and Mr. Parry, for Mr. Bateman, Mr. Shepherd and Mr. Smith, argued that the judgment would only operate against the trust estate of which the trustee was seised at the time of execution sued (29 Car. 2, c. 3, s. 10); and for that reason a judgment creditor who desired to enforce his security against his debtor's equitable interest in freehold estate, could not file a bill till he had sued out an *edgūt*; *Neate v. Duke of Marlborough* (3 Myl. & Craig, 407). That the Plaintiff came here on his legal title, and not, as assumed, upon an equitable title; and that the only right he had was, to have the terms removed out of the way of his obtaining legal relief. That before the Court granted any relief, there should be an enquiry to ascertain under what circumstances the Plaintiff's annuity was granted, and why it was not paid or provided for under the former suits of *Brown v. Howard* [370] and *Brydges v. Howard*. They also cited *Whitworth v. Gaugain* (Cr. & Ph. 325).

Mr. Turner and Mr. Kenyon, for the Earl of Effingham, Lord Rosebery and William Harvey, asked that the bill might be dismissed against Lord Rosebery with costs, as he had ceased to have any interest in the premises; and as to the Earl of Effingham and William Harvey, they were trustees for Mr. Primrose, who was out of the jurisdiction of the Court. They argued that a judgment creditor had no such right as that insisted on by this bill; that his right was legal, and similar to that of a legal mortgagee, who could not file a bill to get legal possession of the estate, though he might come to a Court of Equity to foreclose. That this Court would never entertain a bill purely declaratory as to the right of parties, and would not entertain a bill by a judgment creditor, unless there was a prior incumbrancer who prevented the judgment creditor from availing himself of his right at law. That the Court dealt with a judgment where it intervened in the administration of assets, only because it was considered an impediment, which the Court must necessarily remove; for the same reason when the Court sold an estate, it would also interpose on behalf of a judgment creditor; but that a judgment creditor had no right either to ask this Court for the sale of an estate, or to enforce the judgment, which was the province of a Court of law. The Plaintiff rested his claim upon his legal title; and no equitable relief could be given, unless the Plaintiff put his title in the power of the Court; *Aston v. Lord Exeter* (6 Ves. 288), *Baker v. Harwood* (7 Sim. 373. See also *Bear v. Ward*, Jac. 194; and *Hylton v. Morgan*, 6 Ves. 293), and that the circumstances creating a suspicion that this was not a legal [371] transaction were sufficient to induce the Court to refuse any relief.

That the Plaintiff had been guilty of great *laches* and neglect; for nineteen years had elapsed since Mr. Dudgeon brought the ejectment, and no attempt had been made to put the judgment in force: and there was also no evidence to shew when the outstanding terms were discovered. That in March 1833 a bill was filed by Mr. Alderson, as the solicitor for Mr. Brown, to recover the title-deeds; and in 1836 Mr. Alderson was acting as the attorney for Mr. Dudgeon, in the action of ejectment; the Plaintiff must therefore have had full notice of the proceedings in the other suits, and having neglected to prosecute his claim, the Court would not now assist him.

Sir William Follett, in reply. The Royal assent to the 2 & 3 Vict. c. 11 was given after the institution of this suit. The Act was prospective, and did not affect purchasers, mortgagees or creditors having incumbrances, and it did not say that a security could not be enforced, unless it was registered.

Curtis v. Curtis (2 Bro. C. C. 619), and *Stonehewer v. Thompson* (2 Atk. 440), were also cited.

May 6. THE MASTER OF THE ROLLS [Lord Langdale]. As the Plaintiff Dudgeon was no party to any of the proceedings in the other suits, he is not bound by them. He stands prior in point of time, and in all other circumstances equal, to Pearson and

Brydges, who had the benefit of the proceedings after the incumbrance of [372] Waite, who, though subsequent in point of time, had a specific lien on the property. If the Plaintiffs had admitted the priority of the charges of Brown and Waite, I should have thought it necessary to direct some enquiries for the purpose of enabling them, if the facts should warrant it, to take priority before the other charges of the like nature with theirs.

But their counsel having at the Bar claimed less than is demanded by the bill, the Plaintiffs still insist that they are, as to the freeholds or a moiety thereof, entitled, at law, to priority before the incumbrances of Brown and Waite, and they allege that the ejectment commenced in 1822, so far as regards Brown and Waite, might have been successfully prosecuted, and it would have been prosecuted, if it had not been for the outstanding satisfied terms, which were in existence at the dates of the grant to Dudgeon and of his judgment.

The Plaintiffs having in their bill prayed a declaration of their title in equity, and having by their bill only asked for relief consequential upon that title, have, in argument, rested their case upon a legal title, of which they are unable to avail themselves without the assistance of a Court of Equity, by reason of the outstanding terms. They have not directly asked for such assistance, but still pray for a declaration of their right in equity.

It is, however, clear that even if they have such legal title as they allege, they could not assert it at law, without the assistance of this Court; and it appears to me that as the judgment was signed, the writ of *elegit* issued and the inquisition returned, and as there is no evidence of the judgment having been satisfied, the [373] Plaintiffs may have a right to some relief in this Court. I think, therefore, that I ought not to refuse to them an opportunity of establishing their right at law, if they can; and therefore I shall retain this bill for a year, giving leave to the Plaintiffs to bring their ejectment for the recovery of the freehold; but restraining them from taking out execution on any judgment which they may obtain, and restraining the Defendants from setting up the outstanding terms, which were satisfied at the date of Dudgeon's security, and also from setting up the Statute of Limitations, but leaving them the benefit of all other defences which they may have.

It was urged at the Bar, that I ought to cause some enquiry to be made, as to the manner and circumstances in and under which the Plaintiff's claim arose, so as to satisfy myself that it had an equitable foundation, before I restrained the Defendants from setting up the Statute of Limitations. But there is the judgment, which does not appear to have been impeached; and although, having regard to the relation in which Howard and Gibbs stood to the Plaintiff Dudgeon and to Brown, and in which Alderson stood to Dudgeon and also to Brown, and the other Plaintiffs in the suit of *Brown v. Howard*, and having regard to the bond of the 1st of October 1830, I do not understand how it happened, that the Plaintiff's claim was passed over, or why the Plaintiff was not made a party to the suit, yet, as the judgment remains undisturbed, I think that I must give credit to it, so far as to admit the Plaintiffs, *prima facie* at least, to be entitled to some claim upon the estate. If the Defendants have an equitable case to make against the right of the Plaintiffs to the benefit of the judgment, I think that they ought to have adopted proceedings of their own to establish that case.

[374] In the present state of the proceedings, I do not think that there is any ground for dismissing the bill against the Earl of Rosebery.

I do not think that the receiver was or is a necessary party to the cause. If it had not been for the case of *Lewis v. Lord Zouche* (2 Simons, 388), I should not have thought him a proper party, and should have dismissed the bill against him with costs. But as he has been made a party, probably in consequence of the decision in that case, if his costs be provided for, it will possibly be more convenient for him to be permitted to remain on the record. Ultimately, his costs ought to be paid either by the Plaintiffs or out of the rents of the estate of which he is the receiver; and if the estate were not limited for the life of Mr. Primrose, provision for the receiver's costs need not now be made. As it is, the receiver's costs up to the hearing must now be paid by the Plaintiffs, without prejudice to any question by whom, or out of what fund, they ought ultimately to be paid.

I was asked to make an order to prevent the application of the rents under the orders made in the cause of *Brown v. Howard*. I do not think that the Plaintiffs have established a case entitling them to any such order. I give the Plaintiffs an opportunity of establishing, if they can, their legal right, but at present I do not think myself entitled to interfere in their favour any further. (NOTE.—An appeal to the Lord Chancellor is pending. [See note at beginning of case.])

[375] GRUBB v. PERRY. April 15, 1844.

After *subpoena* to rejoin, a Defendant cannot, without special leave, refer the bill for impertinence, though he has taken no step in the cause since its amendment. Plaintiff amended his bill requiring no further answer, and after the expiration of the eight days, filed a replication and served *subpoena* to rejoin. The Defendant afterwards took exceptions to the amended bill for impertinence. Held irregular. Whether the eight days mentioned in the 14th Order of 1833 are to be computed from the filing the amended bill or from amending the Defendant's office copy, *quære*?

This was an application to take off the file an exception for impertinence, which, it was alleged, had been irregularly filed by the Defendant.

On the 19th of March the Plaintiff obtained an order to amend his bill without costs, the Plaintiff amending the Defendant's office copy and not requiring any further answer.

On the 21st of March the Plaintiff gave notice to the Defendant that he had amended the bill, and requiring him to leave the office copy with the Record and Writ Clerk to be amended; and further that, at the expiration of eight days from that date, he would proceed to file a replication. The Defendant's office copy bill was left for amendment on the 22d, and on the 23d it was obtained amended.

By the 14th Order of December 1833 (Ord. Can. 47), where "the Plaintiff obtains an order to amend without requiring any further answer, and shall amend the bill, &c., the Defendant shall, as of course, have eight days' time to consider whether it is necessary for him or her to answer the same, at the end of which time the Plaintiff shall be at liberty to file a replication," &c., unless the Defendant shall obtain time to answer.

The Defendant neither answered the amended bill, nor obtained an order for time to answer it. The Plain-[376]-tiff, on the 30th of March, filed a replication, and on the 3d of April served a *subpoena* to rejoin. After this, the Defendant, on the 11th of April, filed an exception to the amended bill for impertinence.

Mr. Turner and Mr. Giffard now moved to take the exception off the file. A Plaintiff cannot refer an answer for impertinence after replication or an undertaking to speed the cause; *Barnes v. Saxby* (3 Swan. 232). The cause being at issue it is not competent for a party, at least without the special leave of the Court, to take a proceeding which may result in varying the issue between the parties.

Mr. Tinney, *contra*. The rule is, that a party may file exceptions for scandal at any time, and for impertinence at any time previous to his taking a step in the cause. Here the Defendant has taken no step whatever; all the subsequent proceedings have been taken by the Plaintiff.

Secondly, the Defendant is to "have eight days' time to consider whether" he will answer, at the end of which time the Plaintiff may file a replication. He is, therefore, to have eight clear days, and they must be computed from the time at which he obtains the office copy of the amendments, or, at all events, from the time when it has been amended according to the Plaintiff's undertaking. In either way, the eight clear days had not expired on the 30th of March, and therefore the replication was irregularly filed on that day.

[377] THE MASTER OF THE ROLLS [Lord Langdale]. Where a bill is amended, although the Plaintiff may require no answer, still the Defendant may be able, by answer, to state matters of defence of the greatest importance to him, and which

cannot be given in evidence, unless the points be properly raised by his answer. For this reason, the Defendant is allowed eight days' time to consider whether it will be necessary for him to answer the amendments.

Then comes the question from what time the eight days are to be computed. The order is not very distinct; it does not say that the time is to be reckoned from the period at which the office copy is amended, but when the Plaintiff obtains the order and "shall amend," the Defendant is to have eight days. This seems to imply from the time when he "shall amend." Here the amendment was made on the 21st of March, and notice was given; therefore, between the amendment and the replication, there were eight clear days, even excluding both the 21st and the 30th.

I should be reluctant in laying down, that the time is to be computed from the time of filing the amended bill; but if you take it the other way, and compute the time from the amendment of the office copy of the bill, then, according to the ordinary rule of computing time, you must exclude the first and include the last day. This is the practice of the Court, it being considered that the fractions of the two extreme days are equivalent to one whole day; but when you speak of eight clear days, you mean eight clear days excluding the portions of both the first and last day. That is the established practice of the Court and in the registrar's office, though there is clear evidence of there being a different [378] practice in the Six Clerks' Office, (1) derived, perhaps, from considerations in favour of the liberty of the subject. However, reckoning in this manner, the replication was regularly filed, and the Defendant has had the time which the practice of the Court allowed him for answering.

The other question is, if the Defendant must determine within the eight days whether he will take exceptions for impertinence, and I think it must be so, for when the *subpoena* to rejoin has been served, new duties arise, the cause being at issue, the parties proceed to hearing on the record as it then is, and exceptions cannot afterwards be filed without leave. I am therefore of opinion that this application must be granted, and the exceptions must be taken off the file. The Defendant will not be without remedy, for if there be impertinence in the bill, he may get it expunged, but he must make a special application for that purpose. (2)

[379] AMES v. PARKINSON. June 5, 7, 1844.

[S. C. 2 Ph. 388; 41 E. R. 992. Distinguished, *In re Chapman* [1896], 2 Ch. 763.]

Where a trustee neglects to invest on real or Government securities according to the trust, the *cestui que trust* has the right of selecting whether the trustee shall be answerable for the money or for the stock.

An executor and trustee directed to invest a legacy on mortgage, may properly appropriate one of the testator's mortgages in payment of the legacy, but he must ascertain its sufficiency.

A trustee having the option of investing on mortgage or Government security, improperly took an insufficient mortgage security. Being held answerable, the Court decided, that having exercised his discretion, though improperly, he was answerable for the money lost, and not for the stock it might have produced.

By his will, the testator directed his executors, "within twelve months after his decease, out of his personal estate, to lay out and invest in their or his names or name

(1) *Mootham v. Waskett*, 1 Mer. 243; *Manners v. Bryan*, 1 Myl. & K. 453; S. C. 5 Sim. 147 and 148, n.; *M'Intosh v. Great Western Railway Company*, 1 Hare, 331; *Richardson v. Horton*, 5 Beav. 91.

(2) See *Jeffray v. McCabe*, 1 Russ. & Myl. 739; *Bradbury v. Booker*, 4 Sim. 325; *Kimworthy v. Allen*, 1 Bro. C. C. 400; *Anonymous*, 2 Ves. sen. 631; *Anonymous*, 5 Ves. 656; *Pellew v. ———*, 6 Ves. 456; *Beavan v. Waterhouse*, 2 Beav. 58; *Everett v. Prythergh*, 12 Sim. 363; and *Stanley v. Bond*, 5 Beav. 175.

the sum of £1500 on mortgage of freehold or copyhold estates of inheritance or on Government securities," and which they were to hold upon certain trusts under which the Plaintiffs were interested.

The testator died on the 27th of December 1825, possessed of three mortgages on freehold estates for £800, £500, and £200, besides other property. His assets were admitted to have been more than sufficient to pay his debts, funeral expenses, and legacies, and it appeared that the Defendant, his executor, was interested in the residue.

On the 27th of December 1826 the executor appropriated the three mortgages of £500, £200, and £800 for the purpose of answering the legacy of £1500, which the executor had the option of investing on mortgage or Government securities.

The mortgage for £500 was paid off, and the produce properly invested.

The mortgage for £800 was paid off in May 1836, and was placed in the hands of Messrs. Gurney, bankers, to a deposit account, in the name of the surviving executor. The account was distinct from his own account, but the money was, in no way, marked as trust money.

The £200 was alleged and appeared to be invested upon an insufficient security, and the mortgagor was insolvent.

This bill was filed in 1842 by parties interested in the £1500 legacy, against the surviving executor, seeking to make him liable for the loss occasioned by the alleged non-investment of the legacy within twelve months after the testator's death.

The price of the funds had risen, so that it would be more beneficial to the Plaintiffs to make the Defendant account for the stock which might have been purchased, than for the money.

Mr. Kindersley and Mr. Busk, for the Plaintiffs. The executors never complied with the direction of the will. They might have invested the money on mortgage, yet it was to be "in their names;" but they had no authority to appropriate the testator's mortgage in discharge of the legacy, thus leaving the securities in the name of the testator, instead of that of the trustees.

As to the £200 mortgage, the executor did not exercise a proper discretion. The mortgage property is proved to be worth no more than £150, and the mortgagor is insolvent. The Defendant is interested in the residuary estate, and would have the benefit of appropriating bad securities to the payment of the legatee; he is therefore liable; *Stickney v. Sewell* (1 Myl. & Cr. 8).

[381] The Defendant committed a breach of trust by lending the £800 on a deposit account with his bankers, and as to all the funds, the *cestui que trust* has the option of recovering either the money or the stock, which would have been produced by a proper investment in the funds at the proper time; *Watts v. Girdlestone* (6 Beav. 188).

Mr. Turner and Mr. Adams, *contra*. The executor had a discretion, and has been guilty of no default in appropriating the testator's own mortgages in discharge of the legacy of £1500, for he has substantially fulfilled the directions of the testator. It would have been absurd for him to have realised the mortgages, and then to have reinvested the produce in the same securities to answer the legacy.

As to the two mortgages for £500 and £800, they have been realised, and no complaint can therefore be made as to those securities.

As to the £200 mortgage, there is no allegation that, at the time of the appropriation, the Defendant was aware that it was a deficient security, and it may have become depreciated since. If a trustee acts *bona fide* to the best of his judgment and without corrupt motives, the Court will not charge him, though the security he has taken may ultimately turn out deficient. There is no case, "in which an executor has been called upon to bear the loss that has arisen, because, in the *bona fide* exercise of a reasonable discretion, the conclusion he came to has turned out unfortunately;" *Buxton v. Buxton* (1 Myl. & Cr. 96). At all events, the Defendant is entitled to an enquiry on the subject.

[382] With regard to the deposit of the £800, the Plaintiffs have acquiesced, for it appears they witnessed the receipts for the interest signed by the tenant for life. The Defendant has not received any personal benefit from the investment, and there being a discretion either to invest on real security or in the funds, he is to be charged

with the money only, and not with the stock. It was decided by Sir John Leach, in *March v. Hunter* (6 Mad. 295), "that if trustees may invest in stock or on real security, and they lend on personal security, and thereby the money is lost, they shall be answerable, not for the amount of stock which might have been purchased, but for the principal money lost." If real security had been taken, the principal money only would have been forthcoming to the trust, and the want of real security is all that is imputable to the trustees.

Lastly, the Defendant has been found a lunatic, and is shewn by the evidence to have had fits of partial insanity before the time from which he is found by the inquisition to have been a lunatic. He is not, therefore, responsible for his acts or defaults.

Mr. Kindersley, in reply.

Hall v. Hallet (1 Cox, 134), and *Hockley v. Bantock* (1 Russ. 141) were also cited.

THE MASTER OF THE ROLLS [Lord Langdale]. One ground of defence in this case is, that the Defendant has been found a lunatic by inquisition, which carries back the lunacy to December 1840, a period subsequent to the time when the several transactions, in [363] respect of which relief is sought, took place. These acts and omissions having taken place at a time not over-reached by the inquisition, the Defendant must be assumed, in the absence of distinct proof to the contrary, to have been of sound mind, and, having regard to the answer and evidence, I am of opinion, that there is no satisfactory proof of this gentleman having been of unsound mind at the several particular times at which the transactions complained of took place. He must, therefore, be considered subject to the same liabilities, as a person of competent understanding would be.

The principal allegation, on the part of the Plaintiffs, is, that the executors, being directed to invest this money either on real security in their own names, or on Government securities, have not done so: not having invested a competent portion of the testator's personal estate in their own names, it is asked that they may pay into Court so much stock as would have been purchased with the £1500, at the end of twelve months from the testator's death.

On the other hand, it has been argued, that there being proper mortgage securities belonging to the testator, the executors were under no obligation to sell or realise those securities; and afterwards invest the produce again in the same sort of securities. I think there is great weight in the argument; but it does not apply here. I do not think it was necessary for them to call in good securities, and then procure others of the same nature to answer the legacy, and I do not understand that there was anything to preclude the executors from appropriating proper securities belonging to the testator to the payment of these legacies; but the appropriation, being an act of their own, was done on their own [384] responsibility, and it was therefore incumbent on them to see that the securities so appropriated were of sufficient value. It was an exercise of discretion on the part of the executors when they, by appropriation, invested the £1500 on real security.

It has happened that, with respect to two of the three mortgages, they have been actually paid; in the exercise, therefore, of their discretion as to these two sums, they were right, and no harm ensued, because these two sums were both actually realised.

With respect to the other, I think there is, on this evidence, great doubt whether the discretion was properly exercised, because no enquiry appears to have been made by them at the time, and I am not satisfied that at that time it was a good security.

What is the extent of their liability? The executors exercised a discretion which they were authorised to do; and, taking it at the worst, it turns out that the £200 is not wholly secured. The loss must be answered by the trustee who has improperly exercised his discretion. The Plaintiffs ask, that they may have the benefit of the money, as if it had been laid out in the funds at the end of the year. I think they are not entitled to this, because the trustees had a right to exercise a discretion, whether the £1500 should be invested on real securities or in the funds. They exercised that right of selection; and are only to be charged with the sum which may be lost.

As to the £500 there has been no loss, and it was properly invested; therefore nothing more need be said respecting it.

[385] With respect to the £800, the case seems to be very different. When the mortgage was paid off in May 1836, the money was in the hands of the surviving trustee, who had a discretion to lay it out on mortgage, or on Government securities. He did neither, and never exercised his discretion, but left it on deposit at his bankers. It is said that after all this neglect, he, the trustee and executor, has a right to choose the investment in which he is to account for the trust fund, and that the *cestui que trust* has no such option. I will look at the authorities before I ultimately decide; but my impression certainly is, that the *cestui que trust*, and not the trustee, is the person entitled to select whether he will have the fund or the stock which the money would have produced at a reasonable time after it had been received.

June 7. THE MASTER OF THE ROLLS [Lord Langdale]. I have examined the authorities cited in argument in this case, but I have not found anything to cause me to alter the opinion which I have already expressed. Upon consideration, I retain the opinion I expressed in *Watts v. Girdlestone*, and think that case was rightly decided.

The trustees had a discretion to exercise. They might at their option have invested the money in the funds; and if the value had risen or fallen, they would have been safe, for they would have exercised their discretion according to the directions of the trust. But as to this sum of £800 they did not exercise the discretion at all, and the question is, whether the *cestui que trust* has not a right to complain of the omission, and to be placed in the situation in which he would have been, if the trustees had not neglected to exercise the discretion [386] reposed in them. I think that the opinion I have already expressed with regard to the £800 must be adhered to.

With regard to the £200, the trustee is entitled to an enquiry, but he is not liable for more than £200. The trustee exercised his discretion in an imprudent manner, and, as a punishment for his error, is answerable for the insufficient security, but as the discretion has been exercised, he is liable for the money only.

NOTE.—See *O'Brien v. O'Brien*, 1 Molloy, 533; *Kellaway v. Johnson*, 5 Beav. 319; and *contra*, *Shepherd v. Moulis*, before V.-C. Wigram, 7th June 1845.

[386] STANLEY v. BOND. March 12, 1844.

[For subsequent proceedings, see 8 Beav. 50.]

Course of proceedings to take a bill *pro confesso* after appearance, under the 1st Order of April 1842.

Form of charging order, in equity, under the 1 & 2 Vict. c. 110, s. 14.

In this case the Defendant had entered his appearance to the bill, but not having answered, an attachment issued against him.

The Plaintiff, being unable to procure the attachment to be executed by reason of the Defendant having gone abroad, gave notice of motion to take the bill *pro confesso*. The motion came on upon the 13th of July 1843, when it was ordered that the cause should be put in the paper on the 9th of July instant, and that the Clerk of Records and Writs should attend at the hearing of this cause with the record of the Plaintiff's bill, in order to have the same taken *pro confesso* against the Defendant.

On the next day, an order of course was obtained for setting down the cause next after the causes, &c., already [387] appointed, in order that the Plaintiff's bill might be taken *pro confesso*.

On the 19th of July 1843 a decree was made for taking the bill *pro confesso* against the Defendant; and it was ordered that the Defendant should pay to the Plaintiff his costs of the suit.

On the 18th of August 1843 the decree was left at the registrar's office, and duly marked by the proper officer. (2d Order of 10th May 1839, Ord. Can. 138.)

The costs were taxed at £299, 1s. 1d., as appeared by the Master's certificate,

dated the 29th of January 1844, and the decree was duly registered in the proper office under the 1 & 2 Vict. c. 110.

The Defendant, who was resident on the Continent to avoid payment, had standing in his name in the bank books a sum of £6106, 3½ per cent. Reduced.

The Plaintiff presented an *ex parte* petition praying that this stock might stand charged with the payment of the sum of £299, 1s. 1d.

Mr. Kindersley and Mr. Wright, in support of the petition. The only question was as to the form of the order to be made. It appeared that the form in the Common Law Courts was as follows: "I do order, unless cause be shewn to the contrary, that the sum of £ &c., do stand charged with the payment of the sum of £ , for which judgment has been recovered [388] against the said Defendant in Her Majesty's Court of at Westminster."

THE MASTER OF THE ROLLS [Lord Langdale], ordered that the 3½ per cents. standing in the name of the Defendant should stand charged with the payment of the sum of £299, 1s. 1d. and interest, "unless the said Defendant should, on or before the 2d day of November next, shew unto the Court good cause to the contrary;" and it was ordered that the Governor and Company of the Bank of England be restrained from permitting a transfer of the said Bank annuities in the meantime, and until the order should be made absolute or discharged.

[388] DENTON v. DENTON. April 27, 1844.

[S. C. 8 Jur. 388.]

A testator charged annuities exclusively on his real estate, the legal estate of which he devised to trustees, upon trust to pay the rents to or permit the same to be received by one for life, with remainders over. On the testator's death, the tenant for life took possession of the estate and title-deeds, and he kept down the annuities, but cut some timber. The trustees acquiesced for four years, but afterwards proceeded by action to recover the deeds and to receive the rents. The Court, by motion, restrained the proceedings, on the tenant for life undertaking to keep down the annuities, not to grant leases or cut timber without the consent of the trustees, and bringing the deeds into Court.

Where a testator devises the legal estate to trustees, and gives to a tenant for life an equitable estate only, with remainders over, such tenant for life ought not to cut timber without the consent of the trustees.

The testator, by his will, bequeathed certain legacies, and also several annuities, which amounted in the whole to about £310 a year, and he charged his real estates with the payment of the annuities, and gave the annuitants powers of entry and distress for securing the same; and he bequeathed his residuary personal estate to William Morrice and Francis Denton, upon trust to pay his debts, funeral expenses, and legacies (except the annuities) and pay the residue to the Plaintiff.

[389] And he devised his real estates "unto and to the use of William Morrice and Francis Denton and their heirs and assigns, upon trust to pay the rents, issues, and profits of the same unto, or permit the same to be received, held, and enjoyed by Thomas Denton (the Plaintiff) and his assigns for and during his natural life, and from and after his decease, then the said testator gave, devised, directed, limited, and appointed the said real estate and premises last above-mentioned, unto all and every the child and children of the Plaintiff, on his, her, or their attaining their respective ages of twenty-one years" with certain gifts over.

The testator died in July 1840, and on his death Thomas Denton, the tenant for life, entered into possession of the estates, and of the title-deeds. This was done with the assent of Morrice, but whether or not with the assent of Francis Denton was a matter in contest upon the affidavits used on the present occasion.

The personal estate was more than sufficient to pay the charges thereon, and part of the surplus had been handed over to the Plaintiff. The annuities were not at any time in arrear.

In September 1842 Morrice died, and in November following Atkinson was, under powers contained in the will, appointed a new trustee in the place of Morrice.

After this time, disputes took place between the tenant for life and the trustees, as to the right to the possession of the estates and of the title-deeds; the trustees, on their part, insisting, that they were entitled to the possession of both. They required that the deeds should be delivered up to them, that the rents should be received by the Plaintiff as their agent, and that the [390] receipts should be given in their names. This claim not having been acquiesced in by the Plaintiff, the trustees, in March 1844, commenced an action of *detinue* against the Plaintiff to recover the title-deeds, and gave notice to the tenants to pay the rents to them.

Thomas Denton, thereupon, filed this bill, praying the performance of the trusts of the testator's will; that it might be declared that the Plaintiff, so long as he kept down the annuities, was entitled to receive the rents of the estate and hold the title-deeds, or, if the Court should think fit, that they should be brought into Court. The bill also prayed an injunction, to restrain the trustees from proceeding in the action of *detinue* and from distraining, &c., on the tenants, or compelling them to pay the rents to the trustees, and from disturbing the Plaintiff's possession.

A motion was now made for the injunction.

One ground on which the motion was resisted was, that the Plaintiff, of his own authority, had cut down and sold a number of trees upon the estate, and had rendered no account thereof to the trustees. On this point, there were many affidavits filed as to the propriety of cutting the timber. It appeared that part of the timber had been cut on another neighbouring estate, the sole property of the Plaintiff.

Mr. Kindersley and Mr. James Parker, in support of the motion, contended, that as the trustees had no active duties to perform, the *cestui que trust*, according to the ordinary rule, was entitled to the possession of the estate; that as the annuities had been regularly kept down, there was no necessity for the interference of the trustees, on behalf of the annuitants, who had a [391] legal remedy for recovering their annuities by means of their power of entry and distress, in case they should be in arrear.

As to the timber, they contended, that it appeared from the affidavits that it had been cut down in the proper and provident management of the estate, and that the produce had been principally applied in repairing upon the estate. They further argued, that as the Defendants had acquiesced in the existing mode of dealing with the estate and with the title-deeds down to the present time, they had no right unnecessarily to vary it.

Mr. Turner and Mr. Malins, *contra*. The testator has thought fit to give to the trustees the legal estate, and has entrusted them with the performance of duties in respect to it; they are to see that the annuities are regularly paid, and also that the estate is properly managed and protected, not for the sake of the Plaintiff, but for those entitled in remainder. They ought, therefore, substantially, to have the possession on behalf of the various persons interested in the estate.

As trustees and legal owners of the estate, they are entitled to the possession of the title-deeds on behalf of all parties; and it would be an act of great negligence and a breach of duty for trustees to leave them in the hands of the tenant for life; *Erews v. Bicknell* (6 Ves. 173).

The Plaintiff has no right to cut timber without the sanction and concurrence of the trustees. He is not to be the judge of what, as between himself and those in [392] remainder, is proper to be cut; and he ought to have kept a proper account of the produce.

Jenkins v. Milford (1 Jac. & W. 629) and *Doe dem. Lloyd v. Passingham* (6 Barn. & Cr. 305), as to the legal estate, were cited.

THE MASTER OF THE ROLLS [Lord Langdale], without hearing a reply. This is a case which happily very rarely arises between trustee and *cestui que trust*. There is no question as to any breach of trust, but the sole contest is for power, and arises from a personal feeling, the gratification of which, I confess, I am unable to appreciate the value of.

I have not now to determine either the nature or extent of the estate vested in the trustees, because I will assume that they have the legal estate to any extent they

may require for the purpose of the present motion. I have no doubt whatever that the testator devised the estate to the trustees for the protection of the estate; and if it now appeared that the trustees were desirous of exercising the power which the legal estate gives them, for the purpose of protecting the estate from any injury which it was likely to suffer, I certainly should in no way interfere. But how does the case stand? Notwithstanding all the observations I have heard, I must take it that Mr. Denton, the trustee, has acquiesced in the possession of this estate by the equitable tenant for life. What does it signify that now and then he made his complaints, or that he could not get his co-trustee to concur with him in asserting the right he now insists on. If any interference on the part of the trustees was necessary for the protection of the estate, this Court was at all times open to [393] him. He, however, never applied, but acquiesced in the possession of this estate by the equitable tenant for life, who has regularly paid the annuities: in that respect, at least, there has been no default on the part of the tenant for life. The Plaintiff has therefore been in possession from the death of the testator down to the present time: he has kept down the annuities; and he has done this with the acquiescence of the trustees. As I understand the case, all this has been done in accordance with the will, which directed the trustees either to pay the rents to, or *permit the same to be received* by the tenant for life. The trustees now desire to have the rents received in their own names, and to have possession of the title-deeds.

In the course of this proceeding, I believe there has been some error on both sides. The Plaintiff, Mr. Denton, has desired and assumed to be, and to seem to the world to be, somewhat more independent of the trustees than the testator intended. In that respect, I think he has acted under considerable error.

The trustees now desire to have this matter put on a different footing; but what has happened? There is no arrear of the annuities, but it is said that there has been a cutting down of timber. Now certainly, in my opinion, the Plaintiff has no right to cut down timber without the consent of the trustees; and I think also that he committed considerable error when he cut down his own timber and timber belonging to the estate, and mixed up the whole into one transaction. If he cut down timber on the settled estate for the performance of the duties attached to him as tenant for life, it was his duty to have preserved a distinct account and distinct evidence of the timber he so cut down, and of its application, because he was bound to account for it to the trustees.

[394] The trustees, therefore, now desire that the system which has gone on from the testator's death to the present time may be discontinued, not because the tenant for life has done anything wrong, for nothing had before been said about the timber, but because something wrong may be done. That, I think, is a subject which may hereafter be properly examined into; but what I am to consider upon this interlocutory application is, whether the state of circumstances existing from the testator's death to the present time ought not to be continued up to the hearing of the cause, preserving matters as they were; and I think there is no reason at all why this state of things should, at present, be altered.

At the same time, I am desirous of not saying anything which may tend to diminish the legal power the trustees may have. I say nothing about their estate; they may be entitled to the whole extent they now contend for; and it may be extremely necessary for the purpose of protecting the estate, that they should interfere. What I have now to consider is, whether they have done right in interfering with the existing state of things, and in endeavouring to take away from the Plaintiff, before his rights have been finally determined, that which the trustee has heretofore acquiesced in his having.

Before I interfere, I must have a very distinct undertaking from the Plaintiff, to keep down the annuities—not to cut any timber without the consent of the trustees—not to grant any lease beyond leases from year to year, without the consent of the trustees. The Plaintiff giving these undertakings, and bringing the deeds into Court, and leave being given to the Defendants to apply if any of them should be infringed, I shall restrain the Defendants from proceeding with the action, and from interfering with the Plaintiff in the receipt of the rents.

[395] ROWLEY v. ADAMS. *March 1, 2, 4, 5, 6, 7, 9, May 9, 1844.*

[Affirmed, 2 H. L. C. 725; 9 E. R. 1267. For other proceedings, see 4 My. & Cr. 534; 41 E. R. 206; 7 Beav. 548; 9 Beav. 348; 14 Beav. 130.]

Special directions given in a decree for an account, that if the Master should be unable to take such account, by reason of the non-production of the books of account or other circumstances, he should ascertain and state such circumstances, and report thereon.

Difficulty in making a decree against parties depending on the result of accounts, which could not be satisfactorily taken, in consequence of the loss of the books of account.

Executors, having, for about three years, paid interest on the Plaintiff's legacies, the Court, at the first hearing, directed accounts, with a view of determining, from the state of the assets, the liability of the executors to pay the legacies. The Court, on further directions, refused to hold, that by payment of interest the executors had admitted assets, such a conclusion being wholly at variance with all that had been previously done in the suit.

In 1825 the testator and his son Henry E., who had previously carried on business as brewers, admitted another son, George, into partnership. By the partnership deed, it was agreed, that the plant, &c., which it was stated had been valued at £63,600, exclusive of the stock and debts, should be the capital, of which the testator was to be entitled to a moiety. The testator's surplus monies in the business were represented to amount to £48,915, on which the testator was to receive interest. The testator died in 1826, having, by his will, given his surplus capital to his executors, in trust to invest on security, and pay the income to his wife, and after her death to set apart two legacies of £12,000 each for his daughters and their children; and he gave his interest in the business, and the stipulated ordinary capital, to his sons Henry E., George, and William, who was a minor, and he directed and required his executors to carry on the business, in conjunction with his sons, until the youngest attained twenty-one, and he empowered them to sell the brewery during William's minority. He charged his freehold and other property with the payment of his surplus capital, and directed mortgages of his real estate for securing the legacies. The will was not proved till December 1827; but, after the testator's death the executors left the surviving partners in the undisturbed possession of the partnership property, and though they did not take any active part, the business was carried on with their concurrence. Disputes arose between the surviving partners, and a suit for administration was instituted, which, through the interference of the executors, was abandoned. In January 1828 the executors joined in deeds whereby the partnership was dissolved, and Henry E. assigned his interest to George in consideration of £20,000, and the executors released Henry E. from all claims in respect of any surplus capital. The business was afterwards sold with the sanction of the Court, and in March 1830 was found to be insolvent, and the partnership property turned out to be wholly unproductive to the testator's estate. In January 1831 a bill was filed by infants interested in the two legacies, seeking to charge the executors with wilful default in not having obtained payment of the legacies out of the surplus capital. By several decretal orders, accounts were directed to be taken as to the accuracy of the recitals in the partnership deed, the value of the plant, &c., and the surplus money due to the testator at his death, and accounts of the partnership dealings and transactions; and if he should find that he was unable to take such account, by reason of the non-production of books of account, he was to state the circumstances. He was also directed to inquire by whom the partnership property was possessed at the death of the testator, and how disposed of, and whether the executors, with due diligence and without their wilful default, might have possessed themselves, out of the partnership property, of sufficient to pay the two legacies of £12,000. The Master was unable to take the accounts, by reason of the non-production of the books. He found, however, on the imperfect evidence before him, large sums due to the testator, and large partnership

assets, which however varied in each of his three reports: he also found that the executors might, with due diligence, &c., have possessed themselves, out of the partnership property, of sufficient to pay the two legacies. The Court, however, was of opinion, that there was no reason for thinking that the testator's surplus capital could, if at all, have been realized without putting an end to the business, which the executors were not bound to do. That though the executors had not fully or properly performed their duty, still it was more a matter of conjecture than of proof what the assets and liabilities were, that the results were not accurate or approaching to accuracy, and that it had not been satisfactorily made out either that there were partnership assets, out of which the legacies could have been recovered or secured, nor that the assets were such as to make it impracticable for the executors to obtain payment of the legacies. The Court, in this state of things, declined to charge the executors.

This cause came before the Court upon exceptions to the Master's report. The facts are fully detailed in the judgment of the Master of the Rolls.

[396] Sir William Follett (Solicitor-General), Mr. Kindersley and Mr. Russell, for the executors, and in support of the exceptions.

Mr. Turner and Mr. James Parker, for the Plaintiffs, the children of the legatees of £12,000.

Mr. Tinney and Mr. Erakine, for Mr. and Mrs. Rowley, and Mr. and Mrs. Adams.

Mr. Wray, for the representatives of William Wyatt, the testator's youngest son.

Mr. Temple and Mr. Collins, for Henry Earley Wyatt.

Sir William Follett, in reply.

May 9. THE MASTER OF THE ROLLS [Lord Langdale]. By a decretal order made in these causes on the 9th of May 1839, it was, amongst other things, referred [397] back to the Master to enquire and state to the Court, by whom the property and effects of the partnership in the causes mentioned, existing at the death of the testator Henry Wyatt, were possessed and received, and how and by whom the same had been applied and disposed of, and what had become thereof. And the Master was to enquire, whether the executors, with due diligence and without their wilful default, might have possessed themselves, out of the partnership property and for the testator's estate, of a sufficient sum to pay and satisfy the two legacies of £12,000 each, found to be due to the Plaintiffs, or any and what part thereof: and in making the enquiries, the Master was to have regard to the findings in his several reports of the 29th of April 1835, the 12th of June 1837, and the 1st of May 1838.

The Master, by his report, dated the 16th of December 1843, finds, that the partnership business was carried on after the testator's death by Henry Earley Wyatt and George Wyatt with the concurrence of the executors; but he does not find that the executors or either of them interfered with or gave any orders or directions with respect to the management thereof, or to the collection of the assets thereof. And, on consideration of the states of facts and evidence before him, he finds, that on the decease of the testator there were sufficient assets of the partnership, existing at the death of the testator Henry Wyatt, for the payment of the two legacies of £12,000 each, and he found, that the Defendants the executors, with due diligence and without their wilful default, might have possessed themselves, out of the partnership property for the testator's estate, of a sufficient sum to pay and satisfy the legacies found due to the Plaintiffs, or that they might, with due diligence and without their wilful default, have secured, out of such [398] property and for the testator's estate, a sum sufficient for the payment of the legacies.

To this report the Defendants, the executors, have filed twenty exceptions, of which the three first are admitted to be the most material.

In these exceptions it is alleged, first, that the Master ought not to have certified, that on the decease of the testator Henry Wyatt there were sufficient assets of the partnership existing for the payment of the legacies of £12,000 and £12,000. Secondly, that he ought not to have certified, that the executors, with due diligence and without their wilful default, might have possessed themselves, out of the partnership property and for the testator's estate, of a sufficient sum to pay and satisfy the legacies, or might, with due diligence and without their wilful default, have secured,

out of such property and for the testator's estate, a sum sufficient for payment of the said legacies. Thirdly, that he ought to have certified, that the executors could not, with due diligence and without their wilful default, have possessed themselves, out of the partnership property and for the testator's estate, of a sum sufficient to pay and satisfy the legacies.

Henry Wyatt, the testator, had carried on business as a brewer on his own account. He had three sons—Henry Earley, George, and William; and, having agreed to take Henry Earley into partnership for a fourth share, he executed a deed, dated the 9th of April 1817, and made between himself of the one part, and Henry Earley Wyatt of the other part. It was therein recited, that the father had proposed and agreed to take the son into partnership for the term of twenty-one years, and to give him (subject to a proviso after contained), a fourth [399] part or share of the plant, stock-in-trade, and effects of the business, except the stock of malt, ale, and beer, and the debts owing to the father up to the 1st of January then last; and further, that the said one-fourth share had been estimated at the sum of £6000 as the fourth part of £24,000, the balance due to the father from the trade, upon which sum, it was agreed, that the son should, out of his share of profit, allow to the father interest at the rate of 5 per cent. per annum. In the operative part of the deed, it was provided that Henry Wyatt, the father, might, at any time during the continuance of the partnership, sell and dispose of his share in the partnership stock-in-trade and effects and goodwill, to any person or persons, who should thereupon be taken and received as a partner in the trade, upon such terms as might be mutually agreed upon between the father and son. And it was agreed, that any sum lent to the concern by either party, or any share of profits left in the concern by either party with the consent of the other, should bear interest at the rate of 5 per cent. per annum.

On the 1st of January 1825 George Wyatt, the second son, was admitted a partner with Henry Wyatt, the father, and Henry Earley Wyatt, the eldest son. The deed to carry into effect the agreement then made, is dated the 31st of December 1825, and it was made between Henry Wyatt of the first part, Henry Earley Wyatt of the second part, and George Wyatt of the third part. The partnership between Henry Wyatt and Henry Earley Wyatt was dissolved, and it was agreed, that Henry Wyatt, Henry Earley Wyatt, and George Wyatt, should become and be partners from the 1st of January 1825, for seven years, if all of them, or if Henry Wyatt and either of the others should so long live.

[400] The second article, which has given rise to much controversy in this case, was to the following effect:—That the plant, utensils, implements, horses, drays, waggons, carts, live and dead stock, and other effects now belonging to and employed in the business which have been valued at the sum of £63,626, 4s. 1d. (exclusive of the stock of malt, ale, and beer, and the debts due and owing to the late partnership up to the 31st of December last inclusive, and which are meant to continue the property of Henry Wyatt and Henry Earley Wyatt as part of the effects of their late partnership, and exclusive also of the principal sum of £48,915, 5s. 10d. the amount of surplus money due and owing from the business and belonging to Henry Wyatt; and also the further principal sum of £3129, 16s. 10d. the amount of surplus money due and owing from the business, and belonging to Henry Earley Wyatt, which shall be employed by and in the said intended partnership), and the capital of the said partnership shall consist of the said sum of £63,626, 4s. 1d., and the said several sums of £48,915, 5s. 10d. and £3129, 16s. 10d. shall form a surplus capital of the said Henry Wyatt and Henry Earley Wyatt, on which they shall respectively receive interest. Henry Wyatt was to be entitled to one equal moiety of the £63,626, 4s. 1d., and Henry Earley Wyatt to an equal fourth part thereof; and the annual profits of the business were to be applied in paying to Henry Wyatt and Henry Earley Wyatt interest, at 5 per cent., upon the several sums of £48,915, 5s. 10d. and £3129, 16s. 10d. respectively, and the clear residue thereof was to be paid as to one half to Henry Wyatt, and Henry Earley Wyatt and George Wyatt were each of them to have one-fourth, but, out of the one-fourth of George, Henry Wyatt was to have interest at 3 per cent. upon £15,909, 1s. being the fourth part of the capital of £63,626, 4s. 1d.

[401] No one of those who have had to consider this deed, seems to have been

able to understand what the parties really meant by the recital which it contains, and the intention which they might have had is, at this time, involved in as much obscurity as ever. It must be supposed that, on the 31st of December 1825, there was considerable property belonging to the firm of Henry Wyatt & Son, and several debts owing to and from the firm. In computing the capital to be employed in the new firm, certain portions of the property were excluded; amongst other portions, the debts owing to the old concern; nothing is said as to the mode of paying the debts owing by the old concern; but assuming that the property of the old firm which was excluded from the computation of the capital to be employed in the new firm was sufficient for the purpose, and was intended to be applied in payment of the debts of the old firm, it is stated, that £63,626, 4s. 1d. was to be the capital employed in the new firm, and that the two sums owing to the old partners, and amounting together to upwards of £52,000, were to form a surplus capital.

It would seem, that the whole of the tangible property with which the business was to be carried on, and by which all charges were to be borne, had been estimated, or perhaps arbitrarily stated, at £63,626 and that this was the only property out of which the £52,045 was to be paid to the old partners, and yet interest at 5 per cent. upon the £52,045 was made payable out of the profits of the new firm, and George Wyatt was, besides, to pay interest at 3 per cent. on £15,919 as a fourth part of the £63,626, stated to be the value of the capital to be employed in the new concern, just as if no debt had been charged upon it.

[402] The business was, however, carried on, as the parties may have supposed, under the provisions of this deed.

Henry Wyatt made his will, dated the 14th of June 1826, and he thereby bequeathed to the Defendants Adams and Marks all such *surplus pecuniary capital* and then accrued interest thereon, as, at his decease, he should have in his business, over and above his rightful and stipulated capital therein, and also such shares as he should be entitled to in Government, East India or South Sea stock, in trust to invest the same *surplus capital* in Government or real securities, and to stand possessed of the *surplus capital*, stocks and funds, on trust, during the life of his wife, to pay the income to her, and, after her death, on trust, out of the same surplus capital stocks and funds, to appropriate and set apart the two several legacies of £12,000, each afterwards given for the benefit of his two daughters and their children; and he gave the residue to his two sons George and William. And he gave a copyhold estate to his wife for life, with remainder to his son George, and a freehold estate to his wife for life, with remainder to his son William. And then he gave, devised and bequeathed all his share and interest of and in the brewhouse, and of and in the plant, stock-in-trade, and all chattels used in carrying on the business, and of and in the goodwill of the said business, and the stipulated ordinary capital for carrying on the said business (charged and chargeable as in the said will mentioned), as to one moiety of his moiety, being one-fourth of the whole, unto and for the use of his son William; and as to the other moiety of his moiety, being the remaining one-fourth of the whole, unto and equally between his sons George and William. And he directed and required his executrix and executors to concur in carrying and managing his said business, in conjunction with his sons for the time being of full age, on behalf [403] of William, he being under the age of twenty-one years; and for their trouble they were to have £50 a year out of William's share, and thereout an allowance was to be made for William's maintenance, and the residue of the annual gains was to be invested for his benefit. The testator then gave the residue of his personal estate, subject to his debts and funeral and testamentary expenses, and the deficiency of legacies and otherwise as before mentioned, to his executrix and executors to be invested, and the income to be paid to his wife for life, and, after her decease, in trust for his sons George and William and his daughters. The testator then gave the two legacies of £12,000 each to Adams and Marks, in trust for the benefit of his daughters and their children, with such remainders over as in the will stated. He then empowered the guardians of his son William, during his minority, if they should think fit, to sell William's share in the brewery, and all benefit thereof, unto his brothers, or any other person. He then gave certain property to his son Henry Earley, and for the benefit of his son William, making

the same subject to his just debts, funeral and testamentary expenses and legacies. And he declared that all the freehold and other property whatsoever, devised, given and bequeathed by his will, was so devised, given and bequeathed, subject to and charged and chargeable with the payment of the *surplus capital* continued or lent in the business, and the interest for the same. And he charged all his copyhold and customary estates devised by his will, and also his residuary estate, with the payment of the two several sums of £12,000 to his daughters, and directed that interest, after the rate of 5 per cent. per annum, should be paid thereon till invested, from and after the decease of his wife; and he directed that his sons and all necessary parties should, whenever thereunto required (and which he directed might be [404] done), duly execute good and sufficient mortgages to his trustees, of the same copyhold or customary and freehold estates for securing payment of the same sums of £12,000 each, with interest for the same sums respectively after the rate aforesaid, and expenses, within two years after the date of his decease, in which mortgages were to be contained powers of sale; and should also enter into and execute any other deed, for more effectually charging and making liable such estates, and also the testator's residuary estates, with the payment of the two sums of £12,000 and interest and expenses. And he appointed his wife, or, after her decease or second marriage, Samuel Adams and Edmund Marks, guardian or guardians of his son William Wyatt. And he appointed his wife and Adams and Marks executors of his will.

The testator died on the 9th of July 1826, and the executors were willing to prove the will and to act in execution of the trust thereof.

By the testator's death, the partnership, so far as it depended on the deed of the 31st of December 1825, ceased; but the testator directed and required his executors to concur in carrying on the business in conjunction with his sons Henry Earley and George. By the recital, in the deed of the 31st of December 1825, the testator and his sons had represented, that the capital employed in the concern, exclusive of the stock of ale, &c., and also exclusive of the debts owing to the concern, exceeded £63,000, and that he had surplus capital to the amount of £48,000.

It has been considered that, by the expression "*surplus capital*," which is used in the deed of December 1825, the parties did not mean monies or surplus capital beyond what was employed in the business, but did mean the amount of debts due from the partnership to the individual partners, and payable out of the partnership assets, which were, in the first instance, subject to the debts due from the partnership; and, even on the assumption that a large debt was due to the testator's estate from the partnership, and that the partnership property, after payment of the debts due from the partnership to other persons, was sufficient to pay what was due to the testator, I find nothing in the proceedings which affords any reason for thinking, that the sum of money or debt which the testator called his surplus capital, could, if at all, have been raised or realised, without putting an end to the trade and selling off the property employed in it.

But having regard to the circumstances in which the executors were placed at the time of the testator's death, considering the nature of his will, and the recitals in the deed, the executors appear to me to have had some reason to think otherwise. The testator would seem to have intended, not only that the "*surplus capital*," as he called it, should be taken out of the concern, but also that the trade should be carried on, for he gave the surplus capital with other property to the trustees, on trust to be invested in Government or real securities, and directed that the interest arising therefrom should be paid to his wife, and that the principal money, after her death, was to be the primary fund for payment of the two legacies of £12,000; and he also, by the same will, directed and required his executors to concur with his sons of full age, in carrying on the business till his son William attained the age of twenty-one years.

It would seem, however, that the testator had some doubt or misgiving, not only as to the sufficiency of the [406] surplus capital to pay the legacies, but also as to the practicability of realising the "*surplus capital*" out of the partnership assets. He did not intend his daughters to rely on that fund alone for payment

of the legacies, for, although the legacies amounted to £24,000, and the "surplus capital," as it was called, had, on the 31st of December 1825, been stated to be £48,000, and is supposed to have been afterwards increased, nevertheless, after making the surplus capital the primary fund for payment of the legacies, the testator charged his other property with the payment thereof, and directed security to be given; and he also thought fit to subject and charge his freehold and other property with the payment of the "surplus capital" continued or lent in the business.

After the investigation which the subject has undergone, it is very difficult, if not impossible, to form any clear notion of that which the testator intended to be done; and on this part of the case I cannot conclude that the executors, even if they had possessed the power, would have been to blame, or would have become liable to answer, personally, for any loss which ensued, merely because they did not proceed at once to realise, by sale of the partnership property, such debt as was due to the testator from the partnership at the time of his death. I do not think that they could have done so, without putting a stop to the trade, which they were expressly directed and required to carry on; and I think that the directions to invest the testator's "surplus capital" are materially qualified, not only by the directions to carry on the trade, but also by the direction to secure the legacies in another manner, and by the "surplus capital" being itself charged on the testator's other property.

[407] It appeared, upon the death of the testator, that there was a very valuable and important business in which a large capital was employed, and which the executors were directed to concur in carrying on with the testator's adult sons, until his minor son came of age, with the intention, no doubt, that after that time, his three sons should carry on the business in partnership together; and also with the intention, that the debt due to himself, which he called "surplus capital," should be paid, and should be the primary fund for paying the legacies to his daughters, for which, however, he provided other security.

Under these circumstances, the executors seem to have thought, that the assets would be sufficient to pay everything thereout payable; and they seem only to have desired that the business might be carried on as the testator intended. Why were they to distrust Henry Earley and George, the surviving partners of the testator, with whom the testator himself had directed them to concur in carrying on the trade? Why were they to think, that in doing the very thing which the testator had directed them to do, they were exposing his assets to hazard? How could they suppose, that in following his directions, they were committing a breach of trust, and exposing themselves to liability. But a short time after the testator's death, serious disputes arose between Henry Earley Wyatt and his brother George, the surviving partners; and Henry Earley Wyatt, the elder brother, denying the validity of his father's will, and, in November 1826, causing a *caveat* to be entered against the proof of it. The authority of the trustees being thus questioned, it was impossible for them to act as if they had obtained probate.

[408] It was argued, that they ought to have known, and must have known, that Henry Earley Wyatt had no case against the will. I think it appears that they never had any serious doubt of the will being ultimately established; but Henry Earley Wyatt, in his answer to the bill filed by the executors in 1829, which was long after the *caveat* was withdrawn and the probate granted, did not admit the validity of the will; and the executors, being for a long time unable to obtain probate, the limited power, which the will would have given them, to interfere with the property and rights of the surviving partners, was very much diminished. The disputes between the brothers Henry Earley and George proceeded to great length. It appears, from a letter written by Mr. Coote to Henry Earley in January 1827, that the executors took the part of George, and accused Henry Earley of considerable misconduct. Whether the accusation was well founded, or what defence was made, does not appear; but it is plain, that with such disputes between the partners, the business which they were to carry on could not prosper, and with the knowledge which has now been obtained, it cannot be doubted, that Mr. Orchard and Mr. Rowley adopted a very prudent course for their wives and families, when, on the 5th of March 1827, they filed a bill in this Court to have the trusts of the will duly executed, and to procure the appointment of a

receiver of the partnership property and the other personal estate of the testator, and to have the accounts taken.

In this bill it was stated, that after the testator's death, the trade was carried on by Henry Earley Wyatt and George Wyatt or one of them; that great differences and animosities existed between them; that they had no communication with each other on the affairs of [409] the trade, and that no proper accounts were kept, and misconduct was charged against Henry Earley Wyatt.

It is to be regretted, and by none so much as by the executors, that this bill was not prosecuted; but the executors, and more especially Mr. Marks, appear to have been persuaded that the assets were amply sufficient for payment of the legacies, and that the trade might be carried on advantageously, if Henry Earley Wyatt could be prevailed upon to leave it, and if the business were not interfered with by a receiver. Under these circumstances, Mr. Coote, who acted as solicitor for George and also for the executors, whilst he was taking the necessary steps to obtain probate of Henry Wyatt's will, was also taking steps to induce Henry Earley Wyatt to sell his interest in the concern to George, and also to induce the Plaintiffs in *Orchard v. Wyatt* to dismiss their bill. These several objects were dependent on one another; Orchard and Rowley would not dismiss their bill till probate of the will was granted to the executors, and Henry Earley Wyatt would not agree to withdraw his caveat, till George had agreed to purchase his share in the concern; and many difficulties arose in settling the terms of the purchase. After very carefully reading all the correspondence, and all the evidence relating to the treaty and negotiation, I see no reason to think, that the executors and Mr. Coote on their behalf did not act with perfect *bona fides*, and with the intention of carrying into effect the testator's intention, so far as they could after the disputes arose between Henry Earley and George. It may have been, and I think it was, very imprudent to assist or concur in the purchase by George of Henry Earley Wyatt's share on such terms as were adopted, and very imprudent to use any endeavours to procure the dismissal of the bill in *Orchard v. Wyatt*; but there is nothing to [410] shew, that the executors did not adopt the course which they sincerely believed to be beneficial to the estate of the testator. It seems manifest, that Orchard and Rowley must, ultimately, have been of the same opinion; and I do not think that the executors are liable to any blame for not prosecuting their suit for probate with greater activity than they did. No unnecessary delay appears to have taken place, until such progress had been made towards completion of the purchase, that further adverse proceedings would only have occasioned needless expense.

Nevertheless, it does not appear to me that the executors fully or properly performed their duty. Some investigation of the property and accounts had taken place, and the result of it was, apparently, such as to satisfy the executors, that the statement of the capital of the partnership, recited in the deed of the 31st of December 1825, was altogether erroneous; that the plant, stock and effects of the partnership, exclusive of beer and malt and of debts due, amounted to no such sum as £63,000; and that the something, which was called the testator's "surplus capital," amounted to no such sum as £48,000. Finding and acknowledging such errors, I think that the executors ought to have taken peculiar care to have the state of the property and affairs of the partnership accurately ascertained, and ought not to have sanctioned the sale of Henry Earley Wyatt's share to George, and to have done the other things provided by the deeds of January 1828, without first ascertaining the real value of the capital, and the accurate state of the concern at the time of the testator's death, and at the time of the intended assignment. They were under great difficulties; it seems probable that the state of the concern was better known to Henry Earley Wyatt than it was, or could be, to any other person, and that he was not very willing to give information. It may have [411] been, that, notwithstanding every proper exertion, they would not have been able to obtain all the information which they ought to have had; but in my opinion, if they had not the information which the occasion required, they ought to have refused to sanction the arrangement between Henry Earley and George. It was strongly pressed against the executors, in argument, that they improperly relied on such information as Henry Earley Wyatt thought proper to afford them at a meeting held on the 8th of June 1827, and proceeding upon that, entered into an arrangement which the true state of the assets did not warrant, and thereby occasioned

great loss to the estate. The whole extent of the reliance which the executors placed on Henry Earley Wyatt, or how or when he satisfied them that he was to be relied on, does not appear; but they admit, that, from the representations made to them by Henry Earley Wyatt as to the state of the assets of the partnership, they were induced to believe, that, on the 1st of January 1828, the testator had not any "surplus capital" in the trade, or any sum of money due to him therefrom on his separate account, and that there were not any assets of the partnership remaining, except his share and interest in the partnership trade, and a mortgage debt of £800 due from Cooper.

The testator's widow died on the 15th of April 1827.

Probate of the will having been obtained on the 24th of December 1827, the executors joined in the execution of deeds of the 1st of January 1828, whereby the partnership was dissolved as to Henry Earley Wyatt, and by which Henry Earley Wyatt assigned his share and interest in the concern to George Wyatt, in consideration of £5000 said to be then paid, and the further sum of £15,000 agreed to be paid by future half-yearly pay-[412]ments of £500 each, and the executors, professing to do it as far as they lawfully could, released Henry Earley Wyatt from all claim they might have against him, in respect of any "surplus capital," and also from any claim they might have against him as creditors of the partnership.

After the date of these deeds, the business was carried on by George Wyatt alone. On the 6th of May 1827 William, the younger brother, came of age. He declined to become a partner in the business, and on the 15th of July in the same year, a new bill was filed by Rowley and Orchard, and their wives and children, to have the estate protected, and the trusts of the will executed. In that suit, it was alleged, that the executors had proved the will, but that, in consequence of various disputes and differences, they had not acted in the trusts or in execution of the will of Henry Wyatt. A receiver was appointed, and George Wyatt having, with the approbation of the executors, contracted to sell the property to Mrs. Thomson, a reference was made (Nov. 1829) to the Master to inquire into the propriety of that arrangement; and ultimately (in March 1830) it appeared that the concern was insolvent, the debts owing by the concern amounting to £64,600 and upwards, whilst the assets did not amount to £57,400; and thus, the partnership property turned out to be wholly unproductive to the testator's estate. George Wyatt and Thomson, not long afterwards, became bankrupt (in Dec. 1831), and Henry Earley Wyatt obtained payment of part only of the £15,000 stipulated to be paid to him.

The present bill was filed, by the infants interested in the two legacies of £12,000, on the 3d of January [413] 1831; and the allegation on their behalf, which I have now to consider is, that the executors, without their wilful default, might have obtained payment of the legacies of £12,000 out of the partnership property.

For the purpose of proving, that the executors might, without their wilful default, have obtained payment of the two legacies of £12,000 it should be established:—

First. That there were assets applicable to the payment of the legacies, which the executors might have received.

Secondly. That such assets were lost, through the wilful neglect or default of the executors.

In this case, therefore, the first question is, whether the testator had in the partnership concern, in the shape of "surplus capital" or otherwise, an interest convertible into money sufficient for the payment of these legacies.

Sir John Leach, by his decree dated the 28th of April 1832, directed an inquiry as to the accuracy of the recitals in the deed of the 31st of December 1825; and an inquiry, what, at the time of the death of Henry Wyatt, was the value of the plant, utensils, implements, horses, drays, waggons, and other effects, not excluding malt, ale, beer, and debts; and also what was, at that time, the amount of surplus money due and owing from the business, and belonging to the testator.

Sir John Leach thought fit to direct the inquiry as to the accuracy of the statement in the partnership deed, although his own mind appears to have been satisfied on the subject, for he said, that no person looking at [414] the case could fail to see, that the sums named in the deed were nominal and fictitious sums.

The Master made his report on the 29th day of April 1835; he states that various

books, which, by the evidence before him, appear to have been kept and used in the partnership business, had not been produced before him,—viz., the cash-book, the bankers' pass-book, the cheque-book, two books bound in calf, in which were entered the annual accounts of the partnership for the year preceding the 1st of January 1825, and two other books, containing an account of what each partner had drawn out. And he finds, that, in consequence of the non-production of the books, he is unable to state what, on the 1st of January 1825, was the value of the plant and other articles, which in the deed of the 31st of December 1825 was stated to amount to the sum of £63,626, 4s. 1d. But he found that, on the 1st of January 1825, there was due from the partnership to Henry Wyatt £48,915, 5s. 10d., and to Henry Earley Wyatt £3129, 16s. 10d., which sums were considered as surplus capital; but that they did not consist of monies or surplus capital over and above what was employed in the trade. That £13,000, part of £52,045, 2s. 8d. the aggregate of the two sums owing to the partners, represented improvements made to the stock since the 1st of January 1817, and the residue, about £39,000, represented the property of the partnership of Wyatt & Son, exclusively of the plant and other things, and except the improvements, but in the absence of the books in which the accounts were entered, and of the other books before referred to, and save as in his report set forth, the Master was unable to state the particulars of the sum of £13,000, or, except as in his report mentioned, how the several sums of £48,915, 5s. 10d. and £3129, 16s. were made up, or what was the amount of surplus money due [415] and owing from the business to the said Henry Wyatt and Henry Earley Wyatt on the 1st of January 1825. The Master further finds what was the value of the plant and other things at the time of the testator's death. No evidence had been laid before him as to the quantity or value of the malt, hops, and corn on the premises at that time; but he finds the value of several other particulars, amounting in the whole to £70,208, subject to a debt of £8000 owing to the bankers; and that there was owing to Henry Wyatt from the concern a sum of £57,329, 9s. 8d.; and that the property liable to pay the same was, in the first instance, subject to the debts owing from the partnership, but that, from the non-production of the books, he was unable to state, save as aforesaid, what was the amount of surplus money at that time due and owing from the business and belonging to Henry Wyatt.

Considering that the testator's assets were to be determined at the time of his death, and that the state of the partnership at a prior time could only be material as affording a period and a state of accounts from which a subsequent account could be taken, the directions contained in the decree were imperfect; and upon the report, made on such imperfect evidence, in answer to the inquiries directed by Sir John Leach, no further directions could be given, and the case coming on before Lord Cottenham, when Master of the Rolls, on the 11th of January 1836, he directed an account to be taken of the partnership dealings and transactions, regard being had to the findings stated in the Master's report of the 29th of April 1835; and if he should find that he was unable to take such account, by reason of the non-production of books of account or other circumstances, he was to ascertain and state such circumstances and to make a separate [416] report thereof (see *Turner v. Corney*, 5 Beavan, 515); and thereupon the parties were to be at liberty to apply to the Court for such further order as should be necessary, and the usual accounts were directed to be taken of the testator's personal estate, debts, and legacies, and the Master was to inquire as to the real estate.

In his judgment, on making this order, Lord Cottenham noticed, that the Plaintiffs were claiming their legacies out of a specified part of the testator's estate, and could not be in a better situation than a legatee of such specific part would be, and that no specific legatee could recover the thing bequeathed, without proving the existence of the thing bequeathed, and that it was not wanted to satisfy prior charges.

The Master made a separate report, dated the 12th of June 1837, and thereby found, from such evidence as was before him, that hops belonging to the brewery business at the testator's death were, according to one estimate, of the value of £7993, 15s., and, according to another estimate, of the value of £4893, 15s., and that, besides the book debts owing to the bankers, the partnership was indebted to other

persons to the amount of £17,463 (1); and he expressed his opinion to be, that, by reason of the non-production of the books of account therein mentioned and the circumstances therein contained, he could not take the account of the partnership dealings and transactions by the order directed to be taken, further than before mentioned, and that he had no means whatever of taking any account as between the individual partners in the business.

[417] Exceptions were taken to the separate report, and the Master made his general report on the 1st of May 1838, and the cause came before me on the exceptions and for further directions. The exceptions were overruled, and on the 9th of May 1839 it was referred back to the Master to make the inquiries which I have before particularly mentioned. (*Ante*, p. 396.)

This order was reheard before the Lord Chancellor, who confirmed it (4 Myl. & Cr. 534), and, in pursuance thereof, the Master made his report of the 16th of December 1843, which is now under consideration.

The general result of the Master's report is, that at the time of the testator's death the partnership assets were of the value of £89,961; that the debts owing from the firm to strangers amounted to £39,748, leaving a surplus of somewhat more than £50,000; that the firm was indebted to the testator in more than £57,000; and the Master has concluded, that the executors might, without their wilful default, have obtained out of the assets, and for the testator's estate, a sufficient sum to pay the two legacies of £12,000 each, or might have obtained security for them.

It is obvious that the Master, although he has used the utmost diligence, has not been able to obtain results satisfactorily shewing the state of the assets and liabilities of the firm. Having used his best endeavours to obtain accurate results, he states, in his different reports, that save as he has done, he is unable, in consequence of the non-appearance of the books relating to the partnership, to state the property and effects of the partnership existing at the testator's death, or by whom they [418] were received or applied, or what parts thereof were outstanding. After all the trouble which has been taken, and all the expense incurred, it is, at this time, more a matter of conjecture than of proof what the assets and liabilities were.

The accounts of the dealings and transactions of the partnership have not been, and cannot be, accurately taken. No account has been taken between the individual partners. It does not appear what would probably have been produced by a sale of the plant and stock, on breaking up the business shortly after the testator's death.

The value of the malt, though stated in a report which has been confirmed, does not rest on proof which can be called satisfactory. The value of the hops, as stated in this report, is not satisfactorily proved; and the amount of debts, in the first report stated to be £8000 and upwards, in the second report stated to be £25,463, and in the present report stated to be £39,748, cannot be considered as accurately ascertained. It may possibly be, that an accurate statement of the accounts and liabilities would not so alter the present apparent state of the assets as to shew, that after payment of the debts, there would not have been a surplus belonging to the partners of such amount, that the testator's share of it would have been sufficient to pay these two legacies; but this is not and cannot be proved, because no complete and accurate account can be taken. The assets, as stated by the Master, comprise debts due to the testator and his partner Henry Earley Wyatt, and debts due to the testator and his two sons as partners. What was due and payable to the testator from either of the partners does not appear. Some portions of the several debts have not been received; and it does not appear, whether, by any exertion, the unreceived debts could have been collected; neither does it appear, whether all the debts which were in fact received could have been collected, if the business had been suddenly put an end to; and we do not know what was the true amount of the demands upon the concern.

To what extent the results obtained by the Master are erroneous, in consequence of the imperfect and unsatisfactory evidence before him, it is impossible to say, but

(1) He also found that the stock of malt on the premises at the death of the testator was worth £13,015, 16s.

I cannot affirm, or even think it probable, that the results are accurate, or approaching to accuracy. With results, which, as it seems to me, must be to some, and even a very considerable extent, erroneous, and without having any means of obtaining results which can be relied on as accurate, or of shewing the extent of the errors occasioned by the non-production of books and accounts, can I say that the executors are answerable as if the results were ascertained to be accurate?

Every successive investigation has resulted in an apparent increase of assets, but also in an apparent decrease of surplus applicable to the payment of the debts due to the partners. None of the results are or can be considered as accurate, but such as they are (and the Master could not do better, nor are better results likely to be ever attained), in round numbers, the first report (*ante*, 413) shewed assets £70,000, ascertained debts £8000 and upwards, leaving a surplus of about £62,000. The second report (*ante*, 417) shewed assets £83,000, ascertained debts £25,000, leaving a surplus of £58,000; and the last report shews assets £89,000, ascertained debts £39,000, leaving a surplus of £50,000; the principal items, in all the reports, resting on most imperfect evidence. Is it possible to treat this last result as if it were accurate, to charge the executors personally, as if it were proved to [420] be so? Such a proceeding would, as it appears to me, be inflicting an arbitrary penalty upon the executors, instead of charging them with ascertained assets, which, without a breach of trust, they might have received.

I am, as I have before stated, far from stating that the executors fully performed their duty; they were, I think, greatly mistaken in using endeavours, which unfortunately succeeded, to stop the suit which was commenced, for the security of the legatees; greatly mistaken in dealing with the property without having an accurate account of it taken, and greatly mistaken in executing a release to Henry Earley Wyatt, in the manner they did; but, in a case where it is not proved by any satisfactory evidence that the most active diligence could have obtained payment of these legacies out of the partnership property, I feel an insuperable difficulty in saying, that the executors might, without their wilful default, have received them. The Master, indeed, has not found absolutely, that the Defendants might have possessed themselves, out of the partnership property and for the testator's estate, of a sufficient sum to pay the legacies, but he proceeds, in continuation of the same sentence, as follows: "or they might, with due diligence and without their wilful default, have secured, out of such property and for the testator's estate, a sum sufficient for the payment of the said legacies." Considering that a *caveat* had been entered against the probate of the will, and that the surviving partners had a legal right to possess themselves of the partnership assets, and to collect the debts, it is obvious, that the executors, who could not prove the will till a subsequent time, could only have secured the partnership assets, and the payment of the legacies out of the testator's interest in them, by filing a bill in a Court of Equity, or by availing themselves of the bill already filed by the legatees. [421] I think that the executors (who were trustees of the legacies) might, by a bill of their own, have obtained the appointment of a receiver. Acting in concurrence with the legatees, a receiver might have been appointed in their suit, and it would have been much better if such a course had been adopted; but were the circumstances, as they were then known, such as to make it the imperative duty of the executors to adopt it?

Considering the statement which the partners had made of their capital in their partnership deed, there seemed to be sufficient reason to believe that the concern was prosperous, and might pay what was due from it to the testator. If this were an error, as it probably was, it was occasioned by the testator himself; but there seemed to be nothing but the conduct imputed, truly or erroneously, to Henry Earley Wyatt, to prevent the future prosperity of the trade, which the testator had expressly directed them to carry on, and it was clear, that the appointment of a receiver, if it did not put an end to the trade altogether, would very greatly injure it. The executors, by filing a bill or concurring in the appointment of a receiver, would, at once, have relieved themselves from all further responsibility; but, in the circumstances in which they were placed, I cannot say that their abstaining from filing a bill was such a wilful neglect as would make them personally answerable for something which might have been recovered by the suit, and which, in the absence of the suit,

was lost; and how is it possible to ascertain what might have been recovered in the suit? Who can venture to affirm that by the suit, if duly prosecuted, £24,000 might have been recovered for the testator's estate out of this concern, of which so little is accurately known?

[422] The executors were traders dealing with the concern, and were creditors of it, and it was argued, that they had a strong personal interest in the business being carried on. They might have had, perhaps had, some interest of that kind; but they did not interfere in the conduct of the trade, and there is really nothing to shew that any such personal interest influenced their conduct. The mere existence, or probable existence, of such an interest naturally excites suspicion; but in Courts of Justice suspicion must not be permitted to usurp the place of evidence and established truth.

And it was argued at the Bar, that the executors having paid, or consented to the payment of interest on the legacies (NOTE.—Down to the 18th of April 1829), ought to be held to have admitted assets for payment of the legacies; but such a conclusion would be wholly at variance with all that has been done in these causes. If the Court had considered that, under the circumstances of this case, the executors were to be held to have admitted assets to pay the legacies, all the investigations which have been made would (so far as the legacies are concerned) have been wholly unnecessary. And having regard to all the other circumstances which I have stated, I am unable to conclude that the executors could, without their wilful default, have secured, out of the partnership property for the testator's estate, a sufficient sum to pay the legacies.

Being of this opinion, I must allow the two first exceptions; but the evidence is not such as to enable me to allow the third. It does not appear to me to be satisfactorily made out, that there were partnership assets out of which the legacies could have been recovered or secured; on the other hand, it is not satisfactorily made [423] out, that the assets were such as to make it impracticable for the executors to obtain payment of the legacies. I cannot affirm either one or the other—either the proposition in the report that the executors might have obtained the legacies, or the proposition in the third exception, that they could not.

The parties have, I think, on both sides properly considered that the other exceptions are not very material to be considered; but I have examined them, and I am of opinion that, except the fourth, they must all of them be overruled. I do not at present consider whether any hope can be entertained of obtaining further information upon further inquiry, or whether any of the parties may or may not be entitled to any further inquiry, if they desire it. Those questions may be considered on further directions; but I am of opinion that the evidence, as it stands, is not sufficient to support the finding as to the hops, which are the subject of the fourth exception; and, attending to the inquiries upon which the Master proceeded, to the directions given, and to the evidence obtained, I am of opinion that the Master was perfectly right, in the regard which he had to his former findings. He was well aware of the imperfect nature of the evidence on which those findings rested; and he has admitted evidence to prove them to be erroneous, and has either corrected them, or retained them, as upon the evidence appeared to him to be proper; and in this respect I think that he proceeded correctly, and has come to right conclusions. On this ground, I overrule all the exceptions from the 5th to the 12th, both of them included.

Upon the evidence, I am of opinion, that the executors did leave the surviving partners in the undisturbed possession of the partnership property, and that they [424] did so far consent to and encourage the business being carried on by the surviving partners, that although they did not take any active part in carrying on the trade, it may be properly said, the business was carried on by the surviving partners with their concurrence; and for these reasons, and because there was no direction to ascertain the state of the assets on the 1st of January 1825, I am of opinion that the thirteenth, fourteenth, fifteenth, and nineteenth exceptions must be disallowed.

The findings of the Master upon subjects of the sixteenth, seventeenth, and eighteenth exceptions, appear to me to be in accordance with the evidence; and the

exceptions must, for that reason, be overruled. I think that Mr. Coote was acting for the executors as well as for George Wyatt during the negotiation.

The twentieth exception relates to the real estate, and was not argued.⁽¹⁾

[425] TITLEY v. WOLSTENHOLME. July 1, 6, 8, 1844.

[S. C. 13 L. J. Ch. 410. See *Ockleston v. Heap*, 1847, 1 De G. & Sm. 642; *Osborne v. Rowlett*, 1880, 13 Ch. D. 786; *In re Morton and Hallett*, 1880, 15 Ch. D. 146.]

A testator devised real and personal estate, on certain trusts, which, as the Court considered, the testator intended to be performed by his trustees named, and the survivors and survivor, and by the heirs and assigns, or by the executors or administrators, of the survivor. The will contained no power to appoint new trustees. The surviving trustee devised and bequeathed the trust estates and powers to A., B., and C., upon the trusts of the first will. Held, that this devise and the appointment of A., B., and C. as trustees, were valid.

Where a trust estate is limited to several trustees, and the survivors and survivor of them, and the heirs of the survivor of them, the surviving trustee does not commit a breach of trust by not permitting the trust estate to descend, or by devising it to proper persons, on the trusts to which it was subject in the hands of the surviving trustee. *Semble*.

The question in this cause related to the validity, in equity, of a devise made by a surviving trustee of the trust estates, having regard to the particular expressions used in the will creating the trust, and to the fact, that no express power of appointing new trustees was thereby given. The circumstances which gave rise to the question are as follows:—

Richard Titley, the testator, by his will dated in 1828, devised and bequeathed his real and personal estate to his wife, his son Richard, and Robert Tebbutt, [426] “their heirs, executors, administrators, and assigns,” upon the trusts, &c., after mentioned. He then declared the trusts, which, on eleven several occasions, he expressed as being to be performed by “the said trustees, and the survivors and survivor of them, his or her heirs and assigns.” The same persons were empowered to sell the residuary real estate, and to give receipts for the purchase-money, and “the said trustees and executors, and the survivors and survivor of them,” were to get in the personal estate.

The “said trustees and the executors, and the survivor and survivors of them, his or her executors and administrators,” were to apply the proceeds of the sale of the real estate directed to be sold, and of his personal estate, in payment of specified legacies to his children, and were to invest the residue in realty, and apply the rents as therein mentioned, and in the meantime to invest in the funds, &c.

He declared, that “if it should appear to his said trustees, or the survivors or survivor of them, his or her heirs or assigns, that it would be advantageous” to sell his estate at Gorton, or the estates to be purchased “by the said trustees,” by virtue of the powers thereinbefore given them, it should be lawful “for the said trustees, or the survivors or survivor” of them, to do so.

There was a power of leasing to “his said trustees for the time being,” and an indemnity clause to his “trustees and executors;” and the testator declared, that “the said trustees and executors, and each of them, their and each of their heirs, executors, administrators and assigns,” might reimburse themselves their costs, &c., &c.; and he appointed his wife, Henry [427] Burgess, Robert Tebbutt, and his son Richard executors.

The will contained no power to appoint new trustees.

(1) This exception was subsequently argued, and the further directions and costs disposed of; see *post* [7 Beav. 549]. An appeal to the House of Lords is however pending.

By the deaths of the other parties, Robert Tebbutt became the sole surviving executor and trustee.

Robert Tebbutt, by his will dated in 1838, after disposing of his own real and personal estate, devised and bequeathed to Edward Titley, David Waddington, and Charles Wolstenholme, their heirs, executors, administrators, and assigns, all the trust estates, monies, and premises vested in him as surviving devisee in trust and executor of the will of Richard Titley, upon the trusts, &c., &c., expressed in the will of Richard Titley; and he appointed Wolstenholme, Crompton, Unwin, and Ollier, executors.

This bill was filed by the *cestuis que trust* under the will of the original testator, praying a declaration that Robert Tebbutt was not authorized to appoint trustees, and that the devise and bequest of the trust estates by his will was invalid and ineffectual, and for the appointment of new trustees, and conveyance to them of the trust premises.

Mr. Bacon, for the Plaintiffs. The will of Titley gives no authority to the trustees to nominate new trustees; the devise of the trust estate is therefore invalid, and new trustees should be appointed under the authority of the Court. This case is governed by the decision in *Cooke v. Crawford* (13 Simons, 91), in which case a testator devised his real estates to A, B, and C, in trust [428] that they, or the survivors or survivor of them, or the heirs of the survivor, should, as soon as conveniently might be after his decease, but at their discretion, sell the same; and he empowered them and their heirs to make contracts with and conveyances to the purchasers: and declared that the receipts of them, or the survivors or survivor of them, or the heirs, executors, or administrators of such survivor, should be good discharges to the purchasers: and he directed that they, their heirs, administrators, and assigns should hold the proceeds of the sale upon certain trusts. A and B disclaimed, and C alone acted. He devised the estates to M. and N. upon the trusts affecting the same. After his death, M. and N. agreed to sell the estates to P.: it was held by Sir L. Shadwell that M. and N. were not entitled to execute the trust for sale, as they were the devisees, and not the heirs, of C.

The Vice-Chancellor of England, in giving judgment in that case, said, "It is plain that, when William Hall, who, by the disclaimer of Burkitt and Woolley, became the sole trustee, thought fit to devise the legal estate that was vested in him, he did an act which he was not authorized to do. And here I must enter my protest against the proposition, which was stated in the course of the argument, that it is a beneficial thing for a trustee to devise an estate which is vested in him in that character. My opinion is, that it is not beneficial to the testator's estate that he should be allowed to dispose of it to whomsoever he may think proper; nor is it lawful for him to make any disposition of it. He ought to permit it to descend; for, in so doing, he acts in accordance with the devise made to him. If he devises the estate, I am inclined to think that the Court, if it were urged so to do, would order the costs of getting the legal estate out of the devisee, to be [429] borne by the assets of the trustee. I see no substantial distinction between a conveyance by act *inter vivos*, and a devise; for the latter is nothing but a *post mortem* conveyance; and, if the one is unlawful, the other must be unlawful."

In *Townsend v. Wilson* (1 Barn & Ald. 608, and 3 Mad. 261) it was held, that a power of sale given to three trustees, was not well executed by the two surviving trustees; and in *Bradford v. Belfield* (2 Simons, 264), it was determined that a trust for sale vested in A. and his heirs, could not be executed by an assign of A.

The testator having abstained from giving to his trustee any power of selecting his successors, it was as much a breach of trust to devise the trust estate, as it would have been to have transferred it in his lifetime.

He referred to 2 Jarman on Wills, p. 714.

Mr. Turner and Mr. Little, for the Defendants. This case does not come within the decision of *Cooke v. Crawford*. Here the devise and bequest is to the trustees, their heirs, executors, administrators, and assigns, and the trusts are to be performed by the assigns. In *Cooke v. Crawford* the Vice-Chancellor of England observed on the omission of the word assigns. He says, "It is observable that the testator has not used the word 'assigns,' either in the clause in which he has created the trust for sale,

or in either of the two clauses that follow it, in which he points out the machinery by which the sale is to be effected. He does not introduce that word until he begins to speak of something that is to be done after the sale has taken place, that is, until he [430] declares the trusts upon which the *proceeds of the sale* are to be held."

A trustee who has undertaken a trust cannot, without authority, relieve himself from his duty, and refer its performance to another person, for *delegatus non potest delegare*. The rule, however, ceases upon the death of the trustee, when there is an end to all personal confidence, for a testator cannot be supposed to entertain any personal confidence in the heir, executor, or administrator of a trustee; they must be unknown to the testator, as it depends on the chance of events who may fill those characters.

If it be a breach of trust to devise a trust estate, it would be equally one for a trustee to make a general devise without excepting thereout the trust estates. The testator, by the use of the words "executors" and assigns, must have intended his trustee to have some power of nomination; and it would be no more improper to make a devisee than to appoint an executor. The interests of the *cestui que trust* might require such a devise; for the heir might be an infant or lunatic, or under disability, or an alien. To prevent the estate falling into improper hands or escheating to the Queen, who would not be bound by the trusts, it surely would not be wrong to devise the trust estate to trustworthy persons, by whom the trusts might be carried into execution.

A "devisee" may come within the term "heir," as he is considered the *hæres factus*, besides which a devisee is an "assignee" in law; *Whitfield v. How* (2 Shower, 59).

Lord Eldon did not concur in the decision in *Townsend v. Wilson* as appears in *Hall v. Dewes* (Jacob, 189), and *Bradford v. Belfield* (2 Simons, 264) does not apply.

[431] Lastly. Conveyancers have always considered, that in these cases a trustee might properly devise a trust estate. The result of holding the contrary will be not only to destroy many titles, but to make the estates of the trustees, who have heretofore devised trust estates, liable at this moment for a breach of trust. The Court has always regard to the established practice of conveyancers, and considering the prejudicial consequences, will not feel inclined to extend the doctrine of *Cooke v. Crawford*.

They also referred to *Lord Braybrooke v. Inskip* (8 Ves. 417), *Wall v. Bright* (1 Jac. & W. 494, 1 Sug. on Powers (6th ed.), 223), *The Midland Counties Railway Company v. Westcomb* (11 Sim. 57).

Mr. Bacon, in reply. The testator has pointed out the heir as the person who is to perform the trusts after the death of the trustee, and the latter had no authority to vary that arrangement.

If difficulties arise in cases of lunacy, &c., a proper remedy will be applied; but these difficulties are not to extend the powers of a trustee, and enable him to exercise a discretion which the author of the trust has not given him.

July 8. THE MASTER OF THE ROLLS [Lord Langdale]. Robert Tebbutt was surviving trustee and executor under the will of Richard Titley. By his will, dated the 30th of July 1838, Robert Tebbutt gave, devised, and bequeathed unto the use of Edward Titley, David Waddington, and Charles Wolstenholme, their heirs, executors, administrators and assigns, all the trust estates, monies, [432] and premises vested in him as surviving devisee in trust and executor, named and appointed in and by the last will of Richard Titley, to hold the same, to the use of the said Edward Titley, David Waddington, and Charles Wolstenholme, their heirs, executors, administrators, and assigns, according to the nature and quality of the same premises respectively, upon the same trusts, and to and for the same ends, intents, and purposes, and under and subject to the same powers, provisos, and declarations as are limited, expressed, declared, and contained of and concerning the said estates, monies, and premises, in and by the said will of the said Richard Titley, or as near thereto as circumstances would admit.

The question in this cause is, whether the devisees in trust, under the will of Robert Tebbutt have, by virtue of the devise, lawfully become trustees of the estates devised by the will of Richard Titley. It is admitted that the legal estates and interests which were vested in Robert Tebbutt, as surviving trustee and executor,

have, by virtue of his will, become vested in his devisees and legatees; that they, as such devisees and legatees, are under an obligation so to dispose of such legal estates and interests, that the *cestui que trust* under the will of Richard Titley may have the benefit of them; but it is alleged, that they have not, themselves, any legal authority to execute the trusts, and consequently, that new trustees ought to be appointed for the purpose by this Court.

Richard Titley, the testator, by his will dated the 16th of January 1828, gave, devised, and bequeathed to his wife, his son Richard, and Robert Tebbutt, their heirs, executors, administrators, and assigns, all his real estate and all his personal estate; to hold the same real and personal estate, to the use of his wife, his son [433] Richard, and Robert Tebbutt, their heirs, executors, administrators, and assigns, according to the nature thereof, to, for, and upon the several uses, trusts, ends, intents, and purposes in his will after mentioned and declared. And then he proceeds to particularise the trusts, directing a part of the trusts which was to be performed by application of the personal estate, to be performed by the trustees, and the survivors and survivor of them, his or her executors or administrators, and directing other parts of the trusts which were to be performed by application of rents or by conveyance or sale of real estates, to be performed by the trustees, and the survivors or survivor of them, his or her heirs and assigns. There are, in the will, a few directions given, in respect of which neither the word "executors" nor the word "assigns" is distinctly used; as where he says "my said trustees or any of them," "my said trustees," "my trustees and executors," "my trustees and executors, and the survivors and survivor of them," "or my trustees for the time being;" but this case is very distinguishable from the case of *Down v. Worrall* (1 Myl. & K. 561), where, although the gift was to the trustees, their executors, administrators, and assigns, there was a mere personal direction given to the trustees: and, having regard to the whole will, I consider it to be clear, that on all occasions to which I have referred, the expressions used had reference to the class of persons to whom he had given the real and personal estate on the trusts of his will, and whom he has, in the course of his will, repeatedly designated and described as the persons by whom the trusts were to be performed; and (upon a careful examination of the will), I am of opinion, that the testator intended that the trusts of his will should be performed by the trustees named, and the survivors [434] and survivor, and by the heirs and assigns, or by the executors or administrators of the survivor, and that he has used words sufficient to give validity and effect to that intention.

The testator has not, by his will, given any power to appoint new trustees, and it is thereupon argued justly, that the trustees, or the survivors or survivor of them, could not, by any assignment or act *inter vivos*, relieve themselves from the responsibilities and duties of the trust; but it is further contended, that the same disability attends any assignment by way of devise or bequest, and that although the estate and property may be vested in the devisees or legatees of the surviving trustee, the duties and the responsibilities attending the execution of the trusts remain in the legal representatives, real and personal, of the surviving trustee.

Upon this occasion, there is no question as to the trustworthiness of the devisees, or as to any fraudulent or improper motive of the surviving trustee in making the devise and bequest. The argument, in this case, has been, properly, conducted on the supposition that the devise was, or at least may have been, made to trustworthy persons, for the purpose of better executing the trusts. No imputation has been cast upon the conduct of the surviving trustee, or upon the conduct, character, or trustworthiness of his devisees and legatees; and the case is, therefore, to be considered independently of any circumstance involving any such imputation.

When a trust estate is limited to several trustees, and the survivors and survivor of them, and the heirs of the survivor of them, and no power of appointing new trustees is given, we observe a personal confidence [435] given, or at least probably given, to every one of the several trustees. As any one may be the survivor, the whole power will eventually come to that one, and he is entrusted with it, and being so, he is not, without a special power, to assign it to any other; he cannot, of his own authority, during his own life, relieve himself from the duties and responsibilities which he has undertaken.

But we cannot assume, that the author of the trust placed any personal confidence in the heir of the survivor; it cannot be known, beforehand, which one of the several trustees may be the survivor; and as to the contingent survivor, it cannot be known, beforehand, whether he may have an heir or not, or whether the heir may be one, or may consist of many persons, trustworthy or not, married women, infants, or bankrupts, within or without the jurisdiction. The reasons, therefore, which forbid the surviving trustee from making an assignment *inter vivos*, in such a case, do not seem to apply to an assignment by devise or bequest; which, being made to take effect only after the death of the last surviving trustee, and consequently after the expiration of all personal confidence may, perhaps not improperly, be considered as made without any violation or breach of trust. It is to take effect, only at a time when there must be a substitution or change of trustees: there must be a devolution or transmission of the estate, to some one or more persons not immediately or directly trusted by the author of the trust: the estate subject to the trusts must pass either to the *hæres natus* or the *hæres factus* of the surviving trustee, and if the heir or heirs at law, whatever may be their situation, condition, or number, must be the substituted trustee or trustees, the greatest inconvenience may arise, and there are no means of obviating them, other than by application to this Court. With great respect [436] for those who think otherwise, and quite aware that some inconveniences, which can only be obviated in this Court, may arise, from devising trust estates to improper persons, for improper purposes, I cannot, at present, see my way to the conclusion, that in the case contemplated, the surviving trustee commits a breach of trust by not permitting the trust estate to descend, or by devising it to proper persons, on the trusts to which it was subject in the hands of the surviving trustee.

But the case so considered is not the present case. We have, in this will, expressions which clearly shew that the testator intended the trusts to be performed by the "assigns" of the surviving trustee; and in construing the will, we must, if practicable, ascribe a rational and legal effect to every word which it contains. We cannot, consistently with the rules of this Court, consider the word "assigns" as meaning the persons who may be made such by the spontaneous act of the surviving trustee to take effect during his life; but there seems nothing to prevent our considering it as meaning the persons who may be made such by devise and bequest; and if we do not consider the word "assigns" as meaning such persons, it would, in this will, have no meaning or effect whatever.

For these reasons, and under the circumstances of this case, I am of opinion, that the devise and bequest made by Robert Tebbutt of the trust estates held by him under the will of Richard Titley, was a good and valid devise and bequest; and that the estates thereby given to Edward Titley, David Waddington, and Charles Wolstenholme are vested in them, on such of the trusts thereof declared by the will of Richard Titley, as now remain to be performed.

[437] RIDGWAY v. WOODHOUSE. March 18, April 2, 1844.

A testator directed his charitable bequests to be paid out of his pure personalty, in priority of all other charges; and he devised his real and personal estate to trustees, upon trust, to lay out the personal estate in real estate, and pay the rents, &c., to his wife for life; and he directed, that in case his wife's sister should reside with, or dwell in the house or place of residence of his said wife, or become part of her family, then, for every day of such residence, &c., his trustees should retain £100 out of the rents, &c., payable to his wife, and pay the same to a charity. Held, first, that the condition was not illegal; secondly, that its effect being to divest a vested interest, it must be strictly construed; and, thirdly, that as the benefit intended for the charity could not, in consequence of the Statute of Mortmain, take effect, the condition was void.

Joseph Ridgway, by his will dated the 13th February 1841, directed the charitable bequests given by him to be paid out of such part of his personal estate not specifically

bequeathed as might be legally bequeathed or charged by will for charitable purposes, in preference to his debts, testamentary and funeral expences, and legacies, and all other charges whatsoever, and he exempted such part of his estate as might be legally given, bequeathed, or charged for charitable purposes from payment of or contribution to his debts, and such other charges, and he imposed the same upon the remainder of his estate, real and personal, so far as might be necessary; and he directed his assets to be duly marshalled for that purpose.

The testator also gave to his sister Alice Harrison the clear yearly sum of £400.

But he provided, that in case Thomas Harrison, son of his said sister, should, at any time after his decease and notice to his said sister of this condition, reside with his said sister, or dwell in her house or place of residence, or become part of her family, the bequest thereinbefore contained for her benefit should cease and become void, as if she were actually dead.

The testator then gave several legacies and charitable bequests, and devised all his freehold, copyhold, and real [438] estate, unto John Woodhouse and John Mangnall, their heirs and assigns, upon trust, in the first place, for payment of his debts, legacies and testamentary and funeral expences, in aid of his personal estate; and subject thereto, he gave the real estates to the use of the said John Woodhouse and John Mangnall, their heirs and assigns, during the life of his wife Anna Maria Ridgway or until she should marry again, upon trust to receive the rents and pay thereout the repairs, &c., and then to pay the remainder unto his wife, A. M. Ridgway, and her assigns during her life, if she so long remained his widow, for her own use and benefit; which provision was to be in satisfaction of dower, and also to be considered as inclusive of all claim for jointure under her marriage settlement, so long as she remained unmarried, and not in addition thereto.

In case of his wife's marriage, that provision was to cease, and his wife was to have £400 a year jointure provided by settlement, and after the death or marriage again of his said wife, he devised the same freehold, copyhold, and real estate, to the use of his said trustees, and their heirs during the life of his nephew Joseph, upon trusts for his benefit, and after his decease, to the use of his first and other sons in tail with divers remainders over, under which, Thomas Stewart Kennedy was the first tenant in tail.

The testator bequeathed his leasehold estates upon similar trusts.

The testator, upon the decease or marriage again of his said wife, gave other charitable legacies, among which was £1000 to the Bolton Dispensary.

And the testator gave his residuary personal estate to his trustees, upon trust, to invest it in real estates, to be settled to the same uses as his own real estates; and [439] until such purchases were made, the sums applicable thereto were to be laid out, and invested in the names of the trustees, on real or Government securities, and to be varied at discretion. The dividends, interest, and annual produce thereof were to be paid and applied unto such person or persons and in such manner, as would have been the case respecting the rents, issues, and profits of the premises to be purchased therewith, if such purchase had been then actually made.

The testator appointed John Woodhouse and John Mangnall executors of his will.

On the 22d November 1841 the testator made a codicil, whereby, after noticing the provision made for his wife, he declared, that in case Elizabeth Editha Wittenhall, sister of his said wife, should, during her lifetime and widowhood, *reside with or dwell in the house or place of residence of his said wife, or become part of her family*, then and in every and any such case, and for each and for every day which the said E. E. Wittenhall should reside with or dwell in the house or place of residence of his said wife, or become part of her family, he directed his said trustees and executors to retain, from and out of the rents, interest, dividends and other monies payable or to be paid to his said wife under or by virtue of his said will, or the trusts thereof, the sum of £100, and when so retained to pay the same to the treasurer for the time being of the Bolton Dispensary, to be by him applied in aid of the funds of that institution.

By another codicil, dated the 23d of June 1842, the testator appointed his wife to be an executrix of his will so long as she lived and continued his widow.

The testator died on the 26th of December 1842, and the will was proved by the executors and executrix on [440] the 14th of January 1843 in the Consistory Court of the Bishop of Chester.

This bill was filed by the testator's widow against the executors, Joseph Ridgway, the first subsequent tenant for life, and Kennedy, the first tenant in tail; stating, that Joseph Ridgway disputed the validity of the will and codicils of the testator, that the Plaintiff was still the testator's widow, and that E. E. Wittenhall had not, since the death of the testator, resided with or dwelt in the house or place of residence of the Plaintiff, or become part of her family.

It also submitted whether the condition in the first codicil was not void, and prayed the establishment of the will and the performance of the trusts.

By the answers it was admitted that the Plaintiff was the widow of the testator; but it was stated that Elizabeth Editha Wittenhall had, since the death of the testator, resided with or dwelt in the house or place of residence of the Plaintiff, and become part of her family. That no application had been made by the treasurer of the Bolton Dispensary, or any person on his behalf, though the fact of such residence was known to him.

Mr. Kindersley, Mr. Turner, and Mr. Chandless, for the Plaintiff. The Court does not favour conditions tending to create forfeiture, especially when the effect is to defeat a vested gift, and such conditions will be strictly construed. The original vested gift must prevail if the condition annexed by the codicil cannot take effect. (See *Carver v. Bowels*, 2 R. & Myl. p. 307; *Kampe v. Jones*, 2 Keen, 756; *Ring v. Hardwick*, 2 Beavan, 352; *Campbell v. Brownrigg*, 1 Phil. 301; *Green v. Harvey*, 1 Hare, p. 431.) Here the condition is objectionable on several grounds. First, it is an illegal condition which [441] the Court will not enforce, for the direction that the testator's wife's sister should not reside with her, or become a member of her family, arose from mere caprice of the testator, no reason for it being assigned, and no complaint whatever being made of her conduct. Such a provision is wholly contrary to the policy of the law: it is an attempt to innovate upon the social system and destroy the union of families. In the same way, a general provision against marriage is void as being against the policy of the law. Secondly. The gift over to the charity can never take effect, because the subject of the gift is land, or money directed to be invested in land, and the gift over is void under the Mortmain Act. (9 G. 2, c. 36.) As the gift over cannot take effect, and no one can take advantage of the condition, the vested interest remains. Thirdly. The gift is void for uncertainty: what is the strict meaning of "residing with or dwelling in the house, or becoming part of a family?" In *Fillingham v. Bromley* (Turn. & Russ. 530), the direction to live and reside upon certain premises was held to be too uncertain for the Court to determine that there had been a forfeiture. Fourthly. The condition is *in terrorem* only, like a clause divesting a vested gift on marriage without consent. Lastly, the sister acted in ignorance of the condition, for upon hearing of the death of the Plaintiff's husband, she, before the codicil was discovered, went to his widow in her distress, and the act was the act of the sister, and not of the widow. The treasurer of the Bolton Dispensary is aware of the circumstances, yet makes no claim.

Mr. Elmsley appeared for the executors.

Mr. Rolt appeared for Joseph Ridgway.

[442] Mr. Bacon appeared for Thomas Stewart Kennedy, the first tenant in tail in existence under the will.

April 2. THE MASTER OF THE ROLLS [Lord Langdale]. In this case there was only one point reserved. As I understand the will, the testator's wife was entitled, for her life, to the rent both of the lands devised and of those to be purchased; and, until any purchase should be made, she was entitled to the income of the personal estate directed to be laid out in land. It is an extremely long will, but this seems to me to be the effect of it.

By the codicil, the testator declared his will to be, that if the sister of his wife should, during the lifetime and widowhood of his wife, reside with or dwell in the house or place of residence of the wife, or become part of her family, then and in every and any such case, and for each and every day during which the sister should reside with or dwell in the house or place of residence of his wife, or become part of

her family, his trustees should retain, from and out of the rents, interest, dividends, and other monies, payable or to be paid to his wife under or by virtue of his will or the trusts thereof, the sum of £100, and when so retained pay the same to a charity.

So that this direction necessarily implies that the payment to the charity was to be made out of the income given to the wife; and this income consisted of the rents of land, or of interest or dividends arising from personalty impressed with the character of land. Such direction to pay to the charity is therefore void, and, consequently, the direction to retain, so far as it was intended to operate for the benefit of the charity, was also void, and had no effect; and that purpose [443] failing, I think the direction to retain must fail altogether.

By the will, the annual income arising from the property is actually vested in the wife. By the codicil, though the testator declares his will only as to the sister, saying that if the sister shall do such acts, the trustees are to retain and pay over, yet such acts are acts which cannot properly be done without the consent of the wife. However, the object appears to have been, and I think the effect was, to impose a condition on the wife subsequent to the vesting, and the effect of which was to be the divesting in part of an interest previously vested. It ought therefore to be strictly construed, and as all the circumstances which the testator had in view do not concur, and as the purpose which he contemplated cannot be effected, it seems to me that the divesting cannot take effect, and therefore that the condition is void.

A great deal might have been said upon the uncertainty of the condition imposed; but I think the conclusion which I have stated, is that to which I must come. I have had a good deal of difficulty, but I consider this direction as in the nature of a condition subsequent, imposed on the wife; and that the condition subsequent having the effect of divesting interests previously vested, it ought to be strictly construed; and having regard to all the circumstances, if it fails in any of the circumstances it appears to me the condition fails.

I cannot say I think the condition itself was an illegal condition.

[444] EXTRACT FROM THE DECREE.—And his Lordship doth declare, that the direction contained in the codicil to the said testator's said will, bearing date the 22d day of November 1841, that, in the events therein mentioned, the trustees and executors should retain, &c., &c., is void and of no effect, and doth decree the same accordingly.

[444] POWELL v. WRIGHT. April 16, 1844.

Observations on what is termed the "substantial representation," in a suit of absent parties, and how far such absent parties are bound.

After bill filed but before *subpoena* served, the Defendant assigned the subject-matter of the suit. Held, that the assignee was a necessary party, and that the Court would, if necessary, grant an injunction to restrain any further assignment.

Scheduled creditors to a creditor's deed, who were not parties thereto, held not necessary parties to a suit by a subsequent incumbrancer, to have the monies out of which it was intended to pay such creditors raised, the trustees being parties.

This case came on upon objections for want of parties, under the 39th General Order of August 1841. (Ord. Can. 175.)

By indentures of the 13th and 15th of December 1834, certain estates were conveyed by Lord Wellesley and his eldest son to trustees, to raise a sum of £462,000. This was to be applied, in the first place, in payment of certain specified charges which did not exhaust the whole, and the residue was to be paid to Lord Wellesley for his own use.

By indenture of the 16th of December 1834, and made between Lord Wellesley of the one part, and Messrs. Springall and Thompson of the other part, Lord Wellesley appointed the surplus of the £462,000 to Messrs. Springall and Thompson, upon trust to pay, in such order and priority, and in such manner and way, in all respects, as the said trustees should in their discretion think fit, to the several persons whose

names were specified in the [445] first and second schedules thereunder written, the several sums of money set opposite to their respective names, being respectively principal sums or debts alleged to be due by Lord Wellesley to such several persons, upon judgment, bond, and simple contract, or otherwise, or so much of the same several sums, as the said trustees should agree to pay, in full for such respective debts, and pay the residue to Lord Wellesley. The schedules contained the names of 130 creditors, but none of them were parties to the deed.

In 1836 Lord Wellesley granted to the Plaintiff an annuity, for securing which he charged the surplus of the £462,000, after satisfying the sums mentioned in the deed of the 16th of December 1834.

This bill was filed on the 9th of January 1841, to have the trusts of the deed of the 16th of December 1834 carried into execution, and to obtain payment of the Plaintiff's annuity which was in arrear.

None of the creditors mentioned in the deed of the 16th of December 1834 were made parties to the suit, but the bill prayed, that, if necessary, this bill might be taken to be a bill on behalf of all persons interested in the execution of the deed of the 16th of December 1834.

One of the Defendants, by his answer, submitted whether the several creditors named in the schedules to the deed of the 16th of December 1834 were properly represented in this suit, and he stated, that on the 2d of June 1842 Lord Wellesley and his son had conveyed the trust estate to John Smith of Regent Street, in fee, for securing a sum of £7000, which mortgage was created before the Defendant was served with the [446] subpoena in this suit, and he submitted whether John Smith was not a necessary or proper party to the suit.

Mr. Kindersley, and Mr. Chandlee, for the Plaintiff. The schedule creditors not being parties to the deed, acquired no interest in the estate, nor any right to enforce the trusts of the deed; *Garrard v. Lord Lauderdale* (3 Sim. 1, and 2 Russ. & M. 451), *Foster v. Blackstone* (1 Myl. & K. 297, and 3 Cl. & Fin. 456). Their numbers would also render it impossible to proceed in this suit, if they were all made parties.

Smith, being a purchaser *pendente lite*, is bound by the proceedings, and need not and cannot be made a party to this bill (see *Bishop of Winchester v. Paine*, 11 Ves. 197; *Metcalf v. Pulvertoft*, 2 Ves. & B. 205); this bill cannot therefore be said to be defective for want of parties.

Mr. Turner and Mr. Toller, *contra*. The creditors are necessary parties; for circumstances may have happened since the deed was communicated to them, which give them an indefeasible interest in the trusts of the deed. The Plaintiff has an interest opposed to that of the creditors; their rights cannot be adjudicated on in their absence. The Defendants, however, do not require that they should all be made parties: all they want is to have them *substantially represented*, by making some of the class Defendants, by which means they will be bound and prevented instituting a multiplicity of suits of their own.

[THE MASTER OF THE ROLLS. Where some only of a class are made parties, it is a very inaccurate mode of expression to say that they represent the rest. The others may be perfectly ignorant of the proceedings, and [447] of what is really going on. It is a matter of convenience or necessity when the Court allows one to sue on behalf of the rest. In consequence of the difficulty arising from the number of parties interested, the Court relies on the assistance of one of the class, on the faith that having the same interest with the absent parties, the facts as affecting them will be fairly brought before the Court. But in such a case as this, how could you prevent another of the same class filing his own bill, if he will not submit to be represented by the person party to the record? Besides which, the Defendants named to represent the class would, in this case, be selected by the Plaintiff himself; if those only whom the Plaintiff pleases be made parties, it would be strange to say that the others, who are absent, would be bound.]

The principle of representation has, however, long been sanctioned; *Cockburn v. Thompson* (16 Ves. 321), *Adair v. The New River Company* (11 Ves. 444). Though the conveyance to Smith was after the filing of the bill, still it does not appear that the suit has been duly registered as directed by the 2 Vict. c. 11 (s. vii.), and therefore he would not be bound by it.

Mr. Kindersley, in reply. It is for the interest of all parties that the £462,000 should be raised, and the Court will then see to its due distribution.

THE MASTER OF THE ROLLS [Lord Langdale]. This case comes before me upon two objections for want of parties taken by the Defendant.

One objection is, that certain creditors named in the schedules to the deed of the 16th of December 1834 are [448] not any of them substantially made parties to this suit. The other is, that Smith, the assignee of the interest of Lord Wellesley, under a deed, executed subsequent to the filing of the bill, is not before the Court.

The case seems to be that Lord Wellesley, being indebted, and his estates being subject to charges of large amount, in 1834, soon after his son came of age, made arrangements for raising a large sum of money to satisfy the charges; and accordingly, in December 1834, a provision was made for raising £462,000, which was, in the first place, to be applied in satisfaction of the several charges on the estates which were enumerated in the deed. The amount of the charges was less than the amount to be raised, and the surplus was intended for the benefit of Lord Wellesley.

It seems to have been part of the same transaction, that this surplus should be applied in the particular manner stated in the deed of the 16th of December 1834. By this deed, Lord Wellesley appointed the surplus to Springall and Thompson, in trust to apply it as they should think fit, in payment of the scheduled creditors, and to hold the surplus upon trust for Lord Wellesley. There appear to be about 130 names set forth in the schedules, but none of them are parties to the deed. These creditors, not being parties to the deed, and not being in a situation to demand the execution of the trusts, must each depend upon Lord Wellesley for payment of his demand.

In 1836 grants of annuity were made to the Plaintiff by Lord Wellesley, which were secured upon the surplus.

After the great, I may say wilful, delay, that has taken place on the part of the Defendants, I am not [449] surprised that these objections for want of parties, in the nature of a dilatory, are now made by them. First, as to the persons mentioned in the schedule to this deed, I am by no means persuaded that it was necessary to make any of them parties; I do not know how they could make any claim or insist on the performance of the trust of a deed executed by Lord Wellesley, merely for making a provision for the payment of his own debts; and the deed giving to the creditors no interest in the estate, or in the produce of the estate.

If I were wrong in that conclusion, then comes the question, whether I am to consider them sufficiently represented in this suit. The argument is singular when you have regard to the position of the parties; for if, under this deed, the scheduled creditors have an interest to be protected, I cannot think that the solicitor of the Plaintiff is the proper person to act for them. That, however, is not the question before me; the question is, whether, supposing they are necessary parties, their interests will be sufficiently protected, not whether there is a representation of their interests.

Everybody must be conscious of the great difficulties which exist in cases of this kind. The Court in conformity with the principles of equity, has adopted a general rule, not to dispose of any matter, not to bind any man's interest, or make any declaration of any man's right, in his absence.

The complication of human affairs has, however, become such, that it is impossible always to act strictly on this general rule. Cases arise, in which, if you hold it necessary to bring before the Court every person having an interest in the question, the suit could never be brought to a conclusion. The consequence would be [450] that if the Court adhered to the strict rule, there would, in many cases, be a denial of justice. This has induced the Courts to sanction a relaxation of the rule. And, accordingly, they have said, if we can be satisfied that we have before the Court, persons whose interests are the same as the interests of those who are absent, we will be content to hear the cause upon the argument of such persons; and if we are then satisfied that the case has been fairly and honestly presented, we will order the distribution of the fund on the representation of the persons present. Though the Court will thus make a distribution, I have never heard that the proceedings in the suit are, to all intents, binding on the absent parties. So far as I know, it has never declared that the absent persons are to be cut off from all chance of correcting

any error which, in consequence of their absence, may have been made to their prejudices. The Courts, in these cases, are always running the risk of doing what may be prejudicial to the absent parties.

A vague sort of expression has been used in these cases, that you must have a "substantial representation;" but it really comes to this, that in simple cases the Court requires all parties interested to be present, but in a complicated matter it is contented with something less. This is the reason why often, in vague language, you speak of "substantial representation." It is, however, a rule of convenience, and nothing is more vague; for the Court is under the necessity of considering the circumstances of each case, and the degree of difficulty in the proceeding: this makes it necessary to give minute and careful attention to the matters, to look at the nature of the case and of the suit, the Plaintiff's claim, and whether there are any adverse interests to protect.

I think, that if it is necessary to have some person to represent the interest of the creditors mentioned in [451] the deed, we have persons sufficient; we have the trustees, one of whom is the assignee of a beneficial interest under a creditor.

I lay out of sight the observation, that the individual who represents the trustees is the solicitor of the Plaintiff. There have been instances in which parties having adverse interests have been represented by one solicitor, and yet the case has been very properly conducted, in such a way as to bring before the Court everything necessary for maintaining the interest of each. In many cases, however, a very considerable and serious injury has resulted from that mode of conducting a case. Sir John Leach laid down the rule, that in no case whatever should a solicitor act for Plaintiff and Defendant; and if he found that was done, he took strong measures to put a stop to it: but the rule could not be enforced, for the solicitor had the power of resorting to the expedient of acting by another solicitor nominated by himself. Experience of this has made me come to the conclusion, that where the same person acts for persons supposed to have adverse interests, it is better that the truth should be known, than that there should be a pretence of different solicitors acting, when, in point of fact, there is but one; in the one case you have vigilance and attention paid to the subject, which would not be if there was a mutual accommodation of names. Having regard to the nature of the deed, and of the suit and other particulars, my opinion is, that the first objection must be overruled.

With respect to the other technical objection, as to Smith, I am inclined to think under the circumstances of this case, that he ought to be made a party to these proceedings, but that cannot be done by amendment.

[452] Mr. Kindersley. The objection is to the present record; however, we will undertake to bring him before the Court by a supplemental bill.

THE MASTER OF THE ROLLS. If necessary, you may apply for an injunction to prevent the Defendant making future assignments. (*Daly v. Kelly*, 4 Dow's P. C. p. 440.)

ORDER.—It was declared that, according to the present state of the record, the parties mentioned in the first objection were not necessary parties in this suit, and the Plaintiff undertaking to file a supplement bill to make John Smith a party to this suit, it was ordered that the said objections be overruled, and the costs were reserved to the hearing.

[452] LEWIS v. SMITH. May 3, 1844.

Where an answer is found impertinent, the Plaintiff is entitled to the costs, and the Master has no discretion on the subject.

The facts of this case sufficiently appear from the judgment of the Court.

Mr. James Parker, for the Plaintiff.

Mr. Turner and Mr. Shebbeare, for the Defendant Green.

THE MASTER OF THE ROLLS [Lord Langdale]. This was a petition of the Defendant John Harry Green, praying that a certificate of impertinence in the answer, and a *subpoena* for costs, might be discharged.

In the month of January 1844 the Plaintiff, alleging impertinence in the answer of the Defendant, procured [453] the usual order of reference to the Master; and on the 6th of February, the Master being of opinion that the answer was impertinent to a large extent, made his report or certificate accordingly.

The Master, at the same time, stated, that in the view which he took of the case, it was not a case for costs, and that he should not give costs against the Defendant.

This was done, on the supposition that the Master had a discretion upon the subject of costs in such a case: but this was denied by the Plaintiff.

The certificate was filed on the 8th of February, and on that day the Plaintiff gave notice to the Defendant, that he should proceed to tax and, if necessary, to enforce payment of the costs in the usual manner; and, further, that the Defendant was not to refrain from excepting, on the supposition that he was not liable to costs.

To this the Defendant answered, that the Master had given no costs, and he relied on that.

The Plaintiff, however, persevered, and on further consideration the Master was of opinion, that according to the practice of the Court, the Plaintiff was entitled to costs, and that the Master had no discretion on the subject; and accordingly, after the warrant to expunge was taken out, and the costs left, the Taxing Master was requested to tax them. They were taxed, and a *subpoena* for payment of them was issued.

I am of opinion, that the Master has no authority to determine whether the Defendant is or is not to pay the costs occasioned by impertinence in his answer.

[454] Before the order of December 1833, after the impertinence had been found, the Plaintiff was entitled, as of course, to an order to expunge the impertinent matter, and for the taxation and payment of the costs.(1) And the 22d Order (Ordines Can. 50), directing the Master to expunge the impertinence, and enabling him, without further order, to tax the costs, did not do more than relieve the Plaintiff from the expence of obtaining an order, which he was previously entitled to as of course.

The Master was enabled to do, without order, that which before he could only do under an order, which the Plaintiff obtained as of course.

It appears to me that the Master's second thoughts were right, and that he had no discretion to refuse the costs which the Plaintiff demanded.

On reading the affidavits, and after communicating with the Master, I have great doubt whether the Defendant was really misled, or under any mistake which prevented him from endeavouring to obtain relief from the report in due time.

Nevertheless, it may have been so; and if the Defendant now informs me that he is advised that he has good ground for excepting to the report, I think that I ought to give him leave to do so, and to stay the proceeding for the costs until the exceptions are disposed of.(2)

If he does not now intend to except, I must dismiss this petition.

[455] HARVEY v. SHELTON. July 3, 4, 1844.

[S. C. 13 L. J. Ch. 466. 9 Will. 3, c. 15, was repealed by the Arbitration Act, 1889 (52 & 53 Vict. c. 49). On point as to time in which motion must be made, see now R. S. C. O. 64, rr. 7, 14; *In re Corporation of Huddersfield and Jacomb*, 1874, L. R. 17 Eq. 476; *In re Gallop and Central Queensland Meat Export Company*, 1890, 25 Q. B. D. 230.]

Award set aside, on the ground of interviews having taken place between the arbitrator and one party, in the absence of the other.

Similar misconduct on the part of the person applying, will not prevent the Court setting aside the award, for the matter concerns the due administration of justice.

(1) See *Hinde's Pr.* 256, 1 *Turn. & V. Pr.* 782, 1 *Newland's Pr.* 277, 1 *Harrison's Chanc. Pr.* 193; *Muscott v. Hahed*, 4 B. C. C. 222; and *Tyrrel v. Redifer*, 1 *Mer.* 132.

(2) See also *Desanges v. Gregory*, 6 *Sim.* 473; and *Everett v. Prythergh*, 12 *Sim.* 464.

A motion was made to dismiss a bill, in pursuance of an award; it came on upon the last day, on which, under the statute, an application could be made to set aside the award. The Respondent then made objections to the award, and the motion was ordered to stand over, with liberty for the Respondent to give notice of motion to dispute the award. Held, that this operated as an extension of the time.

This was an application on the part of the Plaintiff, to set aside an award; the material circumstances relating to which were as follows:—

Disputes arose between the Plaintiff and Defendant, which gave rise to a cross-suit, which proceeded to a decree to take the accounts. The parties thereupon referred the matters in difference to the arbitration of a Mr. Wakefield.

Two meetings took place between the parties before the arbitrator, on the 26th and 27th of September 1843, respectively; and on the second occasion, it was arranged, that the accounts should be referred to Mr. Norris, an accountant. It was sworn, on the one side, that at the second meeting it was agreed that a further meeting of the parties should take place before the arbitrator; but this was denied by the other side.

Norris, however, proceeded in the examination of the accounts, but before the award was made, the following circumstance took place, which was relied on as invalidating the award:—

"On the 6th of December Shelton was sent for by the arbitrator, to meet him at the office of the accountant, on which occasion he was called upon to explain an entry of £350 in the ledger, and which [456] Shelton pointed out to the arbitrator to have been accidentally overlooked by the accountant, and with which the arbitrator was satisfied; and nothing else whatever passed or took place at such meeting, in relation to the matters in reference, or any of them. On the 27th of January Shelton was again sent to by the arbitrator, to meet him at the office of the accountant, when he was again called upon by the arbitrator to explain, as he thought, an omission of £37, 10s. in the account, and one or two other small omissions, all of which sums Shelton pointed out; upon which the arbitrator was satisfied, and the accountant expressed his surprise that he had overlooked the same, and regretted to have thus troubled Shelton; and nothing else passed between Shelton and the arbitrator on such last occasion, or at any other time, except in giving the explanations herein-before mentioned and required by such arbitrator."

Neither the Plaintiff nor any person on his behalf was present at these meetings between Shelton and the arbitrator.

On the other hand, it was objected, that Harvey had sent to the arbitrator a letter relating to the matters, which he had not communicated to the other side, and that he also had attended the arbitrator and accountant in the absence of Shelton.

Mr. W. T. Daniel, in support of the motion, contended, that the award was invalid; first, because at the second meeting, it had been agreed that a further meeting of the parties should take place, yet the award had been made without any such further meeting having been had. In *Dodington v. Hudson* (1 Bingham, 384), the De-[457]-fendant's attorney, swore he understood the arbitrator meant to have called another meeting, and none having been had, the Court set aside the award. So in *Pepper v. Gorham* (1 Moore, 148), where arbitrators, who had proceeded in a reference, informed the Defendant, who was present at the meeting, that they would suspend their proceedings till the books of account had been referred to, it was held, that the having afterwards made an award in his absence, without examining such books, was a good ground for setting aside the award. And in *Walker v. Frobisher* (6 Ves. 70; and see *In re Plews*, Q. B. January 29, 1845), an award was set aside, the arbitrator having received evidence, after notice to the parties that he would receive no more, in which they acquiesced.

Secondly, because there had been private meetings between Shelton and the arbitrator, where statements had been made in the absence of the Plaintiff, which the Plaintiff had not the opportunity of meeting, and which influenced the arbitrator's decision; and that this was manifestly contrary to the first principles of justice.

Thus where a private examination of a party by arbitrators had taken place, the Court of Common Pleas set aside an award: *In the matter of Hick* (8 Taunt. 694).

Thirdly, he relied on errors in the award, the particulars of which, however, it is not necessary to state.

Mr. Turner and Mr. Glasse, *contra*. On the first point, the evidence shews distinctly that there was no arrangement made at the second meeting for a further hearing. All that then remained to be done, was a matter of account, to be settled by the arbitrator with the assistance of the accountant.

[458] Secondly, the interviews between the arbitrator and Shelton on the subject of the accounts, do not invalidate the award. It was a mere mercantile arbitration. In *Malson v. Trower* (Ry. & Moo. 17) each of the parties had been examined in the absence of the other, and it having been objected that the award was void in consequence, Chief Justice Abbott said, "It does not appear that either party desired to be present when the other was examined; legal men indeed usually examine one party in the presence of the other, but among mercantile persons a different practice prevails; the umpire here was a mercantile man, and the Defendants not having expressed a desire to be present at the examination of the Plaintiffs, cannot now object to its having taken place in their absence." Again the Plaintiff himself has been guilty of equal irregularity by communicating privately, by letter, with the arbitrator, and by attending alone.

Mr. Parker, for other parties.

Mr. Daniel, in reply.

Watson on Arbitration (p. 75, 217, 249), and *Fetherstone v. Cooper* (9 Ves. 69), were also cited.

THE MASTER OF THE ROLLS [Lord Langdale]. This is a motion to set aside an award, to which two distinct objections are taken. The first objection is, that at the meeting on the 27th of September 1843, when all parties were heard, it was distinctly arranged, or at least it was by Mr. Harvey understood to be distinctly arranged, that there should be [459] another meeting of all the parties before the arbitrator, for further discussing their rights and interests; yet, contrary to that arrangement or understanding, no such subsequent meeting ever took place, and that on this account, the proceedings were irregular and the award ought to be set aside.

It is next alleged, that between the meeting of the 27th of September and the date of the award on the 13th of February 1844, when the award was made, the arbitrator had two private meetings with one of the litigant parties, in relation to the matters which were the subjects of the arbitration; which is contrary to the first principles of justice, and that in consequence of that irregularity and impropriety the award ought to be set aside.

I shall make but one observation upon the first of these objections, because the really material one is the second. I think that both parties may very reasonably be supposed to be mistaken on this point, for each of the two parties having been heard at length before the arbitrator, and having stated what he thought fit, the matter was referred to an accountant, agreed on by both parties, in whose hands the books and documents relating to the matter in question were to be deposited, and both parties were to have access to them in the presence of the accountant. Now it might reasonably enough have been supposed, on the one hand, when the several parties had discussed their rights before the arbitrator, if nothing remained but to take the accounts by the examination of the books, in the ordinary way, that there might be no occasion for any other meeting before the arbitrator, for the purpose of adversely discussing their rights; on the other hand, it was perfectly reasonable for either party to suppose, that if, upon the examination of the books, disputed [460] items or questions should arise, the parties should have the opportunity of discussing them before the arbitrator. I think that the state of things was such, and the facts of such a nature, that one may reasonably suppose, that each party formed some erroneous notion on the subject.

If this matter had afterwards proceeded with perfect regularity, I should have conceived, that it was open to the arbitrator to have a further meeting or not, according as the exigency of the matter might require, and that if the matter did not require a further meeting, he might have properly made his award without one. This is the view I take of the first question.

With regard to the second question, we must look to the situation in which these

parties stood. There were questions upon the accounts which might have to be discussed. The accounts were to be examined, and it might be material that each party should have access not only to the books, but also to the accountant who was examining them for the purpose of drawing conclusions from them. Mr. Shelton seems to have been perfectly familiar with the accounts and the books; the other party had not had the same opportunities. The arbitrator distinctly states, that the books were to be left with him, and that either party was to be at liberty to examine such books in his presence. It does not appear whether Mr. Shelton ever availed himself of that right, but my impression from the affidavits is, that he did not; though he certainly had a right to attend Mr. Norris to look at the books. I think it must be considered that he had a right to make such communications to Mr. Norris, who was not the Judge, but merely an assistant on that occasion. Mr. Harvey, whatever might have been his right, seems, with the consent of Mr. Norris, to have gone a very considerable [461] length, for he attended Mr. Norris, had an opportunity of seeing the abstracts and extracts which Mr. Norris had made from the accounts, which he corrected and checked by the books, and, according to the statement, Mr. Norris was, in general, satisfied with what was done. It does not appear that, at the period to which I am now referring, he had had any communication whatever with the arbitrator.

The matter seems to have gone on till the month of December 1843, when this circumstance took place: Mr. Norris found himself in difficulty with respect to the sum of £350; he communicated it to Mr. Wakefield, who also had a difficulty on it, and Mr. Wakefield then summoned Mr. Shelton, one of the litigant parties, to attend him, for the purpose of explaining this matter. It is greatly to be regretted that he did not, at the same time, summon Mr. Harvey to attend him. I must assume that Mr. Harvey had an interest in the question respecting the item of £350, because the account was to be taken in which he was interested; however, Mr. Wakefield sends for Mr. Shelton for his opinion, consults him on the matter, and after that consultation and in the absence of Mr. Harvey, he becomes, in some way or other, satisfied in respect of that item of £350. Whether the result of such satisfaction was accordant with or contrary to the interest of Mr. Harvey does not appear. There is no proof, nor in such a case do I apprehend there could be proof, that the result to which Mr. Wakefield came was in any way prejudicial to Mr. Harvey. However, we have this state of things: a question arises affecting the interest of Mr. Harvey; the Judge has a private interview with one party, discusses the matter with him, and through the representations made by that one in the absence of the other, he becomes satisfied, and comes to a conclusion on it.

[462] A similar proceeding took place on a subsequent occasion. There were other items in respect of which difficulties again arose; Mr. Shelton is again summoned, the other party is not summoned; Mr. Shelton has a private interview with the arbitrator, the matter is discussed between them, explanations are given, the result of which explanation is, that the arbitrator is satisfied, and the interest of Mr. Harvey, whether for or against him, is again bound by the decision of the arbitrator (so far as it can be binding), which was made in his absence.

It is so ordinary a principle in the administration of justice, that no party to a cause can be allowed to use any means whatsoever to influence the mind of the Judge, which means are not known to and capable of being met and resisted by the other party, that it is impossible, for a moment, not to see, that this was an extremely indiscreet mode of proceeding, to say the very least of it. It is contrary to every principle to allow of such a thing, and I wholly deny the difference which is alleged to exist between mercantile arbitrations and legal arbitrations. The first principles of justice must be equally applied in every case. Except in the few cases where exceptions are unavoidable, both sides must be heard, and each in the presence of the other. In every case in which matters are litigated, you must attend to the representations made on both sides, and you must not, in the administration of justice, in whatever form, whether in the regularly constituted Courts or in arbitrations, whether before lawyers or merchants, permit one side to use means of influencing the conduct and the decisions of the Judge, which means are not known to the other side.

[463] It is argued in this case, that there has here been equal fault on the other side, and that Lord Eldon, from whom every word that has fallen is entitled to the most profound attention, has said, that if an act of this sort is called in question, the party who seeks relief ought not himself to be to blame. It is stated, on this occasion, that in the matter of this reference, Mr. Harvey, who now complains, has himself been guilty of just the same erroneous conduct as Mr. Shelton, and that as to Mr. Shelton it was not his spontaneous act, for that he remained passive until he was invited by the arbitrator to attend. The truth of this matter does not appear satisfactorily upon the affidavits; but with respect to the letter of the 19th of January 1844, I cannot allow such a matter to pass without expressing my disapprobation of it. Mr. Harvey, in my opinion, was acting extremely wrong in writing such a letter to the arbitrator, unless he sent a copy of it to the other side; I conceive that he was at liberty to make his own representation, provided he imparted it to the other side, but otherwise it was wrong. This sort of misconduct sometimes, though rarely, occurs here; long statements are occasionally sent to me by one side; but I hand them over to the other side, and take care that no kind of communication is made to me without the other party knowing it. I think the arbitrator should have done so with that letter, and there being no proof that it was ever sent to Mr. Shelton, I cannot let the circumstance pass without expressing my disapprobation.

Though there was some statement made to the arbitrator by Mr. Harvey, I do not know what it was, unless I can collect it from the letter of the 19th of January; but assuming a private statement to have been made, I must add, that if there had also been a private interview, and an erroneous and improper private inter-[464]-view, between Mr. Harvey and the arbitrator, I should have found it very difficult to say, that this species of misconduct on the one side was to be an excuse for the mode of proceeding which was adopted on the other. This is not a matter of mere private consideration between two adverse parties, but a matter concerning the due administration of justice, in which all persons who may ever chance to be litigant, in Courts of Justice or before arbitrators, have the strongest interest in maintaining that the principles of justice shall be carefully adhered to in every case.

Under these circumstances, I am of opinion that this award cannot stand, and I must therefore grant this motion.

Another point arose in this discussion, with regard to the time at which the application was made, and which it is thought convenient to separate from the other points in the case.

By the 9 & 10 W. 3, c. 15, s. 2, any arbitration or umpirage, procured by corruption or undue means, shall be judged and esteemed void and of none effect, and accordingly be set aside by any Court of law or Equity, so as complaint of such corruption or undue practice be made in the Court where the rule is made for submission to such arbitration or umpirage, *before the last day of the next term* after such arbitration or umpirage made and published to the parties.

The award was made on the 13th of February 1844, and communicated on the 30th March. On the 15th April 1844 Shelton moved, pursuant to the terms of the award, to dismiss the bill without costs, but Harvey ob-[465]-jecting, that neither the reference nor the award had been made orders of Court, the motion was ordered to stand over.

On the 18th of April the reference and award were, *ex parte*, made orders of Court.

On the 8th of May (which was the last day of the next term after the award had been made and published) Shelton's motion to dismiss was brought on, when Harvey's counsel stating that he had objections to the award, the motion of Shelton was ordered to stand over till the first day of the following term, and liberty was given to Harvey, if he should be so advised, to give notice of motion to dispute the award. He gave notice, accordingly, of the present motion on the 18th of May.

It was now (on the 3d and 4th of July) objected, on the part of Shelton, that the time limited by the statute (9 & 10 W. 3, c. 15, s. 2) having expired, the award could not be now set aside: *Rushworth v. Barron* (3 Dowl. P. C. 317, 1 Har. & W. 122); and that the time could not be extended. *Auriol v. Smith* (Turn. & R. 121), *Allardes v. Campbell* (Bunb. 265, Barn. K. B. 152, and Tur. & R. 131, n.).

On the other hand, it was said, that the time allowed by the statute had been extended by the leave given on the 8th of May; that the order to make the submission a rule ought to have been obtained before the award had been made (*Pownall v. King*, 6 Ves. 9), and that the motion to make an award an order of Court was not a motion of course, [466] but a special motion to be made upon notice. *Williams v. Page* (1 Hare, 280).

THE MASTER OF THE ROLLS. The question is, whether such a complaint has been made within the time limited by the statute, as to enable the party to have the benefit of his objection to the award. I think, under the circumstances, that I must consider there was a sufficient complaint. There was a motion for a proceeding to carry the award into execution, which was brought on upon the very last day, on the day on which the time expired within which application could be made for relief. The order asked was then resisted, by an allegation, made in Court of a complaint against the award, and a request was made that an opportunity might be given for making a regular and formal application. I think, under the circumstances, I must give weight to that, though I confess it does not appear so clear as one would wish it to be.

The form of the order was next brought to the consideration of the Court, and it was argued that the order should be drawn up *nunc pro tunc*.

THE MASTER OF THE ROLLS directed the order to be drawn up as of this day, and the facts relating to the different applications to be stated on the face of the order. He, however, gave no costs.

[467] MACKENZIE v. TAYLOR. July 17, 1844.

[See *Hilliard v. Fulford*, 1876, 4 Ch. D. 393.]

Executors directed to convert and invest the testator's property, allowed it to be enjoyed in specie by the tenant for life. Three years after her death, they accounted for the value and paid it into Court. Held, that they ought to pay interest from the death of the tenant for life to the day of such payment.

A residuary estate was divisible amongst several persons. An account was made up, and the adults received their shares. The infants filed a bill for an account against the executors and the other residuary legatees. The latter being satisfied, deprecated the proceedings. The accounts turned out to be substantially correct. Held, that the costs were payable out of the Plaintiffs' share alone.

The testator gave his residuary personal estate to his executors and trustees, upon trust, as soon as convenient after his death, to convert into money and invest the same. One moiety of the residue was given to Mr. Newton, and one-fourth was given to Mrs. Mackenzie for life, with remainder to her children.

The testator died in 1824, and Mrs. Mackenzie died in 1832. This bill was filed by her children against the executors and Mr. Newton for the administration of the estate. The executors, but with the concurrence of Mrs. Mackenzie, had neglected to convert and invest a part of the testator's property, but three years after her death, they accounted for the value and paid the amount into Court. This gave rise to the first question.

The second question was as to the costs. It appeared that the executors had accounted to Newton for his share of the residue: being satisfied, he by his answer objected to the proceedings, and, at the first hearing, resisted the taking of any accounts. On the cause coming on for further directions, the costs had to be provided for; and as the circumstances of the case were not such as to render the executors liable to pay the costs, the question was, whether the costs were to be paid out of the whole residue, including that received by Newton, or out of the Plaintiffs' share only.

[468] Mr. George Turner and Mr. Hithcock, for the Plaintiffs, contended that the executors were chargeable with interest on that part of the estate which they had neglected to convert; and that as this was a suit for the administration, the whole residue ought to bear the costs.

Mr. Baily, for the widow of the testator.

Mr. Kindersley and Mr. Piggott, for the executors and Mr. Newton, contended, that as the executors had, with the concurrence of Mrs. Mackenzie, and for the convenience of her family, refrained from converting this part of the property, they ought not to be charged with interest.

Secondly, that as Mr. Newton, who had received his share, was perfectly satisfied with the accounts, and had deprecated all litigation, he ought not to be ordered to pay any portion of the costs of the suit out of his portion of the residue.

Mr. Turner, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. There are two questions in this case. The first is, whether the executors and trustees are to be charged with interest on the infant's share of the property or on any part of it; the other relates to the costs of the suit.

It seems that the executors rendered an account which turned out to be nearly correct, except as to the value of a steam-engine, and as to that sum, I am of opinion that no interest is chargeable. With respect to the rest, it was given to Mrs. Mackenzie for life, with remainder to [469] her children. It seems that the testator's property consisted of matters capable of personal enjoyment, and no doubt the strict duty of the trustees was to convert and invest the produce, and then to pay the income to the tenant for life, and preserve the *corpus* for the children. This was not done on this occasion, but the tenant for life was allowed to have the enjoyment during her life; the executors have, however, charged themselves with the value of those articles not converted into money. There can be no doubt of what was the duty of the executors; the tenant for life acquiesced, and therefore had no right or reason to complain; but that does not apply to the children, whose interest was neglected. I am of opinion that the executors are chargeable with interest at the rate of 4 per cent. from the death of the tenant for life to the time when the money was paid into Court.

With respect to the costs, the bill was filed by the infants for an account of the residue. It appears that a distribution had previously been made, of all the property except the share of the infants. The question is, whether the distribution was satisfactory to Newton. It appears from the scope of his answer that he was satisfied with the account stated; and he resisted the account at the hearing. Taking the whole transaction, is it not clear that the bill was filed for the benefit of the infants alone? I do not see any reason for charging one who does not require the accounts to be taken, with the costs of a proceeding which he resists.

If the accounts had been unsettled, then it would have been for the benefit of all that they should be taken, and each ought then to contribute towards the expence. Newton had received all he required, and I think from his answer he precluded himself from having the accounts [470] taken. There is no reason for charging him with the costs of these proceedings; they must be paid out of the fund recovered by the suit.

[470] LEWIS v. SMITH. March 27, May 2, 8, 1844.

The common injunction against several Defendants, may be dissolved as to some, before all have answered, and the proper course of proceeding for that purpose is, for those who have answered to obtain an order *nisi*, as of course.

An action at law had been commenced against the Plaintiff by Messrs. Smith & Co., whose firm consisted of five persons, two resident in Liverpool, and three in Australia. The Plaintiff filed this bill against Messrs. Smith and others praying, amongst other things, an injunction to restrain the proceedings at law, and the common injunction was obtained for want of answer. The two partners resident in England having filed their answer, obtained, as of course, an order *nisi* to dissolve the injunction. The other three partners resident abroad had not answered.

Mr. Turner and Mr. Lewin now moved to make absolute the order *nisi* for dissolving the injunction.

Mr. James Parker, *contra*, argued, *first*, that the common injunction could not be dissolved until all the Defendants had answered, for that is the form of the order

for the injunction, and the answers of the other Defendants might be most material, and that which would be a defence to one would be a defence to all; besides, it would be useless to dissolve as to some of the Plaintiffs at law only, for the action could not proceed while any Co-plaintiff is enjoined; that the only exceptions to this rule were collusion and immateriality. *Secondly*, that if it could be dissolved before all the Co-plaintiffs at law had answered, then that the order *nisi* ought not to have [471] been obtained *ex parte*, but upon a special application to the Court. *Thirdly*, that the order *nisi* which had been obtained was to dissolve as to *all*, and that this was clearly irregular.

Mr. Turner, in reply. The Defendants have proceeded according to the ordinary practice. If the answer of the other Defendants be material, that must be proved upon shewing cause.

3 Dan. Prac. 285, Wyatt's Prac. Reg. 234; *Boheme v. Porter* (Barnard, Chanc. Rep. 352); *Roucroft v. Donaldson* (1 Fow. Prac. 286); *Bowles v. Orr* (1 You. & Col. (Exch.), 474); *Kilby v. Stanton* (2 Y. & J. 75); *Lord Delvin v. Smyth* (Mos. 354); *Todd v. Dismor* (2 Sim. & S. 477); *St. John v. Cargill* (3 Anst. 933); *Naylor v. Middleton* (2 Mad. 131); *Montague v. Hill* (4 Russ. 128); *Nanney v. Vaughan* (8 Sim. 439); *Glasscott v. The Copper Miners' Company* (11 Sim. 314); and the cases referred to in the judgment of the Court, were cited.

THE MASTER OF THE ROLLS. I think it right to look at the cases and the form of the order. There may be inconvenience on both sides; but as some of the parties are on the opposite side of the world, it would be hard indeed if the injunction could never be dissolved against those who are here.

May 2. THE MASTER OF THE ROLLS [Lord Langdale]. In this case, the Plaintiff obtained the common order for an injunction to restrain the Defendants who had not [472] answered, from proceeding in an action at law against the Plaintiff.

The Defendants against whom the order was made were five in number; two of them are in this country, the other three are abroad.

The two Defendants who are here, having answered, have obtained an order of course to dissolve the injunction, unless cause be shewn to the contrary.

The order appears to me to be somewhat ambiguously expressed, but I think that I must construe it to be an order to dissolve the injunction as against the Defendants upon whose petition it was obtained, unless cause be shewn to the contrary.

The Plaintiff contends he is not bound to shew or to undertake to shew any cause, upon the order of two Defendants, before the other three have answered.

Beyond all question the general rule is, that the injunction is not to be dissolved till all the Defendants have answered, and this being so, it is unusual, and generally useless, for some of the Defendants to attempt to dissolve the injunction till all who are enjoined have answered.

There are authorities which appear to me to shew the mode of proceeding in such cases.

The case of *Joseph v. Doubleday* (1 Ves. & B. 497) was under the consideration of Lord Eldon, at different times during several years. There were two sets of Defendants com-[473]-prised in the injunction, Doubleday and others, who desired to dissolve the injunction, and Mowbray and others. In August 1810 Lord Eldon, upon a special motion made by Doubleday and others, made an order *nisi* to dissolve the injunction against them. On a motion afterwards made to make that order absolute, and also to dissolve the injunction against Mowbray and others, who had not answered, exceptions to the answer of Doubleday and others were shewn as cause, and the usual reference was made to the Master.

It was suggested, in the argument for the Plaintiff in the present case, that in all such cases, the order *nisi* ought always to be asked for by special motion; but the proceeding in *Joseph v. Doubleday* was conducted otherwise.

Doubleday and others having put in a further answer, obtained, as of course, an order *nisi* to dissolve the injunction as against them, and in July 1812 that order was made absolute on the merits. And subsequently, in the year 1816, the answer of Mowbray and others being put in, they obtained an order *nisi* to dissolve, as of course, and afterwards that order was made absolute and the injunction was dissolved generally.

Again, in *Naylor v. Middleton* (2 Mad. 131) an injunction being obtained against two, one, on putting in his answer, moved specially to dissolve the injunction as to both. This motion was refused with costs, on the ground that an order nisi was necessary on the behalf of the Defendant moving.

[474] And in *Todd v. Dismor* (2 S. & St. 477) an injunction was obtained against three. One having answered, untruly suggested that all had answered, and thereupon obtained an order nisi to dissolve the injunction against all. This was irregular, and the Vice-Chancellor said, one Defendant having answered, has a right to move to dissolve the injunction as against himself, but must not in the order nisi suggest, contrary to the fact, that all have answered.

And in *The Imperial Gas Light Company v. Clarke and Dixon* (Younge, 580), Dixon having put in his answer, obtained an order nisi to dissolve the injunction. It was shewn, as special cause, that Clarke, in whose name the action was brought, had not put in his answer, but the injunction was dissolved as to Dixon.

These authorities seem to me sufficient to shew, that an injunction against several Defendants to restrain them from proceedings at law, may be dissolved, as against some of them before all have answered, and that the proper course of proceeding for that purpose is, for those who have answered to obtain an order nisi, and that the Plaintiff must thereupon shew cause why the order nisi should not be made absolute.

May 8. On this day, Mr. Kindersley and Mr. James Parker shewed cause. They argued that as it appeared from the answer already put in, that the transactions were known to the parties in Sydney alone, to whom the partners in England by their answer referred, the Court ought not to dissolve the injunction until the Plaintiff [475] had acquired full information from the partners in Sydney, who alone were competent to give it.

Mr. Turner and Mr. Lewin, *contra*, contended that the injunction ought to be dissolved as to the Defendants who had answered, especially as it appeared, from the statements in the bill, that the question between the parties was one proper to be determined in a Court of law, and that the bill was in fact demurrable.

THE MASTER OF THE ROLLS, under the circumstances, declined to dissolve the injunction.

[475] GOYMOUR v. FIGGE. March 19, 20, May 6, 1844.

[S. C. 13 L. J. Ch. 322 ; 8 Jur. 526.]

Devise to A. for life, with remainder to her first child and his or her heirs ; but if such child should die under the age of twenty-one years without leaving issue, then in like manner to the second, third, and every other child of A., regard being had to their seniority, and to their respective deaths under age without leaving lawful issue ; for, in case of issue, it was the testator's will that they should inherit the estate, and he thereby gave the same to him or her, and to his or her heirs accordingly. But in case A. died without leaving issue of her body, or, having issue, such issue should die under the age of twenty-one without leaving issue, then he devised the estate over.

A. never had any issue. Held, that she took a life-estate only.

Joshua Nunn, by his will, dated in June 1787, devised the estate in question, which was of copyhold tenure to his wife Protesia for life. After her decease, he devised the same to his daughter Mary Ann Nunn for life, and from and after her decease, he gave the same to the first child of the body of Mary Ann Nunn, whether male or female, and to his or her heirs or assigns for ever ; but if such child should depart this life under the age of twenty-one years, without leaving issue of his or her body lawfully begotten, then [476] he devised the estate to the second child of the body of his said daughter Mary Ann Nunn, and to the heirs and assigns of such second child ; and in case the second child should die under the age of twenty-one years, and without leaving issue of his or her body lawfully begotten, then he devised the estate to the third child of the body of his said daughter Mary Ann

Nunn, and so on to the fourth, fifth, and all and every other child and children of the body of his said daughter to be begotten as aforesaid, regard being had to the seniority of age and priority of birth of such child and children, and to their several and respective deaths under age, and without leaving lawful issue of their bodies; for, in case of issue, it was the testator's will that such issue should inherit the aforesaid estate, and he thereby gave the same to him, or her, and to his or her heirs accordingly.

But in case his daughter Mary Ann departed this life *without leaving issue of her body* lawfully begotten, or, having issue, such issue should die under the age of twenty-one years without leaving issue lawfully to be begotten as aforesaid, then he devised the estate, with the appurtenances, to Mary Ann Goymour for her life, and after her decease he gave the same to Nunn Goymour in fee.

The testator died in 1787; his wife Protesia died in 1801; whereupon the devised estate became vested in the daughter Mary Ann, the wife of the Defendant Pigge. She died in 1832 without having had any child; but having in 1816 suffered a customary recovery of the property, under which the Defendant claimed. The Plaintiff was the heir of Nunn Goymour, to whom the estate was given in fee in the events contemplated by the will; and Mary Ann Goymour, his [477] mother, having died in 1801, he by this bill made claim to the estate.

The principal question was, whether Mrs. Pigge was, under the limitations contained in the above will, tenant in tail, or tenant for life only.

Mr. Kindersley and Mr. E. G. White, for the Plaintiff. Mrs. Pigge was tenant for life only under the limitations contained in the will. The first limitation is expressly to her "for life." Under the next limitation "to the first child of her body," &c., her children took as purchasers; and there is an executory limitation over to the second child, in case of the death of the first under twenty-one without leaving issue of his body, and similar limitations to the other children.

The subsequent clause is that on which the Defendant will rely—namely, "in case his daughter departed this life without leaving issue of her body lawfully begotten, or, having such issue, such issue should die under the age of twenty-one years without leaving issue lawfully to be begotten as aforesaid." In this clause the word "issue" must be construed "children," which has been frequently done in other cases; 2 Powell's Devises, 537, *Ginger dem. White v. White* (Willes, 348), *Goodright dem. Docking v. Dunham* (Douglas, 251), *Carter v. Bentall* (2 Beav. 351). The words "as aforesaid" have the effect of referring to the prior limitation to the "children," and of attaching to the word "issue" the force of the antecedent expression "children." The limitation over is therefore limited to a failure of the objects of the [478] prior limitation, *Ellicombe v. Gompertz* (3 Myl. & Cr. 127), and consequently the life-estate of Mrs. Pigge was not enlarged by the subsequent devise on the death of Mrs. Pigge without leaving issue, &c.

The limitation over is therefore good, and in the events which have happened has taken effect.

But the Defendant will insist, that whatever might have been the extent of Mrs. Pigge's estate, and even if she were mere tenant for life, the limitation over, being contingent (which we admit, it being a limitation over with a double aspect: *Doe dem. Davy v. Burnell* (6 Term R. 30, and 1 Bos. & P. 215), was destroyed by the recovery; but the answer is, that the estate being copyhold, the freehold which was in the lord was sufficient to support all contingent estates, Scriven on Copyholds (page 476), and to prevent their being destroyed by the recovery suffered by a mere tenant for life.

Mr. Turner and Mr. Chandless, *contra*. The daughter, Mrs. Pigge, took an estate tail, which, with all the subsequent remainders, has been destroyed by the customary recovery. A gift to A. for life with a limitation over, in case of A.'s dying without issue, *prima facie*, gives an estate tail to A.: it is for the Plaintiff to make out the contrary.

The general scope and object of the will is, that the children and their issue should all inherit, and that the estate should not go over until there should be an entire [479] failure of such issue. The testator says, "in case of issue, it was his will that such issue should inherit the aforesaid estate, and he thereby gave the

same to him or her, and to his or her heirs accordingly." This is the intention. Now the general rule is, that where you find a limitation to a class of issue which does not enable all the issue to take, and there is a gift over upon a general failure of issue, an estate tail is created in the parent; consequently, if it can be shewn that the prior limitations do not enable the whole of the issue to take, the words "dying without leaving issue," &c., must be construed so as to give an estate tail to Mrs. Pigge. Here it is to be observed, that in the gift to the second and subsequent children, the words of limitation to his or her heirs, &c., are omitted, so that they would take estates for life, and their issue would be unprovided for, unless you hold that the mother took an estate tail.

The limitation under which the Plaintiff claims has been destroyed by the recovery. Mr. Rogers, for a mortgagee, asked to have the bill dismissed against him with costs.

Mr. Kindersley, in reply. The word "estate," in which the gift to the third and subsequent child is expressed, would carry the fee, as in the case of the first and second child; and then the testator afterwards adds that regard is to be had to the respective deaths of such children under age, and without leaving lawful issue of their bodies, &c. The issue, therefore, of the second and subsequent children would be provided for under the prior limitation.

[480] The following cases were cited; *Bamfield v. Popham* (1 P. Wms. 54), *Doe d. Lyde v. Lyde* (1 Term R. 593), *Doe d. Gilman v. Elvey* (4 East, 313), *Malcolm v. Taylor* (2 Russ. & Myl. 416), *Franks v. Price* (3 Beav. 182), *Doe d. Lean v. Lean* (1 Q. B. Rep. 229), *Lewis d. Ormond v. Waters* (6 East, 336), *Esdaile v. Gall* (1 Russ. & Myl. 540), *Parr v. Swindels* (4 Russ. 283), *Nicholl v. Nicholl* (2 W. Black. 1159), *Tarbut v. Tarbut* (2 Jarman on Wills, 375), *Hutchinson v. Stephens* (1 Keen, 240), *Grimshaw v. Pickup* (9 Sim. 591), *Vanderplank v. King* (3 Hare, 1).

May 6. THE MASTER OF THE ROLLS [Lord Langdale]. The question is, what estate the testator's daughter, Mary Ann, took under the will? The Defendant alleges that she took an estate tail; that a recovery of the estate was suffered; and that by reason of such recovery and a settlement and will, the estate became vested in the Defendant. The Plaintiff, on the contrary, alleges that the will gave a life-estate only to Mary Ann Nunn; and if such be the case, he is entitled to the estate under the devise over.

After a devise to Protesia for life, there is another distinct devise to Mary Ann for life; it is clear that the intention was to give to Mary Ann an estate for life only; and the question is, whether the words which the testator has used are such as necessarily enlarge that estate to an estate tail. The gift of a life-estate to Mary Ann is immediately followed by gifts to the children, successively, in words which probably give suc-[481]-cessive estates tail to the children. The testator contemplated the children of Mary Ann as the persons who, after her, were to have the succession; and the issue of the bodies of the children, respectively, were to have the succession after them; and such children and issue, respectively, being, by the express words he has used, shewn to be in his contemplation, he has used the words upon which the question arises, "in case my said daughter Mary shall depart this life without leaving issue of her body lawfully begotten, or having issue, such issue shall die under the age of twenty-one years without leaving issue lawfully to be begotten as aforesaid." I am of opinion that these words must be construed with reference to the preceding clauses, and that the words "issue of the body," when used with reference to the daughter, must be understood to mean the "children," to whom, subject to the daughter's life-estate, the property is previously devised. It is as if the testator had said, "in case my daughter shall depart this life without having any child, or having children, such children shall die under twenty-one years of age without leaving lawful issue." The issue of the children being issue of the mother, the estate was to go over only in the event of there being no issue of the mother, but still the words do not appear to me to be such, as to connect the life-estate given to the mother with the implied gift to the issue, and to give to the mother an estate tail by implication.

I am therefore of opinion, that Mary Ann, the testator's daughter, upon the true construction of the will, took only an estate for life, and that the Plaintiff is now entitled to the estate under the devise over.

Let an account be taken of the rents for six years before the bill was filed, and declare that the Defendant [482] Pigge was not entitled to make the mortgage of the 29th of September 1837 to Veargitt, and that he ought to redeem the same.

[482] CAMPBELL v. CAMPBELL. May 8, 1844.

[See *Donaldson v. Donaldson*, 1870, L. R. 10 Eq. 639.]

Executors were directed to apply a competent part of the interest of a fund towards the maintenance and education of the testator's son, during his minority, and accumulate the rest; and, after attaining twenty-one, to apply a moiety of the dividends for his support till he attained twenty-five, and to transfer the fund at twenty-five, with a gift over if he died between twenty-one and twenty-five. The son attained twenty-one between the periods of payment of the half-yearly dividends. Held, that there should be no apportionment, and that he was entitled to the whole half-yearly dividend received after he came of age.

The testator gave his residuary estate to his executors, "upon trust to apply a competent part, at the discretion of his trustees, of the interest and dividends arising therefrom, for or towards the maintenance and education of his son James Campbell, during his minority, and from time to time to accumulate the residue of such interest, &c., and after he should attain twenty-one, to pay and apply a moiety of the last-mentioned interest and dividends, in and for his support, until he attained twenty-five; and after he should have attained twenty-five years, upon trust to pay, transfer, and assign the said residue of his personal estate unto his said son; but in case his said son should attain twenty-one, but should die before he attained twenty-five, leaving children him surviving," then, upon certain trusts, for such children. And in case he should die under twenty-five years without leaving any children, then in trust for the testator's daughters equally.

The testator died in May 1835.

On the 11th of January 1844 £548 was received for a half-year's dividends on a sum of Bank 3 per cents. [483] standing in the name of the Accountant-General, and forming part of the residuary estate of the testator.

The son attained twenty-one on the 31st of October 1843.

This was the petition of James Campbell, praying payment of a moiety of the dividends received since he attained twenty-one, and claiming the whole £548, on the ground of its having been received after he attained twenty-one.

Mr. B. Parry, in support of the petition.

Mr. Kindersley, for the executors, submitted, that, under the 4 & 5 W. 4, c. 22, the Petitioner was only entitled to an apportioned part of the dividends which accrued due in January 1844; for the children of the Petitioner, if they became entitled to the funds, might insist that the Petitioner was only entitled to half of that portion of the dividends which accrued after he attained twenty-one.

THE MASTER OF THE ROLLS [Lord Langdale]. I do not think that this is a case for an apportionment of the dividends.

[484] MAN v. RICKETTS. May 30, July 3, 1844.

[[Affirmed, 1 Ph. 617; 41 E. R. 767.]

A suit was instituted by the creditors' and official assignee of a bankrupt. The creditors' assignee died before decree, the official assignee died after decree, and a new official assignee being appointed, his name was, on motion, substituted under the 6 G. 4, c. 16, s. 67, as Plaintiff in the suit.

This bill was filed by James Man, the creditors' assignee, and George Lackington, the official assignee, of a bankrupt. James Man died in March 1842, leaving

Lackington surviving him, and a decree was made in the cause on the 22d of February 1844. (*Ante*, 93.) In March 1844, after the decree had been pronounced, but before it had been entered, Lackington, the official assignee, who was then the sole Plaintiff, died, and on the 2d of April 1844 William Turquand was appointed official assignee in room of Lackington. A motion was now made under the 6 G. 4, c. 16, s. 67, and 1 & 2 W. 4, c. 56, s. 24, that the name of Turquand might be henceforth substituted in the place of Man and Lackington, or of Lackington, in all further proceedings in these causes, in the same manner as if Turquand had been originally a party thereto.

By the sixty-seventh section of the 6 G. 4, c. 16, it is enacted, "That whenever an assignee shall die, or a new assignee or assignees shall be chosen as aforesaid, no action at law or suit in equity shall be thereby abated, but the Court in which any action or suit is depending may, upon the suggestion of such death or removal and new choice, allow the name of the surviving or new assignee or assignees to be substituted in the place of the former; and such action or suit shall be prosecuted in the name or names of the said surviving or new assignee or assignees, in the same manner as if he or they had originally commenced the same."

[485] Mr. Hallett, in support of the motion.

Mr. Kent, *contrâ*, for the Defendant T. B. Ricketts, objected to the form of the notice of motion, it not stating on whose behalf the motion was made, and contended that this section did not apply to the present case, and that a supplemental bill was necessary.

THE MASTER OF THE ROLLS [Lord Langdale]. I think that the Vice-Chancellor of England has made orders of this description, and I will take an opportunity of looking at them.

The Act provides that the estate shall vest in the new assignee, and that the new assignee may be substituted by "suggestion." I should have felt some difficulty as to the proper mode of giving operation to the direction as to the suggestion, but for the orders of the Vice-Chancellor of England.

The unreported cases of *Fort v. Weston*, *Bourne v. Walker*, and *Nouaille v. Flight*, were afterwards referred to (see next page), and on the 3d of July

THE MASTER OF THE ROLLS ordered the name of Turquand to be substituted in the place of Lackington deceased as a Plaintiff in the suit; and that the suit should be prosecuted in the same manner as if Lackington had been originally a Plaintiff therein.

NOTE.—See *Mendham v. Robinson*, 1 Myl. & K. 217; *Bainbrigg v. Blair*, Younge, 386; *Lloyd v. Waring*, 1 Coll. 536.

[486] Between R. FORT AND H. STRACEY (Assignees of Brickwood), a Bankrupt, Plaintiffs; and JOHN WESTON, Defendant. V.-C. March 14, 1826.

On the 25th of February 1826 Bolland was appointed a new assignee of the bankrupt, in the place of Stracey, who had become bankrupt, since the commencement of the suit. On the motion of

Mr. Coombe, it was ordered "That the name of Bolland be substituted in the place of the said Stracey as such assignee as aforesaid. And that this suit be prosecuted in the names of the said Plaintiff Fort and Bolland, in the same manner as if the said Fort and Bolland had originally commenced the same." Reg. Lib. 1825, A. fol. 612.

[486] BOURNE AND LA MARCHE v. WALKER. V.-C. Nov. 19, 1840.

La Marche, one of the assignees of the bankrupt, had died, and Holderness was appointed assignee in his place. On the motion of

Mr. Cankrien, it was ordered, "That the Plaintiff be at liberty to substitute the name of Holderness, of, &c., in the place of the name of La Marche, lately deceased, as Co-plaintiff in this suit with the above-named Plaintiff Bourne." Reg. Lib. 1840, A. fol. 74.

[486] NOUAILLE v. FLIGHT. M. R. April 26, 1844.

The Plaintiffs Nouaille, Vallé, and Day, together with Gibson, since deceased, and Lackington, as the official assignee of Woodgate, a bankrupt, filed their bill in this Court against the Defendant thereto, and a decree was made therein, and the Master made his report. Further directions were afterwards given. George Lackington had since died, and Patrick Johnson had been duly appointed official assignee in the place and stead of Lackington. On the motion of

[487] Mr. Heathfield, and on proof of the several matters,

THE MASTER OF THE ROLLS [Lord Langdale] ordered, "That the name of the said Patrick Johnson be substituted in the place of the said George Lackington, deceased, as a Co-plaintiff with the Plaintiffs Nouaille, Vallé, and Day in these suits : and that these suits be prosecuted in the names of the said Plaintiffs Nouaille, Vallé, and Day, and the said Patrick Johnson, in the same manner as if the said Patrick Johnson had been originally a Plaintiff therein. And hereof notice was to be given to the Defendants forthwith."

[487] *In re* BROMLEY. April 1, 24, 1844.

The taxation of a bill was directed on the terms of paying the amount, £50, into Court; it was taxed at £25. The Court, upon motion, directed payment out of the Court of the fund deposited.

Terms of taxation after the expiration of one month from the delivery of the bill.

Under the Solicitors Act (6 & 7 Vict. c. 73, s. 37), where an application is made to tax a solicitor's bill after the expiration of a month from its delivery, the reference for taxation is to be made "with such directions and subject to such conditions as the Court or Judge making such reference shall think proper."

The application for taxation being made in this case after the expiration of the month, the Master of the Rolls, by an order of the 8th of February 1844, directed the bill of costs, amounting to £51, 19s., to be taxed upon the payment by the applicants of that sum into Court.

The bill was taxed, and £25, 16s. 5d. was found due to the solicitor.

Mr. F. H. Goldsmid now moved, on the part of the client, that the sum of £25, 16s. 5d. might be paid out of Court to the solicitor, and that the remainder might be paid back to the client.

[488] The only question was whether this could be done on motion. (See *Heathcote v. Edwards*, Jacob, 504; *Oliver v. Burt*, 1 Beavan, 583; *Garratt v. Niblock*, 5 Beavan, 143.)

THE MASTER OF THE ROLLS [Lord Langdale] took time to consider the case, and under the circumstances, and to save the expence, he made the order. He, however, afterwards observed that he begged it to be understood that this was not to be the general practice.

NOTE.—Payment into Court is not now required at the Rolls, where the application for taxation is after the expiration of a month from the delivery of the bill of costs; but it is ordered, "That no proceedings at law be commenced against the Petitioner pending the reference, but the Petitioner is to procure the Master's report in a month (unless the Master shall certify that further time is necessary to enable him to make his report), or the order is to be of no effect."

[489] MADEN v. VEEVERS. *June* , *July 31, 1844.*

A Defendant admitted the possession of documents, but stated that they were all prepared and made since the dispute arose, in contemplation of the litigation of that dispute, and her defence against the Plaintiff's claim: but she did not connect them with her professional advisers. Held, that they were not privileged, and ought to be produced.

A bill was filed, insisting on a partition already made between the Plaintiff and Defendant, who were tenants in common. The bill contained an alternative prayer for a partition under the Court. The Defendant insisted on the invalidity of the partition, but admitted the possession of documents shewing the manner in which she had since dealt with her share of the property. Held, that the Plaintiff had an interest in them, if it were only for the purpose of ascertaining who were tenants in common with him.

The principal facts of this case will be found stated in a former volume (5 Beavan, 503), from which it will appear that the Plaintiffs, the Defendant, and others, had been or were tenants in common of certain lands and coal mines. A partition had been made by agreement between the parties in 1812. The Defendant, Mrs. Veevers, was then under coverture, and had not concurred in any fine so as to bind her estate. The object of the bill was either to establish the partition, or, in the alternative, to effect a partition by means of the usual commission issuing out of this Court.

The Defendant, Mrs. Veevers, by her answer stated, that she had certain deeds and documents mentioned in the schedule, but she said that the same deeds, documents, &c., specified in the first part of the schedule, related exclusively to the title of the Defendant, and of the several parties, thereinbefore mentioned, entitled under the appointment executed by her, and under the will of Sagar Veevers, in and to the several estates, hereditaments, &c., whereto she and such several other parties were respectively entitled; and she submitted she was not bound to produce them, and she said that the several documents, papers, and writings in the second part of the schedule, "related wholly and exclusively to the dispute between the Defendant and the said Com-[490]-plainant, respecting the Defendant's aforesaid title to the said estates, hereditaments, and premises, whereof, wherein, and whereto the Defendant was possessed, interested, and entitled, and that the same and each of the last-mentioned documents, papers, and writings had been, respectively, prepared and made since the said dispute arose, and with a view to, and in contemplation and prospect of the litigation of the said dispute, and of the Defendant's defence against the claim of the said Complainant; wherefore the Defendant submitted and insisted, that she was not bound, and ought not to be required to produce, or deposit, or part with the possession of the several last-mentioned documents, papers, and writings, or any or either of them, and she declined so to do."

A motion was made for the production of these documents.

Mr. Kindersley and Mr. Rogers, for the Plaintiffs.

Mr. Turner and Mr. Bacon, *contrà*.

THE MASTER OF THE ROLLS reserved judgment.

July 31. THE MASTER OF THE ROLLS [Lord Langdale]. In this case, production is sought for the documents stated in the second part of the schedule to the Defendant's answer; she says, that they relate exclusively to the dispute between her and the Plaintiffs respecting the title to the estate in question, and that they were all prepared and made since the dispute arose, in contemplation of the litigation of that dispute, and her defence against the Plaintiff's claim. If these documents [491] were cases laid before counsel, the statements made by or for her legal advisers, or communications made between her and her solicitor, merely in the relation of solicitor and client, she would be entitled to protection; but that is not said, and the answer does not bring her within the rule.

With regard to the other documents, which shew the manner in which she has dealt with her own share of the property, I am of opinion, that the Plaintiffs, as

tenants in common, have an interest in them, if it be only for the purpose of ascertaining who are tenants in common with them.

I am therefore of opinion that the documents mentioned in the schedule must be produced.

[491] *In re WATTS. March 23, 1844.*

Special direction given on an order for taxation, that if the solicitor should be unable to establish any of the charges by reason of the death of his clerk, or the absence of the books and papers delivered to the client, the Taxing Master should report specifically thereon.

This was a petition for the taxation of five bills of costs. One of the objections was, that the solicitor would be unable to establish some of his charges, in consequence of the death of his clerk, and of the books and papers having been delivered to the Petitioner and to other persons jointly liable who had become bankrupt.

Mr. Kindersley and Mr. Bagshawe, for the petition.

Mr. Turner and Mr. Elmsley, *contra*.

THE MASTER OF THE ROLLS having ordered the taxation, directed, that if the Taxing Master should find, that with respect to any of the items in any of the five bills of costs, Mr. Watts should be unable to establish any of [492] his charges, by reason of the death of Oliver Orlando Scott in the affidavit of Mr. Watts named, or the absence of the books and papers stated in the said affidavit to have been delivered to the Petitioner or the said other bankrupts, the said Taxing Master should report specifically thereon to the Court.

Reg. Lib. 1843, A. 762.

[492] *BECK v. BURN. March 21, 23, 1844.*

[S. C. 13 L. J. Ch. 319; 8 Jur. 348. Questioned, *Parker v. Sowerby*, 1853, 22 L. J. Ch. 946; 1 W. R. 404. Doubted, *Adams v. Roberts*, 1858, 25 Beav. 658.]

Where the only gift to a class consisted of a direction to *divide and pay*, upon the death of the tenant for life: Held, upon the context, that those only took who survived such tenant for life.

A testator made a direct gift of his real and personal estate to his wife for life, and after her death he directed his executors to sell and "divide and equally pay" the produce amongst a class of children; and in case of the death of any of the children in the lifetime of the wife, leaving issue, he directed his executors to "pay" unto the issue, his parent's share. Held, that those children and issue were alone entitled who survived the tenant for life.

This bill was filed by the three Plaintiffs, on behalf of themselves and all other persons interested in the freehold and copyhold estate of a testator, except the Defendants.

The testator, by his will dated in 1801, gave and bequeathed all his real and personal estate to his wife for her life; and immediately after her decease, he directed his executors to sell his freeholds, &c., and his household furniture, &c., and to call in monies, and invest a sufficient sum in consols to answer three annuities, which annuities, in case of the deaths of the annuitants, were to fall into the residue of his personal estate, and be divided as after mentioned.

The testator proceeded as follows:—"And with respect to the residue of the produce of sale of my said [493] freehold, copyhold, or leasehold estates, household furniture, books, plate, linen, and china, and other household stuff, hereinbefore directed to be sold, and money due upon bonds or otherwise, and other the rest, residue, and remainder of my real and personal estate, I direct my executors to *divide and equally pay* the same, to and amongst all and every the children born in lawful wedlock of my brothers and sisters, and to and amongst all and every the children

born in lawful wedlock of my said dear wife's brothers and sisters, share and share alike. And my further will and meaning is, that in case of the death of any or either of the above-mentioned children in the lifetime of my said dear wife, leaving issue, then and in that case, I hereby direct my said executors, to pay unto the issue of such child or children his, her, or their parents' share equally between them, share and share alike. And my further will and meaning is, that as the several annuitants die, I hereby direct that their said annuities, as they respectively fall into the residue of my personal estate, and the stock wherein they are invested, shall go and be equally divided amongst all and every the children above mentioned, and the issue of such deceased child or children, share and share alike."

The testator died in 1818, at which time all the brothers and sisters both of himself and wife were dead.

His widow died in 1837.

William Wilson, a nephew of the testator, died in his lifetime. Samuel Verry, a nephew of the testator's wife, died in her lifetime without leaving any issue, and Robert Stone, a nephew of the widow, also died in the widow's lifetime.

[494] Mr. Spence and Mr. Wood, for the Plaintiffs.

The life-estate is given to the wife directly, and there is no gift to the trustees until her death. There is no gift whatever to the class, except in the direction to *divide and pay*, and, therefore, there was no vesting until the period at which the sale, division, and payment were to take place; consequently those only who survived the tenant for life attained vested interests, and became entitled to participate in the fund.

Mr. Turner and Mr. Maxwell, *contrà*, contended that there was a gift to a class, which vested immediately on the death of the testator, and that the payment alone was postponed for the convenience of the estate. That, therefore, the representatives of those who survived the testator, but died in the lifetime of the widow, were entitled to share in the fund.

The following cases were cited:—*Billingsley v. Wills* (3 Atk. 219), *Viner v. Francis* (2 B. C. C. 658, and 2 Cox, 190), *Batsford v. Kebbell* (3 Ves. 363, 364), *Walker v. Main* (1 Jac. & W. 1), *Leeming v. Sherratt* (2 Hare, 14), *Gray v. Garman* (Ib. 268), *Hallifax v. Wilson* (16 Ves. 171).

Mr. Stinton, Mr. Elderton, Mr. Shebbeare, Mr. Cory, Mr. Ellis, and Mr. Miller, for other parties.

Mr. Spence, in reply.

THE MASTER OF THE ROLLS reserved judgment.

[495] *March 23.* THE MASTER OF THE ROLLS [Lord Langdale]. The testator in this will has described a class of children, amongst whom the residuary estate is to be divided, after the death of his wife, to whom he has given his real and personal estate for life. He has made no direct gift to the children, nor to any trustee for them; but he has directed the whole to be sold and "divided and equally paid" amongst the children, &c.

I am of opinion, upon the construction of this will, that the direction to "divide and pay" applies to such persons only as might answer the description at the time of distribution; and that the class to take consists of such children as should be living at the death of the wife, and the issue of any who should die in the lifetime of the wife, leaving issue, such issue being living at the period of distribution.

The effect therefore is, that the children who died in the lifetime of the tenant for life, and their issue who died in the lifetime of the tenant for life, are excluded.

I do not say that in all cases where there is only a direction to "pay" it excludes all those who may not be living at the time of distribution. That must always depend on the context of the will.

DECREE.—Declare, that the residuary estate "was divisible amongst such only of the children of the testator's brothers and sisters, and of his widow's brothers and sisters, and of the issue of any such child deceased in the lifetime of the said testator's widow, as were living at the death of the testator's said widow, such issue taking the share which their parents would have taken if living at the death of the testator's said widow." And that William Wilson, Samuel Verry, and Robert Stone did not

respectively become entitled to any share or interest in the said testator's residuary estate.

See *Leake v. Robinson*, 2 Mer. p. 387; *Davies v. Fisher*, 5 Beav. p. 209.

[496] *In re TRYON. (Ex relations.) March 22, 1844.*

[See *In re Johnson and Weatherall*, 1888-90, 37 Ch. D. 439; affirmed in House of Lords, 15 App. Cas. 203.]

Taxation ordered, after payment under protest, the payment being insisted on as a condition for parting with a deed necessary to complete a purchase. A party named trustee without his sanction, and called on to disclaim, is authorised in taking the opinion of counsel as to his obligation to execute a disclaimer. Generally country solicitors are not allowed the costs of a journey to London to examine abstracts there, unless there be some speciality.

This was a petition for the taxation of a bill of costs, which had been paid.

The Petitioners had sold an estate vested in them as trustees, and two terms of years having, on a former purchase, been assigned to Mr. Curling to attend the inheritance, the Petitioners applied to him to reassign them to new trustees for the present purchaser. This he refused to do, alleging that his name had been used without his authority, and that he had never accepted the trusts.

Mr. Curling was thereupon requested to execute a deed of disclaimer; he ultimately consented to do so, upon an undertaking to pay his costs and expenses.

Mr. Tryon, who was residing at Deal, was employed by Mr. Curling as his solicitor on the occasion. He perused the abstract of the different deeds, and also the deed of disclaimer, and he took the opinion of counsel as to Mr. Curling's obligation to execute the deed of disclaimer, and made a journey up to London to compare the deeds with the abstract. In August 1843 he delivered his bill of costs, amounting to £26, 18s., in which he charged £7, 7s. for obtaining counsel's opinion, and £12 for his journey to London and expenses there. The bill having been objected to, Mr. Tryon offered to reduce it by the sum of £5, 5s., but refused to [497] part with the deed of disclaimer until he received payment of the balance.

The deed of disclaimer being necessary for the completion of the purchase, the amount of the bill after deducting the £5, 5s. and making an addition of 13s. 4d. was, on the 23d of November 1843, sent by a clerk to Mr. Tryon's London agents, with a letter, stating that the sum was paid *under protest*, for the purpose of obtaining the deed, and without prejudice to the Petitioners' right to tax or otherwise question the bill of costs. On the same day, Mr. Tryon's agents wrote to the solicitor of the Petitioners, stating that they had placed the sum of £22, 6s. 4d. to Mr. Tryon's credit with the executors, which, according to his instructions, they had received in satisfaction of his claims, for the purpose of closing this account and avoiding all dispute.

The Petitioners' solicitor, however, immediately returned an answer, stating that the £22, 6s. 4d. was paid upon the terms stated in the letter left, and upon no other; and if they did not think fit to receive it, he offered to return the deed on receiving back the money, and to consider that they refused to deliver up the deed.

In answer to this letter, Mr. Tryon's agents stated that they could not pay back the sum received in exchange for the deed, on its return, as it was useless to Mr. Tryon's client.

A petition was presented, praying the taxation of the bill.

Mr. Roundell Palmer, for the Petitioners, contended that the bill having been paid under protest, ought now [498] to be taxed; that counsel's opinion was unnecessary, not having been taken with a view to assist the execution of the deed, but to determine the propriety of disclaiming a trust of two terms of years which he had refused to accept, and that, in addition to this, Mr. Tryon had been informed that such a course would be objected to as unnecessary. Secondly, that it was not

necessary for a solicitor, having an agent in town, to come to London to examine deeds, when that duty might be as well performed by the London agent, or by his clerk, as by the principal. (*Crossley v. Parker*, 1 Jac. & W. 460; *Alsop v. Lord Oxford*, 1 Myl. & K. 564; *Horlock v. Smith*, 2 Myl. & Cr. 523.)

Mr. Rolfe, *contra*, contended that there ought not to be any taxation of the bill, which had been finally settled. That Mr. Tryon had made the deduction of £5, 5s., and parted with the deed of disclaimer on the terms of receiving the £22, 6s. 4d., and that the account having been thus finally settled by agreement, ought not to be reopened.

He argued also that the items complained of were proper.

THE MASTER OF THE ROLLS [Lord Langdale], on the whole, was of opinion that the payment had been conditional, though, if it had been absolute, it might, upon the special circumstances, have still been subject to taxation.

That Mr. Curling's name having been used without his authority, he was justified in taking the opinion of counsel on the matter; but that as to the travelling expenses, the general rule was not to allow such costs [499] unless there were some specialty, and this would have to be considered by the Master on the taxation, which he must direct.

He therefore ordered a taxation of the items complained of, and reserved the question of costs.

NOTE.—The Taxing Master, on taxation, disallowed the charges for the journey, &c., and allowed £2, 2s. only for the examination of the deeds; but he allowed the costs of the opinion, with some deduction. The parties then arranged the matter, and the case was not again brought before the Court.

[499] HUSSEY v. DIVETT. April 23, 1844.

A bill of revivor and supplement was filed to bring new trustees before the Court. It was supplemental as to the trustees, but a bill of revivor as regarded the other Defendants. Held, that it was only necessary to set down the bill to be heard as against the new trustees.

This was a bill of revivor and supplement, to bring new trustees before the Court. It was set down to be heard against the new trustees only, and not as against the other parties, with respect to whom it was simply sought to revive the suit.

Mr. W. H. Clarke, for the Plaintiff.

Mr. Freeling objected, that this suit had been set down against the new trustees only, and that the practice was as stated in 3 Daniell's Practice (page 232): "It is to be recollected, that, in all cases where there is a bill of revivor and supplement, the case must be set down for hearing *against all the parties*, although the bill is only a bill of revivor against one, and an order to revive has been obtained."

[500] A MSS. case, of *Nellthorpe v. Marriott*, was referred to.

THE MASTER OF THE ROLLS thought that no general rule could be laid down, and that each case must depend on its particular circumstances. However, as it was admitted that this bill contained no new facts connected with the parties against whom it was sought simply to revive the suit, and as its purport was limited to the bringing the new trustees before the Court, the objection could not be sustained.

[500] SMART v. BRADSTOCK. July 18, 1844.

Twenty years ago, twenty-seven persons conveyed real and personal estate to trustees to sell, and to divide the produce. Held, that a bill might be filed by a few, on behalf, &c., against the trustees, to make them account; and that it was not necessary to make all the persons interested parties to the suit.

This bill was filed by the three Plaintiffs, "on behalf of themselves and all other

the persons interested in the real and personal estates of Walter Woodcock," and the produce of such estates, under two indentures dated in 1824 and 1826.

Disputes having arisen between the parties entitled under the will of Walter Woodcock, such parties (being twenty-seven in number) executed the deeds in question, whereby they conveyed the real and personal estate to trustees, on trust to sell, and to divide the produce between the parties beneficially interested. This bill was filed to make the trustees account.

Mr. Bevir, for the Defendant Bradstock, objected, that the suit was defective for want of parties, and he insisted that all the persons beneficially interested under the deeds stated, ought to be made parties, to protect their interests. That there was no allegation in the bill [501] that the persons interested were so numerous that it would be impossible to make them parties to the suit; and in a case before Vice-Chancellor Wigram (*Harrison v. Stewardson*, 2 Hare, 530) it was considered that twenty creditors, interested in a real estate, were not so large a number, that the Court would, on the ground of inconvenience alone, allow a few of them to represent the others, and dispense with such others as parties in a suit to recover the estate against the whole body of creditors.

Mr. Kindersley and Mr. Shapter, for another Defendant.

Mr. Turner and Mr. Bird, for the Plaintiffs.

Where parties are numerous, the Court will not require the presence of all of them, if it sees that they are substantially represented by other parties to the suit, whose interests are not conflicting. It is always a matter of convenience, and to hold the contrary would result in a denial of justice; *Harvey v. Harvey* (4 Beav. 215).

In the case of a joint stock company, the Court allows a few on behalf of the rest; *Taylor v. Salmon* (4 Myl. & Cr. 134); and the reasoning in that case is equally applicable to the present. (See *Richardson v. Hastings*, ante, 301, 323; *Powell v. Wright*, ante, 444; *Gordon v. Pym*, 3 Hare, 223.)

THE MASTER OF THE ROLLS [Lord Langdale]. I must hold that the absent parties are sufficiently represented: they have exactly the same interests as those of the Plaintiffs. The parties were twenty-seven in number twenty years ago; there is no telling what number they may amount to at the present time, and the justice of the case would probably be defeated, if the Plaintiffs were required to make them all parties to the suit.

[502] LECKIE v. HOG BEN. July 22, 1844.

A testatrix, being liable to pay an annuity to A. for life, purchased an annuity during B.'s life, and effected a policy on B.'s life for £2000. By her will she recited, that on the death of B. £2000 would be recovered to her estate. In the event of B. dying in the life of A., the executors were to provide A.'s annuity out of her estate. In the event of A.'s death before B., she gave the purchased annuity to C., he paying the premiums; and on the death of B. she gave to C. the £2000. B. died in the life of A. Held, that C. was not entitled to the £2000.

The testatrix, being under an obligation to secure an annuity of £200 a year to her brother Remington Leckie for life, purchased an annuity of that amount, payable during the life of Fanny Burgess, whose life she insured for the sum of £2000. The testatrix being also bound to pay an annuity of £150 to Mrs. Gill for life, purchased a leasehold property for securing it.

The testatrix had a power of appointing certain property standing in the names of trustees; and by her will, after giving certain legacies, she gave the interest of the remaining sums referred to in her marriage settlement, to her husband for life, and on his death she gave half of the residue to James Henry Leckie, and the other moiety to Mrs. Robinson and her children.

By a codicil, dated in September 1835, she expressed herself as follows:—
"Whereas I am bound to pay my brother Remington Leckie an annuity of £200 sterling per annum during natural life, for which purpose I have purchased an annuity on and during the life of Mrs. Fanny Burgess, on whose life I pay annually the sum

of £80, 16s. 3d. to the West of England Life Assurance Office, in order that, at her death, the sum of £2000, or more, may be recovered to my estate; in the event of Mrs. Fanny Burgess dying before my brother Remington Leckie, I leave it to the discretion of my executors to provide my said brother Remington Leckie his annuity from my estate, as they shall think best. In the event of my brother Remington's death before the above-named Mrs. Fanny Burgess, I give and bequeath [503] the above annuity of £200 per annum unto my brother Captain James Henry Leckie, his heirs, administrators, and assigns, he or they paying the life assurance of £80, 16s. 3d.; and on the death of Mrs. Fanny Burgess, I give and bequeath the above-named £2000 insured upon her life unto my said brother Captain James Henry Leckie, his heirs, administrators, and assigns." The codicil also contained the following disposition, which was supposed to affect the construction of the prior gift.

"I am also bound to pay Mrs. Jane Ann Gill an annuity of £150 during her natural life, for which purpose I purchased a leasehold estate of some houses in Johnson's Court and St. Dunstan's Court, Fleet Street. On the death of the said Mrs. Jane Ann Gill, I give and bequeath unto my niece Mrs. Ann Robinson, &c., the above leasehold estate. I desire my executors to pay my brother R. Leckie the sum of £752, 0s. 3d. After paying this, and the annual assurance of £80, 16s. 3d. on the life of Mrs. Fanny Burgess, and any deficiency in the annuity for Mrs. Jane Ann Gill, I give and bequeath unto my husband John Penny, for his natural life, the interest of all my other property that now is or may come into my estate after my death. At his death, I give and bequeath one-half of the residue of the said property unto my brother Captain James Henry Leckie, the interest of the other half of the said property unto my niece Ann Robinson, &c., for her natural life. At her death I wish it to be divided among her children, on their becoming of age, viz., twenty-one years."

The testatrix died in 1838.

Fanny Burgess died in 1842, leaving Remington Leckie her surviving. The Plaintiff James Henry Leckie [504] claimed the £2000 which on the death of Fanny Burgess had been paid on the policy; and the question was, whether, under the codicil, he was so entitled, or whether the sum in question fell into the testatrix's residuary estate.

Mr. Purvis and Mr. Wood, for the Plaintiff, contended, that on the death of Mrs. Fanny Burgess, the Plaintiff, in any event, became entitled to the policy. That the testatrix provided for the two alternatives, namely, of Mrs. Burgess dying in the lifetime of Remington, and Remington dying in the life of Mrs. Burgess; in the former, Remington's annuity was to be provided out of the estate; and in the latter, Mrs. Burgess's annuity was to go to the Plaintiff; and that then the testatrix thus proceeded: "And on the death of Mrs. Fanny Burgess" (meaning whenever it might happen), "I give and bequeath the £2000 insured upon her life unto my brother James."

Mr. Kindersley and Mr. Freeling, and Mr. Turner and Mr. Busk, *contra*. The contingency on which the policy was given to the Plaintiff has not happened. The gift of it was only to take effect in the event of Remington dying in the life of Mrs. Burgess. The latter words, "and on the death," &c., are qualified by those immediately preceding, and they together form one sentence. The contingency extends to the whole limitation (1 Jarman on Wills, 753), otherwise the copulative "and" will, unnecessarily, be rejected. The £2000 therefore forms part of the residue.

Mr. Randell, for the executors.

Mr. Purvis, in reply.

[505] THE MASTER OF THE ROLLS [Lord Langdale]. The testatrix recites, that at the death of Mrs. Fanny Burgess the sum of £2000 or more may be recovered "to her estate;" and in the event of Mrs. Fanny Burgess dying before Remington Leckie, she left it to the discretion of her executors to provide Remington his annuity from "her estate" as they should think best. So that, the £2000 being recovered "to her estate," her executors were from "her estate" to provide for the annuity.

She then begins a fresh paragraph. In the event of Remington's death before Mrs. Fanny Burgess, she gives the annuity to James Leckie, he paying the assurance on Mrs. Fanny Burgess's life, and on the death of Mrs. Fanny Burgess she gives the policy to James H. Leckie.

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There are two alternative events contemplated; Mrs. Burgess dying in the life of Remington, and Remington dying in the life of Mrs. Burgess. In the former, she or her estate will receive £2000, and be still liable to pay Remington's annuity: she therefore says the £2000 will "come to her estate;" and out of that estate she directs Remington's annuity to be provided for. In the other event, Remington's annuity ceases, but her estate remains entitled to the annuity of £200 during Mrs. Burgess's life, and to the policy payable on her death. The testatrix says, in that event, let my brother James have the annuity, he keeping up the policy, and, on the determination of the annuity by the death of Mrs. Burgess, let him have the £2000 payable on the policy.

In one event, the money payable on the annuity was to fall into her estate, and contribute to pay the continuing annuity to her brother. In the other event, James was to have the annuity payable by Mrs. Burgess during its continuance, he keeping up the policy on her life; and on her death, he was to have the money payable on the policy.

I am of opinion, that in the events which have happened, the Plaintiff is not entitled to the £2000.

[506] YOUNG v. WHITE. WHITE v. YOUNG. July 11, 12, 15, 1844.

[S. C. 13 L. J. Ch. 418; 8 Jur. 654.]

A purchaser being a creditor of the agent of the vendor of an estate, is not entitled, by agreement with the agent alone, to place the debt due to the agent to the debit of the principal on account of the purchase-money.

A. employed B. to sell his estate, and receive the purchase-money. B. sold it to C. An account was afterwards settled between B. and C., whereby, after giving credit for monies paid on account of the purchase, and a private debt of £550 due from B. to C., a small balance appeared due on account of the purchase-money, which C. then paid to B. A. afterwards, in ignorance of the arrangements between B. and C. executed the conveyance, and signed a receipt for the whole purchase-money, which were handed over by B. to C. Held, that the arrangement for setting off B.'s private debt was invalid, and that C. was still liable to A. for the £550.

The Plaintiff Young was entitled to the Radnage estate, subject to a mortgage to Mr. Eeles for £700, and also subject to a mortgage for £200 to Mr. Rumsey the solicitor of Young, which latter, although alleged to have been paid, still remained untransferred.

On the 11th of November 1840 Rumsey, with the authority of Young, entered into a written contract for the sale of the estate to the Defendant White for £920, to be completed on or before the 25th of March then next, on which day the purchase-money was made payable. On the same day, Rumsey obtained payment from White (professedly on account of the purchase-money), of two sums, of £300 and £35.

[507] It appeared that in September 1839 and July 1840, White had, previously, advanced to Rumsey two sums, of £400 and £150, which, though disputed, the Court, upon the evidence in the causes, held to be the private debt of Rumsey.

Rumsey acted as solicitor for both vendor and purchaser in the sale.

On the 26th of March 1841 Rumsey made out two accounts, one of which he produced to White, and was headed "Mr. White in account with Mr. Rumsey," and therein, after charging White with the purchase-money of £920, and giving credit for the debts of £400 and £150, and the two sums of £300 and £35 advanced at the date of the contract, and interest, it appeared, that £3, 14s. 6d. remained due from White on account of his purchase. White thereupon paid this balance to Rumsey. The conveyance of the estate had not, at that time, been executed.

On the same day (26th of March 1841) Rumsey wrote to Young, stating the net balance payable to him out of the £920 purchase-money to be £123, after paying Eeles's mortgage, amounting to £770, and Rumsey's bill of costs in the transaction,

amounting to £27. He also stated, that if he (Young) would return the conveyance executed, "giving him (Rumsey) directions how he would have the balance disposed of, he, Rumsey, would pay it." He enclosed the account, and the bill of costs, in which he charged for the reconveyance of Eeles's mortgage. The Plaintiff thereupon executed a common conveyance of the estate from himself to White, and he signed a receipt, endorsed thereon, for the whole consideration money, and returned it to Rumsey.

[508] Eeles's mortgage had never been paid off or reconveyed.

On the 10th of April 1841 Rumsey sent the deed to White, and a few days after he absconded, and was subsequently made bankrupt. No notice had been taken of Eeles's mortgage, which still remained wholly unpaid.

Young filed this bill against White, praying payment of £620, the alleged balance of the purchase-money, and offering to satisfy Eeles's mortgage.

On the other hand, White filed a cross-bill, insisting that the £400, £150, and £35 had been advanced to Rumsey for and as the agent of Young, and that the whole purchase-money had been paid, and praying an effective conveyance of the property, free from the incumbrances of Eeles and Rumsey.

Mr. Tinney and Mr. R. Palmer, for the Plaintiff Young, contended, that of the purchase-money, £300 alone had been paid by the Defendant, and that the sums of £400 and £150 advanced before the contract, constituted a private debt of Rumsey, which he could not concur in setting off against the sum due to his principal; *Wyatt v. Lord Hertford* (3 East. 147). That even if these sums constituted a debt of Young, they could not be set off against his lien for the purchase-money; *Pinnock v. Harrison* (3 Mee. & W. 532).

That if the money had not been actually paid, the receipt was ineffectual; *Coppin v. Coppin* (2 P. Wms. 294); and no money had been advanced on the faith of the conveyance and receipt.

[509] Mr. Kindersley and Mr. Parry, for the Defendant White, contended, that Rumsey had all along acted as the general agent of Young, and that all the sums had been advanced to Rumsey on account of Young, either as his authorised agent, or on account of the purchase. That, by the execution of the conveyance, and by signing the receipt, Young had recognized all that had been done by his agent, and the mode in which the accounts had been settled.

THE MASTER OF THE ROLLS reserved his judgment.

July 15. THE MASTER OF THE ROLLS [Lord Langdale]. I have read the papers in this case, and the outline of it seems to be as follows:—

Mr. Young employed Rumsey, who had been his attorney and agent in many other matters, as his agent, to sell the Radnage estate, and to receive the purchase-money.

Rumsey agreed to sell the estate to Mr. White for £920, to be paid on the completion of the purchase.

The estate was subject to incumbrances, and at the date of the agreement, Rumsey was indebted to Mr. White in the sum of £550.

In the agreement, no notice was taken of the incumbrances, or of the debt which was due from Rumsey to White; but it was provided, that the estate was to be conveyed to Mr. White, free from incumbrances, for the sum of £920, to be paid at a future time.

[510] Rumsey, however, requested Mr. White to advance £300, part of the purchase-money, immediately, for the use of Mr. Young; and the request being complied with, Rumsey signed a receipt for the same, as part of the consideration money; and in the receipt no notice was taken of the debt which was owing from Rumsey to Mr. White.

I am of opinion that, as the matter stood immediately after the receipt was signed, it cannot be considered that more than £300 had then been paid on account of the purchase-money.

Almost immediately afterwards, Rumsey requested Mr. White to advance a further sum of £35 for the use of Mr. Young. The evidence shews a great probability that this sum of £35 was paid; and although the proof is not conclusive, yet, as Mr. Young has declined to take an inquiry on the subject, I must consider that the

sum of £35 was in fact paid, and I think that it ought to be attributed to the purchase. The question is, what, if any, further sum of money was paid by Mr. White to Rumsey pursuant to the contract.

After the contract had been signed, Rumsey, who was then acting as solicitor for Mr. White as well as for Mr. Young, prepared the conveyance (under the circumstances, a very improper one), and on the 26th of March 1841 he told Mr. Young that the purchase-money was paid.

In the absence of all evidence to the contrary, I think that Mr. Young must have understood Rumsey to say, that the purchase-money was paid pursuant to the contract.

[511] On the same day (March 26th) Rumsey settled an account with Mr. White in relation to the purchase. The account is stated in the name of Rumsey, and not in the name of Mr. Young; but it appears to be the only account which Mr. White had in relation to his purchase from Mr. Young: and in this account Rumsey gave credit to Mr. White for sums amounting to £550, the debt then due from Rumsey himself, and some interest thereon; and upon this account, with such credit, he made it appear that no more than £3, 14s. 6d., remained due to Mr. Young on account of the purchase-money; and Mr. White paid this sum of £3, 14s. 6d. to Rumsey for Mr. Young.

Mr. White seems to have placed so much confidence in Rumsey, as to believe that Rumsey had borrowed the sums amounting to £550 for the use of Mr. Young, that the estate was free from incumbrances, and that Mr. Young had authorized Rumsey to set off the debt against so much of the purchase-money.

On the same day on which Rumsey settled this account with Mr. White, he sent to Mr. Young a statement of account, falsely representing, in effect, that he had received the whole of the purchase-money, and that after applying a part of it in discharge of Eeles's mortgage, and another part in paying his own bill of costs, a balance of £123, remained in his hands, to be applied for the benefit of Mr. Young.

Mr. Young placed so much confidence in Rumsey, as to believe this statement to be true; and he thereupon, at the request of Mr. Rumsey, executed the conveyance which Rumsey had prepared, and signed a receipt for the whole of the purchase-money.

[512] The conveyance and receipt were sent to Rumsey by his clerk, and delivered to Mr. White on the 10th of April 1841.

No money was paid or advanced on the credit of the conveyance and receipt; and no more than £335, and the balance of £3, 14s. 6d., can be considered as paid on account of the purchase-money pursuant to the contract. The question therefore seems to be reduced to this:—

Whether a purchaser, being a creditor of the agent of the vendor of an estate, and dealing with the agent in the absence of his principal, and without any special authority of the principal for the purpose, is entitled, as against the principal, by agreement with the agent alone, to place his debt, really due from the same agent, to the debit of the principal, on account of the purchase-money?

I am of opinion that the purchaser is not so entitled; and consequently that Mr. White is still indebted to Mr. Young for so much of the purchase-money as remains, after deducting the three sums of £300, £35, and £3, 14s. 6d.

On the other hand, Mr. Young is bound to perform his part of the contract, and, at his own charge, to procure for Mr. White an assignment or surrender of the term vested in Mr. Eeles, and a reconveyance of the estate which was vested in Rumsey.

I think that the costs of the suit must follow the event, and I greatly regret the additional burden thus thrown on Mr. White.

[513] His loss has arisen from a shameful fraud practised upon him, and he is himself free from the slightest personal imputation.

[513] STAGG v. BROWN. July 24, 1844.

Upon a motion, made on the last seal after Trinity term, for an order absolute to dissolve the common injunction, the Plaintiff will not be allowed until the next motion day to shew cause on the merits; but the Court will appoint an early day in the Vacation for that purpose.

This being the last seal after Trinity term,

Mr. Bird moved for the order absolute, dissolving the common injunction. He observed, that the Plaintiff was not entitled to have until the next motion day (Michaelmas term) to shew cause on the merits. He therefore asked that an early day might be appointed to shew cause. *Robinson v. Walcott* (5 Ves. 551).

THE MASTER OF THE ROLLS [Lord Langdale]. Such has always been the practice. I appoint this day week for shewing cause.

See *Rew v. Dixon*, 2 Mad. 258; *Fielding v. Capes*, 4 Mad. 393; *Lane v. Barton*, 1 Phil. 363; and *Bordinave v. Wadeson*, 1 Colly. 432.

[514] BLAKE v. BLAKE. July 30, 1844.

An order of course alleged to have been irregularly obtained, cannot be treated as a nullity. It operates, until, by a proper application, it is discharged.

The answer was filed on the 7th of March, and no exceptions were taken. On the 6th of July the Defendant gave notice to dismiss the bill for want of prosecution. Before the motion came on, and on the 20th of July, the Plaintiff obtained an order of course to amend his bill.

Mr. Lovat contended, that the order to amend, having been obtained after the time allowed by orders of the Court, must be treated as a nullity; and at all events, that the Defendant was entitled to the costs of the motion. *Davenport v. Manners* (2 Sim. 514), *Swinfen v. Swinfen* (3 Sim. 384), *Peacock v. Sievier* (5 Sim. 553), were cited.

THE MASTER OF THE ROLLS. The motion to dismiss being intercepted by the order to amend, the order to dismiss cannot be made, but the Plaintiff must pay the costs of the motion.

I should feel great difficulty in treating the order to amend as a nullity. It may or may not be regular, but it must remain in operation until, upon a proper application, it is discharged.

NOTE.—See *De Geneve v. Hannam*, 1 Russ. & M. 494; *Wilkins v. Stevens*, 10 Simons, 617; *Petty v. Lonsdale*, 4 Myl. & Cr. 547; *Fennings v. Humphery*, 4 Beavan, 1.

[515] HEMING v. ARCHER. July 26, 1844.

[S. C. 8 Beav. 294; 9 Beav. 366.]

The 1 W. 4, c. 47, s. 12, does not apply to a case where an estate is devised to a trustee during the life of a *cestui que trust*, with remainders over; and by the disclaimer of the trustee, the legal estate descends on the heir.

The testator, by his will, dated in 1837, devised a real estate, called Eaton Hills, unto and to the use of Thomas Moore and his heirs, during the life of his (the testator's) wife, or until she should marry again, and during the life of his son Joseph Archer, or until his son should become bankrupt or insolvent, or attempt to dispose of, by way of anticipation, the rents and profits of the said premises, or any part thereof, upon certain trusts therein mentioned, for the benefit of his said wife, and

after the decease or second marriage of his wife, upon certain trusts for the benefit of his son Joseph. After the decease, bankruptcy, or insolvency of his said son, or any attempt by him to dispose of, by way of anticipation, the said rents and profits, or any part thereof, whichever should first happen, the testator devised the property, unto and to the use of all and every the child and children of his said son, in equal shares, and the heirs of their respective bodies, as tenants in common, with certain remainders over. The will contained other similar devises of other parts of the testator's property.

After the testator's death, a creditor's suit was instituted, in which the real estate had been directed to be sold for payment of the testator's debt. Thomas Moore, by his answer, disclaimed all interest under the will, and was dismissed. The widow died pending the suit. The testator's son Joseph was living, and had four infant children. The estate had been sold under the decree, and a petition was now presented under the 1 W. 4, c. 47, for the purpose of obtaining a conveyance of the [516] fee-simple, from the equitable tenant for life, or Francis Charles Archer, the heir at law, in whom, by the disclaimer, it was said the legal estate had vested.

By the twelfth section of this Act it is provided, that where any lands, &c., shall be devised by any person whose estate is liable to his debts, and "by such devise shall be vested in any person or persons for life," with any remainder over which may not be vested, &c., and a decree shall be made for payment of such debts, the Court may direct "any such tenant for life" to convey the fee-simple to the purchaser.

Mr. Kindersley and Mr. W. T. S. Daniel, in support of the petition.

Mr. Turner, *contra*. The Act has reference to the case of the legal estate vesting by devise in one for life; here the heir takes by descent and not devise, and the Act is inapplicable.

THE MASTER OF THE ROLLS was of opinion that the Act did not apply to the present case, where there was a mere equitable estate for life, and where the legal estate had devolved on the heir, not by devise, but by descent.

NOTE.—The case was reargued, and on the 27th of February 1845 the Master of the Rolls came to the same conclusion, see *post* [8 Beav. 294]. The Lord Chancellor, on appeal, concurred in the opinion of the Master of the Rolls, 30th of May 1845.

[517] HARVEY v. MOUNT. June 10, 12, July 31, 1844.

Though it is the more usual and regular course to file articles or objections to the credit of a witness, previous to applying for leave to exhibit interrogatories for the examination of witnesses in support of such articles, still a simultaneous motion for leave to file articles, and exhibit the interrogatories, is not irregular.

Previous to a cause being at issue, the Plaintiff's solicitor prevailed on A. B. to make a voluntary affidavit, not required by the proceedings in the cause. A. B. was afterwards examined as a witness on behalf of the Defendant, and was cross-examined by the Plaintiff; her affidavit and depositions were contradictory, but the affidavit was not produced to her at the time of her examination. Upon an application by the Plaintiff to file articles and examine witnesses to discredit A. B.: Held, that though the conduct of the Plaintiff's solicitor had been highly improper, still the motion ought to be granted, leave being given to the Defendant to examine witnesses to support her credit, and as to the circumstances under which the affidavit had been sworn.

This was a motion made by the Plaintiff, for leave to file articles against the credit of Charlotte Sangwell, a witness examined on behalf of the Defendant, and to exhibit interrogatories for the examination of witnesses in support of such articles.

At an early period of the cause, and long before she was or could be examined as a witness, the solicitor of the Plaintiff prevailed upon her to make an affidavit of certain facts alleged to be material to the cause. This affidavit was purely voluntary, and was not required for any proceeding in the cause. Before the time when she was

examined as a witness, the Plaintiff's solicitor was aware that her testimony would probably differ from the statements in her affidavit. The Plaintiff refrained from examining her in chief, but she was produced as a witness for the Defendant, and was cross-examined by the Plaintiff. At the time of her examination, the affidavit which she had sworn was not produced to her, but she recollected and spoke of her having made an affidavit relating to some of the matters in question. After publication, it appeared that her depositions did not accord with her affidavit, in circumstances stated to be material.

[518] Under these circumstances the present motion was made.

Mr. Turner and Mr. Goodeve, in support of the motion.

Mr. Kindersley and Mr. E. F. Smith, *contra*, contended, that the motion was irregular; First, because, according to the established practice, the Plaintiff ought to have exhibited articles to discredit the witness previous to his making this application, in order that the Defendant might have notice of the grounds of objection to his witness. 2 Daniell's Pr. (page 594), Hinde's Pr. (pages 374, 377), Lord Clarendon's Orders (Beames' Ord. 187, and 1 Sanders' Ord. 302).

Secondly, because the affidavit itself ought to have been produced to the witness at the time of her examination, in order that she might have an opportunity of explaining it. Phil. on Ev. (8th ed. p. 925, 929).

And thirdly, because voluntary affidavits being prohibited by the 5 & 6 W. 4, c. 62, s. 13, the proceeding was illegal; *Regina v. Nott* (Q. B. Trin. 1843); and because it was also highly improper for the Plaintiff's solicitor to attempt to fix the witness to a particular statement, so as to prevent her being free and unfettered, when she afterwards came to be examined by the proper officer of the Court. They insisted that the Plaintiff ought not to be permitted to avail himself of the affidavit thus improperly obtained.

[519] *Wood v. Hammerton* (9 Ves. 145), *Purcell v. M'Namara* (8 Ves. 324), *White v. Fussell* (19 Ves. 127), and *Piggott v. Croxhall* (1 Sim. & S. 467), were also cited.

July 31. THE MASTER OF THE ROLLS [Lord Langdale]. The motion was objected to on three grounds:—First. For irregularity, because the motion is made for leave to exhibit interrogatories before any articles or objections to the credit of the witness have been filed.

Secondly, because the Plaintiff's solicitor did not, as it is alleged he ought to have done, cause the affidavit to be produced to the witness at the time she was under examination.

Thirdly, because the Plaintiff ought not to be allowed to found any proceeding on the affidavit, or to use the affidavit for any purpose whatever, inasmuch as it was a highly improper act, and even a legal offence, to procure that affidavit to be sworn.

As to the first objection, it appears to me that, on such a proceeding as this, the more usual and regular proceeding is, first, to file the articles or objections to the credit of the witness, and then to apply to the Court for leave to file the interrogatories; but the order for leave to examine witnesses to the credit of other witnesses has not been uniform; it has sometimes been granted on an allegation that the articles had been exhibited, sometimes on articles to be exhibited; and in the cases of *Purcell v. M'Namara* (8 Ves. 324) and *Wood v. Hammerton* (9 Ves. 145), [520] Lord Eldon appears to have made orders that the party applying should have leave to file articles, and to exhibit interrogatories in support of them. I cannot consider a motion, which, in its form, is so sanctioned by the authority of Lord Eldon, to be irregular.

As to the second objection, although, if the witness had been orally and publicly examined, the affidavit ought to have been produced to her, yet, having regard to the mode of examination in this Court, I cannot consider it to be an objection to this application that the Plaintiff did not cause the affidavit to be produced to her, and did not cross-examine her on the subject of it.

I have had much more doubt upon the third objection. I think that the conduct of the Plaintiff's solicitor in procuring the witness to swear the affidavit was highly improper; it seems like an attempt to entangle the conscience of the witness, and to fix her to the impression she might have at the time, and upon which the solicitor himself might have had considerable influence, and prevent her from speaking the

truth, if it differed from that impression, when she came to be properly and regularly examined, in circumstances free from all influence. Considering the circumstances under which the affidavit was made, it may well be doubted whether, after the establishment of a variance between the statements which the affidavit contains, and the statements contained in the depositions, there may not be a much greater probability in favour of the truth of the depositions. Nevertheless, I think that the fact of difference ought to be brought before the Court for consideration at the hearing; and for that purpose, that I ought to grant this motion, giving leave to the Plaintiff to examine witnesses as to the credit of Charlotte Sangwell, and as to the fact of her having sworn the affidavit; and I think that I [521] ought, at the same time, to give leave to the Defendant to examine witnesses to support her credit, and as to the circumstances under which the affidavit was sworn, but neither party is to examine any witnesses as to any fact which is material to what is in issue in the cause.

[521] NOUAILLE v. FLIGHT. *June 1, July 31, 1844.*

[S. C. 13 L. J. Ch. 414; 8 Jur. 838.]

A lessee covenanted to build thirty-four additional houses on the demised property within five years, to keep in repair the houses built and to be built, and at the end of the term to deliver them up to the lessor; and there was a proviso for re-entry on non-performance of the covenants. The additional houses were not built, but for forty-six years the lessor received the rent, and thus waived the obligation to build. The leasehold interest being sold; Held, *first*, that the covenant to deliver up extended to the additional houses, as well as to the houses built at the date of the demise; *secondly*, that the title was bad, notwithstanding the purchaser might retain possession until the last day of the term, and then escape liability by transferring that day to a pauper; and *thirdly*, that the purchaser was not bound to accept either a compensation or indemnity.

This case came on upon exceptions to the Master's report in favour of the Plaintiffs' title to the leasehold estate, which the Defendant had agreed to purchase. The bill was filed for the specific performance of this agreement, and the circumstances which gave rise to the suit were as follows:—

In April 1789 Lewis Preston agreed with Temple West, to take a lease or leases of the land in question for ninety-two years and three quarters, from Christmas 1789, for the purpose of building thereon fifty messuages or dwelling-houses.

An indenture of lease, dated the 20th of June 1792, was executed by and between Temple West of the one part, and Lewis Preston of the other part, and thereby, after reciting the agreement of April 1789; and that Lewis Preston, pursuant to his agreement had built sixteen, part of the fifty dwelling-houses, and was desirous [522] that a proper lease should be granted of the ground with the new buildings thereon: it was witnessed, that in consideration of the expense which Lewis Preston had been at in erecting the buildings then built on part of the said ground, and also in consideration of the expense which he would be at, in erecting thirty-four additional dwelling-houses on other part of the same piece of ground, and in consideration of the rents and covenants therein contained, the said Temple West demised to Preston, all the piece of ground therein described, together with the dwelling-houses built and to be built thereon: to hold the same for eighty-nine years and a half, from Lady Day then last, yielding the rents therein mentioned, which Preston covenanted to pay.

Preston, amongst other things, covenanted, that he would, *within the first five years of the term, build and finish thirty-four additional dwelling-houses*, to make fifty in the whole, he having already built sixteen conformable to the design therein referred to; and also that he would, during the term, well and sufficiently repair the houses then standing upon the ground, or thereafter to be erected thereon with their appurtenances, and all walls and buildings with the appurtenances; and all the premises thereby demised, so well and sufficiently repaired, *would, at the end or other sooner determination of the term, peaceably and quietly deliver up to Temple West or his representative.*

The lease contained a clause, enabling Temple West to re-enter on the demised premises, in case Lewis Preston should do, or omit to do any act in breach, or non-performance of all or any of his covenants.

The Plaintiffs became entitled to the leasehold interest, as assignees of Children and Woodgate, who [523] became bankrupt in the year 1815, and were themselves entitled as mortgagees with a foreclosed equity of redemption, to such estate as had belonged to Lewis Preston, against whose representative the decree of foreclosure had been obtained and made absolute.

Twenty of the thirty-four additional houses had never been built, but the lessor had continued in the receipt of the rent.

In 1840 the Plaintiffs put up the property for sale by auction, and by the sixth condition of sale it was provided, that the receipt for the ground rent due on the last day of payment for the same, as reserved by the original lease, should be considered as a waiver of any forfeiture of such lease. The Defendant Flight became the purchaser at the sale.

This bill having been filed for the specific performance of the contract, the usual reference as to title was made to the Master.

The Master, by his report, found, that all thirty-four additional houses mentioned in the lease had not been built pursuant to the covenant. That the Defendant had insisted, that the covenant to deliver up thirty-four additional houses, to be built according to the covenant, was an objection to the title; but that the sixth condition of sale having provided, that the receipt for the ground rent, due on the last day of payment for the same as reserved by the original lease, should be considered as a waiver of any forfeiture of such lease, and having regard to the length of time which has elapsed since the date of the lease, without any advantage having been taken on account of the breach of such covenant, and of the Plaintiffs being assignees, under a title ac-[524]-quired subsequent to the expiration of the period limited by the covenant for building the additional houses, the Master stated his opinion to be, that the objection was not a valid objection to the title, and he found in favour of the title.

To this report the Defendant took exceptions, which now came on to be heard.

Mr. Turner and Mr. Rogers, in support of the exceptions. These covenants run with the land, and are binding upon the assignees of the term, *Sampson v. Easterby* (9 B. & C. 505); and although the covenant to build within the five years may have been waived by the subsequent receipt of rent, still the covenants to keep the whole fifty houses in repair, and to deliver them up at the end of the term, are still subsisting. The covenants are in their nature continuous and cannot, by the receipt of rent, be permanently waived. The lessor still remains entitled to all his remedies against the lessee and the assignees of the term under the covenants.

The title is therefore bad. The purchaser is not bound to accept an indemnity, and as to compensation the amount cannot be ascertained; for, until the expiration of the lease, the extent of the lessee's liability cannot be ascertained.

Mr. Kindersley and Mr. Heathfield, *contra*. The covenant to build the thirty-four additional houses ought to have been performed previous to Lady Day 1797, and since that time, the landlord has continued in the receipt of the rent, and has thereby waived the covenant. This covenant was not continuous, and the principal [525] part of the obligation being waived, the accessory, namely, to keep these houses in repair, is waived also. It would be absurd to hold that the lessee is absolved from the obligation to build the twenty houses, and yet liable to keep those non-existing houses in repair, and deliver them over at the end of the term. The covenant to repair and deliver over at the end of the term, therefore, applies only to the houses already built.

Secondly, if there be any liability, the purchaser may, immediately before the expiration of the term, assign it to a pauper and thus relieve himself therefrom. *Rowley v. Adams* (4 Mylne & Craig, 534). Again, the Plaintiffs having entered into no covenant to indemnify will require none from the purchaser.

Thirdly, no forfeiture or liability can accrue till the end of the lease, when the purchaser will have had the enjoyment of the property for the whole term, with the exception of the last day, which he may assign and thus get rid of all liability on the covenant. *Earl of Derby v. Taylor* (1 East, 503).

July 31. THE MASTER OF THE ROLLS [Lord Langdale]. The covenant in question consists of three parts—1st, that the lessee will build thirty-four additional houses within five years; 2dly, that he will keep the premises in repair; and 3dly, that at the end of the term, he will deliver up the houses then built, or thereafter to be built, in good and sufficient repair. The covenant to build thirty-four additional houses in five years was broken; the lessor might have re-entered for the breach, but did not, and continued to receive rent from the [526] lessee. The Master has not stated his opinion, whether the covenant to deliver up the houses covenanted to be built is or is not in force; but has merely stated his opinion, that because the lessor did not take advantage of the breach of covenant to build in five years, and the Plaintiffs are assignees, and acquired their title subsequently, the covenant to deliver up, at the end of the term, the houses stipulated to be built, was not an objection to the title.

It was argued at the Bar—first, that the covenant only affects the houses actually built at the time of the demise, and not the houses then only covenanted to be built, and that the only obligation is, to deliver up in repair the houses which shall actually be then built; secondly, that if the covenant be of any validity, the purchaser may relieve himself from it by assigning the lease to a pauper; and thirdly, that supposing the covenant to be in force, nothing is to be done upon it till the end of the term, after the purchaser shall have held the land during the whole term, and had the full enjoyment of it; and, therefore, that the covenant cannot be an objection to the title.

Having carefully read the deed, I am of opinion, notwithstanding some ambiguities of expression, that the covenant extends to the thirty-four additional houses which were to be built, as well as to the sixteen houses which were built at the date of the demise; and that it cannot be confined to such houses only as shall actually be found upon the land at the end of the term.

As to the second point, if it requires any argument, it may be found in this, that the purchaser ought not to be forced to adopt any such expedient, and that he has a right to the enjoyment of the land during the whole [527] term, and to be exempt from any obligation or inducement, imposed upon him by the state of the title or property, to assign the smallest part of the term, for the purpose of relieving himself from any responsibility.

Upon the third point, the question is, whether a liability of this sort can be the subject of compensation. An indemnity the purchaser would not be bound to take, if in such a case it could be given, and I am of opinion, that such a liability as this is not a fit subject for either compensation or indemnity. It is, I conceive, impossible to ascertain, with any reasonable accuracy, the amount or value of any such liability, and it cannot be said, that a purchaser of a leasehold estate enjoys the property which he has purchased, in any reasonable sense of the word "enjoyment," although he may have had the possession of it during the whole term, such possession being constantly attended by a liability to be enforced at the end of the term, and not admitting either of indemnity or of compensation. I am therefore of opinion, that a title subject to such a liability is not a good title.

Having formed this opinion, I must allow the first, fifth, and sixth exceptions. The second exception appears to have been filed in mistake, and I apprehend that the third and fourth, after the decision upon the fifth, have become immaterial; I will observe upon the third, that I am doubtful whether there was sufficient proof of the counterpart under-lease being lost, and that if it were now material, I should refer it back to the Master.

[528] BATE v. BATE. *March 8, 1844.*

[S. C. 8 Jur. 232.]

The 17th Order of August 1841 was intended to apply to cases in which there are several Defendants answering separately.

The only two Defendants required to answer joined in one answer. It was found insufficient, and the Plaintiff obtained an order to amend, and that the Defendants

might answer the exceptions and amendments together. Some of the original interrogatories were altered, and new ones added; but the note to the amended bill required the Defendants to answer all the interrogatories, without excepting those previously answered. Held, that there was no irregularity.

A Plaintiff, unless he specifically offers to do so by the bill, or is required to do so by a cross-bill, is not bound to produce, previous to the Defendant being compelled to put in his answer, documents admitted to be in his (the Plaintiff's) possession and alleged as proving his case.

This bill was filed for the settlement of disputed partnership matters, against three Defendants, Thomas Bate, William Robins, and Frances Bate. The interrogatories were properly numbered from one to twenty-two, according to the exigency of the 17th Order of August 1841. (Ord. Can. 169.) By the note at the foot, the Defendants Thomas Bate and William Robins "were respectively required to answer all the above interrogatories." No *subpoena* was asked against nor answer required from Frances Bate, but it was prayed, that she being served with a copy bill, might be bound by all the proceedings. The two Defendants Thomas Bate and William Robins put in a joint answer, which having, upon exceptions taken thereto, been found insufficient, the Plaintiff obtained an order to amend, and that the Defendants might answer the exceptions and amendments together. The Plaintiff accordingly amended the bill to such an extent as to require a new engrossment, and he paid to the Defendants 30s. for the costs of such amendment. Several of the old interrogatories had been slightly altered, and some entirely new ones introduced, thereby increasing the number of interrogatories from twenty-two to thirty-seven. The division of the old interrogatories was left without any variation in the amended bill, but their numbers were altered, in consequence of the introduction of the new interrogatories. The note at the foot remained the same, and required the two Defendants Thomas Bate and Robins respectively to answer "all the above interrogatories."

These facts gave rise to the first question now before the Court.

A second question arose out of the following circumstances.

The bill, among other things, charged, that certain indentures of the 28th and 29th of September 1826 "were in fact prepared from instructions given by the Defendants Thomas Bate and William Robins, or one of them, unknown to and without any communication with the Plaintiff and John Hezey Bate and George Bate, or any or either of them, and the said Thomas Bate and William Robins, or such of them as gave instructions for the same, caused the same to be prepared in such way as they or he thought best for their or his own views and purposes, and they always refused to produce or shew the conveyance of the said premises or the draft thereof to the Plaintiff and the said John Hezey Bate and George Bate, or any or either of them, although the Plaintiff frequently applied by letter, and otherwise for an inspection thereof, as by reference to the *correspondence in the Plaintiff's possession* when produced will appear." The corresponding interrogatory, after asking if inspection had not been refused, and why, proceeded, "and whether your orator has not frequently or how often applied, and whether or not by letter, and otherwise, for an inspection thereof."

The bill also, after charging a pretence on the part of the Defendant Thomas Bate, that the Plaintiff and [530] Frances Bate had given an authority, dated the 5th of September 1838, to Thomas Bate to act for them, proceeded, "and your orator charges that the said Defendant Thomas Bate has, on several occasions, stated by letter to your orator since the month of September 1838, that he had done nothing under the said alleged authority, save and except the signing, on behalf of your orator and the said Frances Bate, the deed relating to the sale to the said new joint stock company; and particularly your orator charges, that on or about the 5th of March 1842, the said Thomas Bate wrote and sent to your orator a letter [stating it] as by the said letter to which for greater certainty your orator craves leave to refer, when produced to this honourable Court will appear."

The Plaintiff, in his bill, stated two letters of the 26th of August 1826 and the 7th of September 1826, which had been sent to him; he did not, however, admit them to be in his possession, though he referred to them in these terms, "as by the said

letters to which for greater certainty your orator craves leave to refer, when produced will appear." These matters were interrogated.

It was now moved, on behalf of the Defendants Thomas Bate and Robins, that they might have a month's time to put in their answer to the said Complainant's amended bill, after the interrogatories, contained in the interrogating part thereof, should have been so conveniently divided from each other, and the note at the foot of the bill so framed, as that the said Defendants should not be required to answer, or compellable to take an office copy of, such of the said interrogatories contained in the said amended bill, as were contained in the same words in the original bill, and had been fully answered by the said Defendants, [531] and also such other of the said interrogatories contained in the said amended bill, as were only varied from interrogatories in the original bill which had been fully answered by the said Defendants, by immaterial alterations, as by the additions of dates or particulars stated in the answer of the said Defendants to the original bill. And that the Complainant might pay to the said Defendants all costs which had been, and should be incurred or occasioned, by their having been required to answer and compelled to take an office copy of such interrogatories as aforesaid, and all costs of and incident to the reamendment of the said bill with reference to the purposes aforesaid; or that the Court would make such other order with reference to the dividing and numbering of the said interrogatories and the said note at the foot of the said bill as should seem meet. And further, that the said Defendants might have a month's time to answer the said amended bill, after the said Complainant had produced and deposited with the Clerk of Records and Writs for the inspection of the said Defendants, and the said Defendants should have been permitted to take copies of the documents following; that is to say, the correspondence in the said bill stated to be in the said Complainant's possession, whereby he alleges it would appear "that the said Defendants refused to produce or shew the conveyance of the premises in the bill mentioned, or the draft thereof to the said Complainant, and J. H. Bate and George Bate, or any, or either of them, although the said Complainant frequently applied by letter and otherwise for an inspection thereof," the particulars of such correspondence to be verified by affidavit; and also the letter from the Defendant Thomas Bate to the said Complainant, dated the 5th of March 1842, in the said bill stated, and the other letters in the said bill referred to, whereby, as it is [532] alleged by the said bill, "the said Defendant Thomas Bate has stated to the said Complainant since the month of September 1838 that he had done nothing under the authority in the said bill stated," except as therein mentioned; the particulars of such letters to be verified by affidavit, and also the letters from John Hazey Bate to the said Complainant, dated 26th of August 1826, and 7th of September 1836, in the said bill referred to.

The affidavit of the Defendant Thomas Bate stated as follows:—

That he kept no copy of the alleged letter written by him to the said Plaintiff, dated the 5th of March 1842, in the said bill set forth, or of the several other letters written by him to the Plaintiff, respecting the matters in the said bill stated.

That he and Robins could not properly put in their answer to the said Plaintiff's amended bill, until they had had the opportunity of inspecting the said alleged letter of the 5th of March 1842, and the other letters in the said bill referred to, whereby, as was alleged by the said bill, "the Defendant Thomas Bate had, on several occasions, stated by letter to the said Plaintiff, since the month of September 1838," &c., &c., and also the correspondence in the said bill stated to be in the Plaintiff's possession, whereby he alleges it will appear, "that the indentures of the 28th and 29th of September 1826," &c.

Mr. Roupell and Mr. Prior, in support of the motion, argued that the Plaintiff was bound by the 17th Order of August 1841 (Ordines Can. 169), to specify the interrogatories in the amended bill, to which he required an answer in order [533] "that the office copy of the bill taken by the Defendant should not contain any interrogatories, except those which such Defendant was required to answer;" and to save the Defendants the expense of taking an office copy of the bill, to which a further answer was not required.

That this was like a case in which the Plaintiff having abandoned a portion of his

case, was ordered to pay the costs of the portion so abandoned; *Strickland v. Strickland* (3 Beav. 224); and the application ought to be made immediately upon the cause of complaint arising. (*Mounsey v. Burnham*, 1 Hare, p. 22.) Secondly, that the Plaintiff was bound to produce the documents in his possession, without which it would be impossible for the Defendants properly to put in their answer to the amended bill. (*Shepherd v. Morris*, 1 Beav. 175; *Taylor v. Heming*, 4 Beav. 235.)

Mr. Kindersley, Mr. G. Turner, and Mr. Heathfield, *contrâ*, contended that the General Order referred to did not apply to a sole Defendant (*Lynch v. Leccome*, 1 Hare, 626, and see *Boucher v. Branscombe*, 5 Beav. 545), or to a case like the present, where two Defendants answered together, and that there was no hardship as the Defendants well knew what part of the original bill had been found by the Master to have been insufficiently answered, and the new matter was easily distinguishable.

Secondly, that a Plaintiff was not bound, at the instance of a Defendant, to produce documents which might be in his possession, except he offered by his bill to do so, or unless required by a cross-bill.

The following cases were also cited, *Jones v. Lewis* (2 Sim. & St. 242, and 4 Sim. 324), [534] *Penfold v. Nunn* (5 Sim. 409), *Muntz v. Lord Lauderdale* (V.-C. E. 1840), *Princess of Wales v. Lord Liverpool* (1 Swan. 114, 580, and 3 Swan. 567, and 1 Wils. C. C. 113, and 2, *Ibid.* 29; and see *Jackson v. Sedgwick*, 2 Wils. C. C. 167), *Milligan v. Mitchell* (6 Sim. 186).

THE MASTER OF THE ROLLS [Lord Langdale]. Independently of the question of costs, this motion has two objects, one of which is, in substance, to compel the Plaintiff to produce for the inspection of the Defendants, certain letters which are in his possession; and the other is, to compel the Plaintiff to alter the form of his bill by a further distribution of the interrogatories into numbers. Those two objects are quite distinct from each other, and require a separate consideration.

It is perfectly plain, and it has never been doubted, that the General Order which directed the Plaintiff to number the interrogatories in his bill (Ord. Can. 169), was intended to apply to cases, in which there were several Defendants answering separately. The object is perfectly plain, although it must be conceded, the order is so expressed as to apply itself to all bills; where therefore we come to apply this order to particular cases, we must have regard to that particular object.

In this case there are three Defendants, one of whom has not been called upon to answer at all; and the other two, although there seem to be charges against them which are distinct, are nevertheless so jointly concerned in interest, that they joined in one answer. There is no complaint as to the form of the original bill. The interrogatories appear to have been num-[535]-bered in a manner that is not complained of. These interrogatories were not fully answered; which is a most material matter in the consideration of this particular case. Exceptions were taken and allowed. A further insufficient answer was put in, and an order was then obtained, that the Plaintiff should have leave to amend his bill, and that the Defendants should answer the amendments and exceptions altogether. It is therefore obvious, that the Defendants could not be under any ambiguity, as to what it was their duty to answer; they were to answer the exceptions and to answer the amendments. Moreover, there is a General Order "that a Defendant shall not be bound to answer any statement or charge in the bill unless specially and particularly interrogated thereto" (16th Order of August 1841; Ord. Can. 168): therefore, as to any amendments which were not specially and particularly interrogated to, they were not bound to answer. They knew, therefore, perfectly well, that what they were to do was, to answer the exceptions which had not formerly been sufficiently answered, and to answer the amendments which were interrogated to.

The nature of all of the amendments I do not know, but there are some that may have been very material, others which are alleged to have been very immaterial. Several of the interrogatories seem to have been altered in points, which, as far as I have the means of judging of them from the statements, seem to have been very trifling; but nevertheless, they may or may not have been of the utmost importance, for I have known cases in which the alteration of a mere word has produced material discovery, which, without that small alteration, would never have been obtained. It is impossible in the course of proceedings to foretell what may be important [536] for

the purpose of obtaining from the Defendant that discovery which the Plaintiff has a right to, and the order which has been so often referred to was certainly never framed for the purpose, in the least degree, of cramping the power of the Plaintiff of obtaining important discovery. The power undoubtedly is very great, and has often been greatly abused, but unless that power did exist, no discovery would ever be obtained from a fraudulent Defendant.

This bill, however, is amended, and there are amendments in the interrogatories, but none in the note by which the Defendants are called upon to answer, "all the above interrogatories," the note, therefore, had reference to the interrogatories contained in the original bill, as well to those which remained unaltered as to those which were altered. The consequence was, that the Defendants were left, as they would have been before the General Order was made, to discover to what part of the amended bill, as it stood, they were to put in their answer. Now I do not think there was any great inconvenience in this, but it is said, if you had specified the parts of the amended bill which I was to answer, I might have excluded the other interrogatories from my office copy, and this omission thus to distinguish the interrogatories has, in the argument, been called "a vexatious amendment." I do not mean at all to say, that the Plaintiff might not have made that distinction. I think he might have so managed, as by a reference in the note at the foot of the bill, to point out distinctly to the Defendants, the interrogatories or parts of interrogatories to which he required an answer. The question, however, is, whether he was under an obligation to do so. I am of opinion he was not. He could not, in this case, make any distinction between the different Defendants who were to answer [537] separately. The Defendants had no hardship put upon them; they were only to answer the amendments to the bill which were particularly interrogated to, and the parts previously found to have been insufficiently answered. I think, therefore, that the first part of the motion fails.

Upon the other part of the motion a very material question arises. The question is, how far the Plaintiff, who refers to documents in his possession as evidence of the fact which he distinctly charges, is bound to produce that evidence before the Defendant is bound to put in his answer; that I take to be the question which is raised here. There have been several cases upon this subject; and I think they may be divided into two classes: first, cases like that of the *Princess of Wales v. Lord Liverpool*; and secondly, the two several cases which came before me, and have been referred to, namely, *Taylor v. Hemming* and *Shepherd v. Morris*. Those were cases in which the Plaintiff by his bill not only stated that he had possession of the documents, but intending to use those documents in support of his case, he called upon the Defendant to look at them, and offered to produce them for the purpose. The Plaintiff, in substance and effect, stated by his bill, that the Defendant could not give the answer which the Plaintiff desired to have for his own use, unless the Defendant would look at those documents; and the Plaintiff having done that, then refused to produce the documents. I think I may assume, after the investigation which this case has undergone, that there is no case whatever to be produced, in which the Plaintiff, charging a particular fact to be within the knowledge of the Defendant, and stating, further, that he has evidence of the fact in letters which are in his possession, has been held bound to produce those documents, before the Defendant could be called upon to put in his answer. The strong impression upon my mind is, that there is no such case. None so contrary to the ordinary principle has been produced, and I believe, that if you were to lay it down, as a proposition, that a Plaintiff shall not proceed, until the Defendant knows the evidence which the Plaintiff has, you would state a proposition very much at variance with the ordinary opinion of mankind as well as of lawyers. No doubt you have a right, in this Court, to look at the evidence which the Plaintiff states to be in his possession; but that right is only to be obtained upon a cross-bill. Every party has, in this Court, that advantage which is not to be had so effectually in any other jurisdiction. He may discover that which is in the knowledge and breast of the Plaintiff before he proceeds to a hearing of the cause, but he must do it in such a way as to give the Plaintiff the opportunity of stating all the circumstances connected with the matter. It is undoubtedly extremely important, when the Plaintiff is called upon to furnish any discovery, that he should

do it in the proper form, and be at liberty to state all the circumstances relating to the matter, and that he should have all the guard and protection which he derives from being able to give a full statement of all the circumstances belonging to the case.

Some observations having, during the argument, been made as to the mode of drawing bills, I wish to have it clearly understood, that in my opinion the more strictly accordant with truth a bill is, the better; but I cannot say it has been the rule of this Court, that if a bill is not, in every part of it, strictly in accordance with truth, that it is therefore to be considered as a vexatious bill. Many complicated and difficult circumstances arise in which a party is, by fraud, kept out of the knowledge of the facts which are essential to the support of his [539] case, so that being kept entirely ignorant of the real facts, he is under the necessity, though wishing to adhere to the truth, of connecting facts which may be within his knowledge with other circumstances which he can only surmise, and which may or may not be according to truth. The Defendant being then compelled to answer usually affords information which enables the Plaintiff, by amendment, to state his case better, and perhaps more in accordance with the truth.

It is said in this case that we know that the Plaintiff has written evidence, for he alleges it himself, and that it would be much more convenient to the Defendants to see it before they answer, because they are charged with a distinct fact to be evidenced by that written document. Suppose, however, the Plaintiff had done that which he might have done, namely, omitted all notice of the letters, and had charged the Defendants with a fact; and that the Defendants had in their answer denied the fact to be true, and that the Plaintiff had thereupon amended his bill charging the same fact, and had said "in evidence thereof, I have those letters," would not that course of proceeding, though open to the Plaintiff, have been much more vexatious? Would it not have been more likely to have harassed the Defendants? Was it not at least fair and honest, on the part of the Plaintiff, when he charged the Defendants with the fact, at the same time to intimate to them (if the fact be so), that he had got the letters in his possession which proved the fact charged, and which the Defendants might compel the production of by filing a cross-bill? In practice, I have known instances of a Plaintiff stating, that there existed certain documents proving the fact charged, when there were none, and thereby intimidating the Defendant from stating the truth of his [540] own case: that, no doubt, would be a vexatious and fraudulent mode of stating a case.

That is not suggested here: on the contrary, this motion proceeds on the notion of the existence of the documents, which the Plaintiff states to be evidence in support of his bill, and upon an allegation that the Defendants have a right to see that evidence, before they are called upon to put in their answer.

I think that the second part of the motion also fails, and, the motion failing altogether, must therefore be refused with costs.

[540] BUNNETT v. FOSTER. (*Ex relatione Mr. De Gez.*) April 18, 19, 1844.

[S. C. 2 Ph. 161; 41 E. R. 903; 2 Coop. & Cott. 348; 47 E. R. 1191.]

An adverse decree made in the absence of some of a class, the point not being considered to be one of difficulty.

Costs of an administration suit directed to be paid rateably out of the real and personal estate.

James Worship, by his will, dated 17th of March 1786, devised his real estate in trust for his niece for her life, and after her decease, to pay the yearly rents and profits to her daughter, Ann Le Fevre, for her separate use for her life, and upon further trust to sell, as soon as conveniently might be after the death of the survivor. And he bequeathed his residuary personal estate to his trustees to be converted into money, the interest to be paid to the same tenants for life, and in the same way as the rents and profits of his real estate. And the trustees were to be possessed of the

monies, so to remain out at interest during the lives of the tenants for life, at their decease, and of all the monies to arise from the sale of the real estate, upon trust to pay £100 to each child of [541] Mrs. Le Fevre who should survive her, and to pay the residue of such monies, or the whole, if Mrs. Le Fevre left no child living at her death, unto all the testator's brothers' and sisters' children who should be alive at the death of Mrs. Le Fevre, equally share and share alike, or their respective executors and administrators.

The property comprised both real and personal estate.

The testator died in 1792, his niece in 1814, and Mrs. Le Fevre in 1836. No child of Mrs. Le Fevre, or of any of the brothers and sisters of the testator, was living at Mrs. Le Fevre's death.

This was a bill filed, by one of the legal personal representatives of the next of kin of the testator living at his death, against two persons, each of whom claimed to be heir at law, the trustees, and a party claiming to be next of kin of a child of one of the testator's sisters, praying for the administration of the testator's property. Two questions were raised on the pleadings, first, whether there was a conversion of the realty into personalty, out and out, so as to entitle the next of kin to the whole of the assets, the greater part of which had, in fact, been converted into money since the testator's death. Secondly, whether, under the limitation to the testator's brothers' and sisters' children living at Mrs. Le Fevre's death, or their respective executors and administrators, the next of kin of a child who died in Mrs. Le Fevre's lifetime might not take by substitution.

Inquiries were directed at the original hearing, and by the report it appeared, that the next of kin of the testator living at his death were ten in number: that all of them were dead, and that there were legal personal representatives of three only, the Plaintiff being one of [542] such representatives. It also appeared that the next of kin of the children of brothers and sisters of the testator interested in the second question exceeded thirty in number, and that there were personal representatives of a very few of them.

The cause now coming on for further directions,

Mr. De Gex, for the Plaintiff.

Mr. Roupell, for the trustees, submitted that they would not be indemnified, by a decree pronounced in the absence of any of the parties interested in the questions in dispute.

Mr. Kindersley and Mr. Borrett, for the heir at law.

Mr. G. Turner, Mr. Elmsley, and Mr. Bird, for other parties, submitted that all the different interests were as well represented as convenience and the practicability of carrying on the suit would allow, having regard to the number of parties and the amount of the property. They cited *Harvey v. Harvey* (4 Beav. 215, and 5 Beav. 134).

Mr. Roupell, in reply, said, that in *Harvey v. Harvey* there was no final decision or distribution of the fund, as was sought here.

THE MASTER OF THE ROLLS said, that the practice of allowing some members of a class to represent the whole in certain cases had been adopted on grounds of convenience, but that in this respect every case must be governed by its own circumstances. That it would nevertheless be extremely unsatisfactory to a party, [543] whose property had in his absence been adjudged to another, to be told that it had been done for the sake of convenience. The other questions in dispute might, however, be argued, the decision on the question of parties being reserved.

The case then proceeded.

On the question of conversion, *Cruse v. Barley* (3 P. W. 20), *Fletcher v. Ashburner* (1 Brown (C. C.), 497), *Phillips v. Phillips* (1 My. & K. 649), and *Jessopp v. Watson* (1 My. & K. 665) were cited.

Mr. Bird, on behalf of the next of kin of the child of one of the testator's sisters, admitted that the claim to take by substitution could not be sustained.

THE MASTER OF THE ROLLS [Lord Langdale] observed, that the latter point was so clear that there could be no ground for bringing before the Court any of the other parties interested in maintaining it; that the question of conversion might admit of more argument, but still there appeared to him no sufficient reason for holding that the testator intended a conversion out and out. That, unfortunately, this was a very

vague expression ; but that the case of the heir at law did not require it to be laid down, as had been contended, that there could, in no case, be a conversion except for the purposes of an express trust. That it was sufficient to say that there did not appear to be any indication of an intention to convert the property for any other purposes than those specifically pointed out, and which had failed. That if his Lordship entertained any reasonable degree of doubt [544] on the point, he should have felt great difficulty in finally disposing of it, adversely to the absent parties, and in distributing the property without reserving to them an opportunity of supporting their own case ; but that the Court could only act upon the strength of its own impression, and that he thought, under the circumstances of the case, and with the opinion which he entertained as to the possibility of the question being successfully argued, he should not be justified in burdening the property in dispute with the expense of bringing any other parties before the Court.

His Lordship held that the realty, and the proceeds of so much of it as had been sold, belonged to the heir, and that the personalty belonged to the next of kin of the testator living at his decease.

Mr. Kindersley and Mr. Borrett asked that the costs might come out of the personalty, the question having arisen out of the construction of the will, and the claim of the heir having been held so clear that a decision could be made against absent next of kin. But,

THE MASTER OF THE ROLLS considered that the decision of the Court would benefit the real estate, as well as the personal, by removing difficulties as to the title of the parties claiming it, and he directed the costs to be paid rateably out of the realty and personalty according to their value.

See *Eyre v. Marsden*, 2 Keen, 564, and 4 Myl. & Cr. 231.

[545] BATHER v. KEARSLEY. May 2, 1844.

The bill sought to charge trustees with mismanagement and misapplication of the trust estate. The answer insisted that one of the two Co-plaintiffs had acquiesced. The Court, upon motion, gave leave to amend by making such Co-plaintiff a Defendant, upon payment of the costs of the application, and giving security for the costs already incurred. The costs of the misjoinder were reserved to the hearing.

This bill was filed by Mary Bather, the wife of the Defendant Thomas Justice Bather, by her next friend, and by Thomas Bather. Mary Bather had a life interest without power of anticipation in the trust property which was the subject of the suit, and Thomas Bather had an interest in remainder.

The bill sought an account, &c., of the real and personal estate of the testator, and also sought to charge the trustees with mismanagement and misapplication of the trust property.

The Defendants, by their answer, set up a case of acquiescence on the part of the Plaintiff Thomas Bather.

The Plaintiffs now moved for liberty to amend their bill, by striking out the name of Thomas Bather as a Plaintiff and making him a Defendant. An affidavit was filed by the Plaintiffs' solicitor, stating that he was not aware of the existence of any question as to acquiescence until he read the answer.

Mr. Turner and Mr. J. Baily, in support of the motion.

They cited *Small v. Atwood* (2 You. & Jer. 512), and *Aylwin v. Bray* therein cited, p. 518.

[546] Mr. J. H. Palmer, Mr. Cox, and Mr. Rolt, for the Defendants.

THE MASTER OF THE ROLLS [Lord Langdale] granted the application, but upon the terms of the Plaintiffs paying the costs of the motion, and giving security for the costs up to the present time, and he reserved the costs incurred by the misjoinder until the hearing of the cause.

[546] PEERS v. LAMBERT. May 3, 1844.

A. contracted to sell a wharf on the banks of the Thames, with a *jetty*. The jetty turned out to be liable to be removed by the Corporation of London, if they thought fit. Held, that the jetty was essential to the beneficial occupation and enjoyment of the premises contracted to be sold, and that a specific performance could not be decreed.

This was a bill for specific performance of an agreement.

The Plaintiff put up some property for sale by auction, which, in the particulars of sale, was described as a very valuable copyhold property, known as Ashton's Wharf, consisting of superior water-side premises, first-rate wharf, with *jetty*, extensive warehouses, rigging-house, counting-house, and shop, situate at Blackwall. The particulars also stated, that "this property, of which immediate possession may be obtained, is copyhold of the manor of Stepney, otherwise Stebonheath, subject to a fine on death or alienation of £2, 2s. certain, and to the annual quit rent of 4d." A printed plan was referred to, upon which was delineated a jetty, projecting from the front of the wharf into the Thames.

The Defendant became the purchaser for £5820, and a bill for specific performance having been instituted, it was referred to the Master to ascertain whether a good title could be shewn.

[547] The Master reported "that a good title could be made to the said premises, except as to a certain jetty in the agreement mentioned: and he found, that such good title, except as aforesaid, was first shewn before the institution of this suit. And as to the said jetty to which a good title could not be made according to the said agreement, he found that the same was a wooden structure, with a wooden top placed upon wooden piles, between high and low water mark of the river Thames, and was subject to the regulations of the navigation committee of the Corporation of the City of London, and liable at any time to be removed; in case the said corporation should think fit to remove the same. And he found that the said jetty was essential to the beneficial occupation and enjoyment of the said premises contracted to be sold as aforesaid."

The Plaintiff excepted to the report.

Mr. Turner and Mr. Baily, for the Plaintiff.

Mr. Kindersley, *contra*.

THE MASTER OF THE ROLLS [Lord Langdale] concurred with the Master in opinion that the jetty was essential to the enjoyment of the property; and he, therefore, overruled the exceptions, and dismissed the bill with costs.

See Sugden's Vendors, ch. vi. section 2.

[548] ROWLEY v. ADAMS. May 25, 28, 31, July 31, 1844.

[For other proceedings, see S. C. 7 Beav. 395 and note thereto.]

A. and B. purchased realty out of their partnership assets, which was used for their partnership purposes, and was, in equity, to be considered as personalty. A new partnership was formed between A., B., and C. The realty was continued to be used for the partnership purposes, but A. and B. stipulated for a rent to be paid them by the new partnership, composed of A., B. and C. A. died. Held, the property was, in equity, to be considered as part of his real estate.

Legatees made *bond fide* endeavours to realize the primary fund on which legacies were charged, but failed to prove the existence of such primary fund, by reason of the non-production of the account books. The real estate (being the secondary fund) was directed to be sold for payment of the legacies, but the decree was made without prejudice to any claim which might be made in respect of the primary fund, in any other proceeding against any party who might be answerable for the same.

This case, reported *ante* (p. 395), now came on to be heard upon the twentieth exception, and on further directions and costs.

July 31. THE MASTER OF THE ROLLS [Lord Langdale]. This case came on to be heard on the twentieth of the exceptions taken to the Master's report, and for further directions and on costs.

The Master has found, that the testator was entitled to three fourth parts of a house and premises in Portpool Lane, which were not devised by his will, but which descended to Henry Earley Wyatt as heir at law, and the exception alleges, that there was no evidence to shew that the testator was entitled to three-fourths of the house and property, or whether the same descended to Henry Earley Wyatt as his heir at law, or was to be considered as part of the partnership property, or as otherwise in equity, converted into personalty.

The property was, in fact, purchased by Henry Wyatt and Henry Earley Wyatt out of their partnership assets, for their partnership purposes, and belonged to them in [549] the proportion in which they were interested in the partnership, and whilst used for the purposes of the partnership, it was to be considered as personalty; but, upon the admission of George Wyatt into the partnership, the firm of Henry Wyatt & Son was put an end to, and the house and premises ceased to be used merely as partnership assets of the owners. The two owners, Henry Wyatt and Henry Earley Wyatt, held the property distinct from the partnership and trading property of the three partners, Henry Wyatt, Henry Earley Wyatt, and George Wyatt, and they stipulated for a rent. There was, therefore, in two partners, an ownership of the property and a right to receive rent, and, in the three partners, a possession for which rent was paid; and although the three used the possession for the purposes of the trade of the three, including the two owners, yet I think, that the right of the two owners, to whom as landlords the rent became due, must be considered as real estate. The contest, in this case, appears to me to be of no importance to Henry Earley Wyatt, because, upon consideration of the testator's will, I am of opinion, that the real estate of Henry Wyatt, which descended to Henry Earley Wyatt as his heir, is subject to the payment of the legacies given by his will; but I think that the finding of the Master is correct, and that the twentieth exception must be overruled.

Upon the further directions, the principal question is, whether the Plaintiffs, the legatees, are now entitled to have the testator's real estate descended or devised, sold for the payment of their legacies; and I think that they are. The Plaintiffs have, in vain, attempted to realize the primary fund out of which the testator directed the legacies to be paid. They have endeavoured to prove that such primary fund really existed, and on the supposition of its having had an existence, they have used endeavours, the sincerity of which cannot be doubted, to [550] charge the executors personally with the loss of it. In these endeavours they have failed. It is not now, and the probability is that it never can be known with certainty, whether the funds applicable, in priority to the real estate, existed or not, or who is answerable for it, if it did exist; and the Plaintiffs having done all in their power to ascertain the primary fund and make it available, so as to avoid resorting to the real estate, I am of opinion, that they ought not to be delayed further, and are now entitled to have the real estate sold.

It is very unsatisfactory to be obliged to make a decree under such circumstances. However improbable, it is still possible that it may be discovered that there was a primary fund, and that some of the parties to this cause are answerable for it; and in order to leave the means of redress open, as far as I can, consistently with the rights of the Plaintiffs, I must make this decree without prejudice to any claim which may be made in respect of the primary fund, in any other proceedings against any party who may be answerable for the same.

It does not appear to me that any order ought now to be made for the payment of the rents of the real estates received by Henry Earley Wyatt or William.

Provision must be made for payment of the several sums of money which the Master has found to be due to Adams, to Marks, and to the estate of Hannah Wyatt.

With respect to the costs, so far as the suits relate to the establishment of the will, and the account of such parts of the personal estate of the testator as did not consist of his share or interest in the partnership, I think that all parties are entitled

to their costs; the executors having their costs as between solicitor and client. So far as the suits relate to the accounts of the partner-[551]-ship dealings and property, and with respect to the special inquiries, and the exceptions which relate thereto, I am of opinion that the parties, other than the executors, and Henry Earley Wyatt and George Wyatt and his assignees, are entitled to their costs; but having regard to all the circumstances of the case, I am of opinion, that neither the executors, nor Henry Earley Wyatt, nor George Wyatt, nor his assignees, are entitled to any costs.

It was strongly urged, that I ought to charge the executors with the whole costs of the suit, or at least with the particular costs to which I have last adverted; but on consideration, I think that I ought not to charge them, as I should have done, if I could have agreed with the Master's report on the principal exceptions.

[551] ARCHER v. HUDSON. July 8, 11, 1844.

[S. C. 13 L. J. Ch. 380; 8 Jur. 701; affirmed on appeal, 15 L. J. Ch. 211. See *Turner v. Collins*, 1871, L. R. 7 Ch. 335 (n.); *Parfitt v. Lawless*, 1872, L. R. 2 P. & D. 469; *Bainbridge v. Browne*, 1881, 18 Ch. D. 197; *Powell v. Powell* [1900], 1 Ch. 246.]

A niece, two months after she came of age, and after her guardians had fully accounted to her, entered into a voluntary security for her uncle, by whom she had been brought up, and who was considered by the Court as standing *in loco parentis*. The Court set it aside.

Where a transaction takes place between parent and child, just after the child has attained twenty-one, and prior to what may be called a complete "emancipation," without any benefit moving to the child, the presumption is that an undue influence has been exercised on the part of the child, and a party seeking to maintain such a transaction must shew that that presumption is adequately rebutted.

Though Courts of Equity do not interfere to prevent an act even of bounty between parent and child, yet they will see that the child is placed in such a position as will enable him to form an entirely free and unfettered judgment, independent altogether of any sort of control.

Surety by promissory note, for a floating balance due to bankers from a customer, held released by the bankers crediting the customer with the full amount of the note, without advancing the money at the time.

In 1825 the surviving parent of the Plaintiff, Mrs. Archer (then Miss Kendray), died, leaving her an orphan of the age of about nine years. For about seven years previous to her attaining twenty-one, she [552] resided with her uncle and aunt, Mr. and Mrs. Daniel at Thirsk. Miss Kendray was entitled to some property, consisting of a sum of £1112, and the moiety of some houses, &c., producing an income of about £145 a year. During her minority her uncle "was paid a suitable sum for her maintenance by her guardian, out of the income of her property."

On the 8th of November 1837 Miss Kendray attained her age of twenty-one years, whereupon her guardians transferred her property to her, and she, on the 21st of the same month, executed a release to them.

It appeared that in July 1837 her uncle Daniel had opened an account with the Thirsk branch of the York Union Banking Company, of which Hauxwell was the manager. At the end of December Daniel had overdrawn his account to the extent of £70.

About the 1st of January 1838 Miss Kendray joined, as surety for her uncle Mr. Daniel, in a promissory note for £500 to the bank, and by that note, she and her uncle jointly and severally promised to pay the bank the sum of £500 with interest. The note was handed over, but was not at that time entered in the bankers' books. The way in which it was afterwards dealt with will be presently stated.

On the 13th of November 1841 Miss Kendray married the Plaintiff, Mr. Archer.

After the marriage, the bank appeared to have made some inquiries as to the property of Miss Kendray, and on the 9th of December 1841 the £500, the promissory

note, was placed to the credit of Daniel's account, but entered in the bankers' books under date [553] the 12th of November 1841, this being the day previous to her marriage, at which time the balance against Daniel appeared to be about £96.

In 1843 Daniel became insolvent. Being then indebted to the bankers in a sum exceeding £500, they, on the 24th of April 1843, commenced an action at law against the Plaintiffs, to recover the amount secured by the promissory note of £500. The Plaintiffs thereupon instituted this suit, in order to get relieved from their liability under the note.

Thus far the facts of the case were beyond dispute; it is now necessary to state the material allegations of the bill and the evidence in support of them.

The bill alleged, that the signature of Miss Kendray to the note had been obtained by a scheme or plan between her uncle and the agent of the banking company, entered into previous to her coming of age. That she signed it with reluctance, and entirely through the influence which her uncle and aunt had acquired over her. That it was represented to be a matter of form, and that she would never be required to pay anything in consequence. The bill stated, that the note was given for the amount then in arrear, which the bill alleged had been discharged by subsequent payments by Daniel; and that, under the circumstances aforesaid, the note was fraudulent and void, and ought to be delivered up to be cancelled.

The bill charged "that if the note was ever discounted by the company, the same was not discounted, or the amount thereof credited to Daniel, until some time after the date thereof, and was so discounted unknown to the Plaintiffs, and was not carried to a separate [554] account to the *debts* of the Plaintiffs and Daniel, but remained in the possession of the company, as a note payable on demand by Daniel; and the company, by so dealing with the note, destroyed such right, if any, as they previously had, to hold the same as a collateral security for the balance due from Daniel to the said company; and that the subsequent payment by Daniel to the company exceeded the amount of the promissory note, and of the balance then due to the company, and ought, if necessary, to be applied to the satisfaction of the note and of the balance."

The bill prayed a declaration, that the promissory note had been fraudulently obtained from the Plaintiff by Daniel and the banking company, and was fraudulent and void against the Plaintiffs; and that if not fraudulent and void, then for a declaration, that the subsequent payment to the bank ought to be applied in reduction of the balance due on the promissory note.

The answer denied all the allegations of the fraud and the alleged scheme, and stated, "that about the months of November or December 1837, the account of Daniel with the banking company being overdrawn, Daniel proposed to Mr. Hauxwell, that he and his niece Frances Kendray should give to the banking company a joint and several promissory note for £500 and interest, as a collateral and continuing security to the company for the balance that might, from time to time, become due from Daniel to the said banking company on his account with them, and that the same should be a continuing guarantee to them for the balance of the banking account of the said C. Daniel."

The evidence on the part of the Plaintiffs went to shew the control and influence which Mr. and Mrs. [555] Daniel had acquired and exercised over their niece, the subsistence of an intimacy between Daniel and Hauxwell, and of the knowledge of the latter of the circumstances, fortune, and situation of Miss Kendray, but there was no evidence whatever of any fraudulent scheme between the parties.

Hauxwell was examined as a witness for the Defendants. He denied the alleged intimacy between himself and Daniel, and stated as follows:—"Daniel was allowed by me to overdraw his account at the said Thirsk branch of the York Union Banking Company to a small amount, because I considered him safe. At the end of December 1837 Daniel had overdrawn his account the sum of £70, 7s. 2d. In the latter part of December 1837 Daniel mentioned to me his wish, that the branch bank would allow him to overdraw his account for his accommodation to a greater extent; he gave as a reason why he wished so to draw, that he would thereby be enabled to go into the market and buy his leather for ready money, instead of buying leather and paying with acceptances. When Daniel so applied to me, he wished to be allowed to

overdraw to the extent of £500. I asked him what security he could give, and he proposed his niece Frances Kendray. He said he had not spoken to her on the subject, but he would do so, and let me know. About a week afterwards, Daniel called at the branch bank, and stated to me, that he had spoken to his niece, and she was agreeable to sign a promissory note for £500, but she did not like to come to the bank, from a fear of causing some suspicion that she was going to be bound for her uncle to the bank; that if I would prepare a note in the usual form, and take it down some evening to his (Daniel's) house, where she resided, she would sign it."

[556] The same witness also stated: "That he accordingly prepared a joint and several promissory note, and took it to the house of Daniel between the 1st and the 6th of January 1838. That he produced the promissory note, and told Miss Kendray that it was a joint promissory note for £500, but we did not want £500 of her uncle at that time (the balance owing by him at that time being very small), but that he might want money to the extent of £500, and he asked her, if she was willing to sign the note he then produced; to which she answered, that she was willing to do so. He then requested her to read the said promissory note, which she did accordingly. That Daniel then signed the promissory note, and immediately afterwards the said Frances Kendray signed her name to it. That before the note was signed by the said Daniel and Frances Kendray, he told the said Frances Kendray, that supposing her uncle should want money to the extent of £500 by her signing that note, she made herself liable to the bank to the extent of £500 and interest, in case the bank should ever want that amount of him; she said that she perfectly understood it."

The witness also said, "I then stated, that the said promissory note was to be a security for the amount then due to the said bank from the said Christopher Daniel, or for any amount that might be due, either upon the open account, or upon bills running to the extent of £500 and interest;" and the witness said, "In my opinion and judgment, the said note was signed by the said Complainant Frances Kendray readily and not reluctantly, nor in ignorance, but with the full knowledge of the liability she was thereby incurring."

The cause now came on for hearing.

[557] Mr. Kindersley and Mr. Rolt, for the Plaintiffs, contended, *first*, that the transaction was void *ab initio*, the promissory note having been obtained by an uncle, standing *in loco parentis*, from his niece immediately after her coming of age. That the principles of the Court with regard to transactions between guardian and ward (1 Mad. Ch. Pr. 123, and 1 Story Eq. Jur. 253), and parent and child (1 Mad. Ch. Pr. 309, and 1 Story Eq. Jur. 249), were applicable to the present case; that the protection of infancy continued after the Plaintiff attained her majority (see 3 Swan. 69), and that the Defendants, who took with notice, by their agent, of the invalidity of the transaction, were bound. *Secondly*, that there was no memorandum shewing that the note was given as a security for a floating balance. *Thirdly*, that by the mode of dealing with the note in December 1841, the position of the surety had been altered: for the note, instead of being kept as a continuing guarantee for the ultimate balance due from the principal, as the Defendants said was the intention, had been cashed, and an immediate right to sue for the whole amount created; *Bonser v. Cas* (4 Beav. 379, and 6 Beav. 110). *Fourthly*, that the £500 having been treated as a loan from the 12th of November 1841, every subsequent payment made by Daniel to the bankers must be applied in exoneration of the surety.

Mr. Turner, and Mr. Elmsley, *contra*, for the banking company. The bill alleges and proceeds on a fraudulent contrivance between Daniel and Hauxwell, of which there is not the slightest proof. The transaction was *bona fide* on the part of the banking company; their advances did not exceed £70 at the time, and they had no inducement to procure the Plaintiff in joining in [558] assisting her uncle. The influence proved in the evidence is wholly influence on the part of the Plaintiff's aunt, and not of her uncle. The circumstances appear to have been fully explained, and the Plaintiff was perfectly aware of the nature of the transaction, and of the liability she was about to incur. If this be not sufficient, no transaction between a parent and child, by which the former was benefitted by the latter, could stand. The conduct of the Plaintiff who seeks to raise an equity against Defendants, who have *bona fide* advanced their money on her security, must be regarded. She induced the bank to

trust her uncle; years have elapsed, and after all the alleged influence has ceased, she has permitted the bank to continue their dealings with and to make advances to her uncle, without making any complaint or challenging the validity of her security until he became insolvent. This course of acquiescence deprives her of the right (if she ever had any) of undoing this transaction.

The security was a continuing security, and therefore the subsequent payments by Daniel to the bankers are not to be applied in discharge of the note. *Pease v. Hirst* (10 B. & Cr. 122). The placing the note to the credit of Daniel's account in no way altered the situation or liability of the surety. The Plaintiffs are not therefore discharged.

Mr. Glasse, for the Defendant Daniel.

Mr. Kindersley, in reply.

THE MASTER OF THE ROLLS [Lord Langdale]. There cannot be any doubt, in this case, that Mr. Daniel was, in respect of Miss Kendray, standing *in loco* [559] *parentis*. Being desirous of overdrawing his account at his bankers, he proposed as his surety his niece, a young lady living under his protection, as a child lives under the protection of a parent, who had just attained her age of twenty-one years, and had just then been put into possession of her property. It is fully proved, in the cause, that Mr. Hauxwell was well acquainted with the relative situation of Mr. Daniel and this young lady: he was in the habit of associating with them; he says he was not intimate with them; but there are witnesses who prove that he had associated with Mr. Daniel, and also with this young lady, and that the circumstances of this young lady were perfectly well known to him.

A communication was to be made on the subject between the uncle and niece standing in this situation; the result, as was expected, was, that she consented to become security for her uncle. It appears, however, "that she did not like to come to the bank, from a fear of causing some suspicion that she was going to be bound for her uncle to the bank." This young lady, being asked to do what I suppose must be considered as an act of kindness to her uncle, was afraid that it should be known that she was going to do that act of kindness, and, therefore, this business was not to be conducted in the ordinary way; she was not to go to the bank for the purpose of signing this promissory note, but Mr. Hauxwell was to visit the parties in order that this might be done in a more secret manner. She however signed the note in the manner stated by Mr. Hauxwell in his evidence.

The first point made in this case is, that that transaction cannot stand at all, because the security was obtained through the influence of a person standing *in loco* [560] *parentis*, from the object of his protection and care, and that therefore is a transaction which this Court will not support. The relation between the parties is undoubted. She, by signing this promissory note for the benefit of her uncle standing *in loco parentis*, without any consideration or advantage moving towards herself, became subject to this liability. This is a transaction, which, under ordinary circumstances, this Court will not allow; and really the question is, whether there is anything in this case to take it out of the ordinary rule which the Court applies in other cases of a like kind.

Nobody has ever asserted that there cannot be a pecuniary transaction between a parent and child, the child being of age, but everybody will affirm in this Court, that if there be a pecuniary transaction between parent and child, just after the child attains the age of twenty-one years, and prior to what may be called a complete "emancipation," without any benefit moving to the child, the presumption is, that an undue influence has been exercised to procure that liability on the part of the child, and that it is the business and the duty of the party, who endeavours to maintain such a transaction, to shew, that that presumption is adequately rebutted; and that it may be adequately rebutted is perfectly clear. This Court does not interfere to prevent an act even of bounty between parent and child, but it will take care (under the circumstances in which the parent and child are placed before the emancipation of the child) that such child is placed in such a position as will enable him to form an entirely free and unfettered judgment, independent altogether of any sort of control.

The question then is, whether, under the circumstances of this case, we have any evidence of that kind. Mr. Hauxwell, representing the bank, knew the relative

[561] position of the parties; he knew that the object was to obtain the liability of the child, for the benefit and accommodation of the uncle; he knew they were living together at the time. He went and assisted the uncle and aunt, both of whom were present at the very time. It therefore does not appear, that this young lady was ever severed from the influence which the uncle and aunt had over her, so as to enable her to form an adequate, full, and independent opinion as to what she ought in prudence to have done. I do not mean to say, that if this young lady had her trustees, or some friend or relation of the family, or somebody interested in her welfare, to advise and consult with, in the absence of the uncle and aunt, that the circumstance of her situation and the circumstance of the uncle's situation might not have been such, that this Court would have said that, having entered into this liability, she should be held by it. It might have been so; but to say that Mr. Hauxwell, the agent of the bank, a person with whom the uncle was dealing, the person through whom he is carrying on his business as a customer of the bank, by explaining to an inexperienced young woman who had just attained her age of twenty-one years the meaning of this note, offered anything like such a protection as would secure to her that free and independent judgment which she had a right to exercise, seems to me to go far beyond anything which has been proved in this case.

It does not appear to me, taking this transaction as it stands upon the evidence before me, that it can be supported even on the first ground.

I think also, that it cannot be supported on the second ground. The second ground is this, that she was only security for a floating balance, and that, instead of treat-[562]-ing her as a surety for a floating balance, an attempt was made to make her a debtor for the whole sum, without regard to the circumstances of the account upon which that balance was to arise. This young lady having signed this joint and several promissory note in January 1838, married Mr. Archer upon the 13th of November 1841. What had been done with this note in the meanwhile? The promissory note was given to Mr. Hauxwell, and was kept among the securities of the bank. The account, as between the bank and Mr. Daniel, was an account between them alone, not affected in any way by this transaction; sums were paid in and drawn out, and the note was dealt with as in the ordinary mode of dealing between a bank and a customer, where a security is deposited for a floating balance. The promissory note was joint and several, and payable upon demand; but it did not, on the face of it, represent the real contract. The contract, Mr. Hauxwell says, was, that it should be a security for what the bank wanted of the uncle for the amount due upon the open account. That was the contract, though it does not appear on the promissory note. It was kept among the securities of the banking account, and according to the statement made by Mr. Hauxwell, if there was a balance due to the bank from Mr. Daniel on that account, then the promissory note was to be a guarantee for it.

This lady was married on the 13th of November. The marriage comes a short time afterwards to the knowledge of the agents of the bank. They had an agent at York, a Mr. Wilkinson, and an agent at Thirsk, Mr. Hauxwell. What communications took place immediately after the marriage we do not know: the first statement which we have relating to it is in the letter of the 26th of November 1841, in which Mr. Wilkinson directs Hauxwell to make this "a tangible security." They probably [563] were under some mistake about the effect of it; but I scarcely know, whether what they did was through mere blunder or mistake of their rights, or whether it was not an attempt to place themselves in a different position from that in which they ought to have been. We find that, after a little negotiation, and after enquiry as to the property of Mrs. Archer, Mr. Wilkinson thinks fit, on the 8th of December 1841, without any communication with Mr. and Mrs. Archer, to give this direction to Mr. Hauxwell, "enter the £500 promissory note Daniel, to his credit in the ledger and debit loans, Daniel and Kendray. Do the same in Daniel's pass-book, £500 to his credit, but date it 12th of November. You can then continue any other credits as usual. My object was to have it in the pass-book before Miss K.'s wedding, which was, I believe, on the 20th of November."

Was this the contract, that there should be £500 placed to the credit of Mr. Daniel upon the liability of Miss Kendray? If that was the contract, why was it not

done at the first? What reason or pretence could there be for doing it on the 9th of December 1841, and dating it upon the 12th of November? What pretence could there be for doing it in December 1841, which did not exist upon the 2d of January 1837? Is it not an attempt to put this matter in quite a different situation from what it was before? I cannot concur in the argument, that the situation of surety is in no way altered by it. The promissory note, as I said, did not evidence the contract; there was something more than was expressed on it. The contract, according to the statement of Mr. Hauxwell, was, that the promissory note should be a security for a floating balance. Miss Kendray was answerable for a floating balance, while it remained as a floating balance, and for no more was she, at any time, [564] answerable than the floating balance amounted to. But what was the effect of entering it as a loan? It was giving an immediate credit for the sum of £500. The consequence was, that they had an immediate demand upon the note, for Daniel had the immediate benefit of the sum of £500, he had a right to draw for it all at once, and having credit for this sum, she, all at once, even without his drawing on it, might be made answerable for this note. That was not the contract, but an entire violation of it, and was made without the least authority from, and without any communication with, the Plaintiffs.

If, therefore, it were necessary to determine that question, I should have no hesitation in saying that that species of conduct vitiated and put an end to the whole transaction, and released the surety from an obligation which was made quite different from that which she had been induced to enter into.

Upon both of these grounds I am of opinion that this promissory note cannot stand, and there must be a decree for the Plaintiffs, with costs.

NOTE.—Affirmed by the Lord Chancellor on the 18th of March 1846. [15 L. J. Ch. 211.] No opinion was however given by the Lord Chancellor as to the release of the surety.

[565] HAWKINS v. WOODGATE. July 18, 1844.

[S. C. 8 Jur. 743.]

The grantee of an annuity effected a policy on the life of the grantor, at his own expense. The grantor had a power of redemption on payment of £2500, and it was provided, that in case the grantor should, "at the time of making such repurchase," by notice in writing elect to take the policy, the grantee would assign to him any policy "then vested" in him, which might be effected in respect of the annuity; but it was declared, that it should not be incumbent on the grantor to keep on foot any policy. The policy became valuable, and the grantor gave the month's notice of repurchase, and declared his election to take the policy. Held, that the grantee had no right afterwards to surrender the policy for his own profit; and, *semble*, that although he might have let the policy drop, yet he was not, at any time, entitled to surrender it for his own profit.

In 1825 the Plaintiff granted an annuity of £365 determinable on his own life, and to which Bradford afterwards became entitled. This annuity the Plaintiff charged on certain property, and he covenanted to facilitate the grantee in effecting, at the grantee's expense, policies on his life, and to pay all extra premiums on such policies to the extent of £2500. Policies to this amount were accordingly effected by the grantee in the Sun and Crown offices.

Subsequently, in the same year, the Plaintiff granted an annuity of £442 to Hall, charged on the same property. Disputes arose, which ended in a suit in this Court, pending which, the trustees accumulated the income of the property to the amount of £4945, and the annuities were left in arrear.

An arrangement was come to between the parties, and a deed, dated in 1839, was made between Bradford (the party entitled to the first annuity) of the first part, Hall of the second part, the Plaintiff of the third part, and the trustees of the fourth part,

whereby it was agreed, that the £4945 should be divided between Bradford and Hall, and that the trustees should hold the two annuities of £365 and £442, and the securities for the same (which were assigned to them by an indenture of even date), upon trust to pay an annuity of [566] £215 a year to Bradford, an annuity of £300 a year to Hall; then to pay the extra premiums payable on the said policies, or any other policies effected in lieu thereof, and then upon certain trusts for the Plaintiff. The Plaintiff thereby covenanted to attend at the insurance offices to enable Bradford, at his own cost, to keep on foot or renew the said policies, or to effect and keep on foot policies in lieu thereof, to the extent of £2500.

And it was thereby agreed, that in case the Plaintiff should be desirous to repurchase the same annuity, and should give one calendar month's notice in writing, and pay unto Bradford £2500, with all arrears of the said annuity, and costs, "and also all such extraordinary premiums, fees, and expenses, as Bradford, his executors, administrators, or assigns, should or might expend or be put unto, in or about keeping on foot, renewing, or effecting any policy or policies of insurance as aforesaid, by reason of the Plaintiff going beyond such limits as aforesaid, and which should not have been paid under the trusts of the indenture now in statement; and also the said additional gross sum of £450 thereinbefore directed to be paid to Bradford, his executors, administrators, or assigns, or so much thereof as might not have been paid under the same trusts, then and in that case, Bradford, his executors, administrators, or assigns, should and would accept and take the said sum of £2500, as and in full for the price or consideration of such repurchase of the said annuity or yearly sum of £215 thereby granted and secured; and thereupon, the said annuity or yearly sum of £215 and the several trusts, powers, and authorities thereby created and declared, so far as regarded the payment of the same annuity, should, respectively, thenceforth cease and determine; and in case the Plaintiff should, at [567] any time, repurchase the said annuity of £215 under the proviso thereinbefore contained, and the Plaintiff should, *at the time of making such repurchase*, by notice in writing to Bradford, his executors, administrators, or assigns, elect to take the policy or policies thereafter mentioned, but not otherwise, he Bradford should and would, at the request and expense of the Plaintiff, assign and make over any policy and policies of insurance upon the life of the Plaintiff, which might be *then vested* in Bradford, his executors, administrators, or assigns, and which might have been effected in respect of the said annuity of £365, or the said annuity of £215, and all benefit and advantage of the same policy or policies respectively, unto the Plaintiff, his executors, or administrators."

"Provided nevertheless, that it should not be, in any wise, incumbent on Bradford to effect, or renew, or keep on foot any such policy or policies as aforesaid, or (at any time after the completion of such repurchase as aforesaid without such election being made by the Plaintiff, as aforesaid) to assign or make over the same unto the Plaintiff, his executors, or administrators, as aforesaid."

In April 1844 the Plaintiff gave notice to the Defendants, who were the representatives of Bradford, that he intended, at the expiration of a month, to repurchase the annuity of £215, and that he elected to take the policies and would take an assignment thereof.

The policies being worth £744, the representatives of Bradford threatened to surrender them in consideration of that sum. The Plaintiff, thereupon, filed this bill to compel the Defendants, on payment of the redemption money, to assign to him the policies. The repurchase-money, and the value of the policies were [568] deposited, and it was arranged that the opinion of the Court should be taken, upon bill and answer, as to the rights of the parties in respect of the policies.

Mr. Kindersley, and Mr. Bates, for the Plaintiff, contended, that by the terms of the deed of 1839, the Defendants were precluded from defeating the right of the Plaintiff to the policies, by a surrender, after the Plaintiff had given notice to repurchase the annuity, and had declared his election to take the policies. That although the Defendants might be at liberty to allow the policies to drop, still they could not surrender them for their own profit, and that the words "at the time of making such repurchase" meant the time of giving notice.

Mr. Turner and Mr. Bacon, for the Defendants. Under the first deed, it was quite at the option of the grantee whether he would insure or not, but if he did it

would be at his own expense, and the policy would have belonged to him upon the repurchase of the annuity. By the deed of 1839 the Plaintiff was relieved from a portion of the annuity, but no further benefit was intended for him than that which was expressed on the face of the deed; that deed is to be construed favourably to the grantee, who was voluntarily giving up his right to a portion of the annuity.

The intention of the parties was not to give to the Plaintiff the benefit of any outlay which the grantee might make for his own security, but to entitle him only to any policy existing at the time of the actual repurchase, and which would thereupon become useless to the grantee; this would be a convenience to the grantor, as, after the lapse of some years it might become difficult to effect a new policy on an old life.

[569] Upon the construction of the deed, it is to be observed that the clause of repurchase is dis severed from, and independent of the clause as to the policies: there is an express proviso, "that it should not be, in any wise, incumbent on Bradford, to keep on foot any such policy;" he might therefore have desisted from insuring, or might have surrendered the policy, at any time previous to the actual repurchase. The proviso is, that in case the Plaintiff should repurchase and should, "at the time of making such repurchase," elect to take the policies, then Bradford would assign any policy which might be then (namely at the time of the repurchase) vested in Bradford. So that those policies only were intended, which might be existing at the time of the actual repurchase, or of paying the repurchase-money, and there was nothing to prevent the surrender previous to that time. Mere notice was not a repurchase or payment. It created no obligation upon the Plaintiff which could be enforced; it might not have been fulfilled; and by successive notices from time to time, the Defendants might be constituted mere trustees of the policy for the Plaintiff.

If the notice created a new obligation on the Defendant, then, who was to pay the premiums during the month's notice, who was to be entitled to the benefit of the policy if it fell in during that interval, and what security was there to the Defendant for the payment of the £2500 repurchase-money, if that event had happened?

The policies were voluntarily kept up by the grantee; their value had arisen from an excess of annual outlay made by him out of his own monies. If the policies had been in the equitable, they might have exceeded the whole redemption money; and it never could have [570] been intended that the benefit of such policies, which the grantee was not bound to keep up, should belong to the grantee of the annuity who contributed nothing towards them.

THE MASTER OF THE ROLLS [Lord Langdale] (without hearing a reply), said, I cannot think there is any doubt in this case.

A deed of arrangement seems to have been entered into between the parties, whereby an annuity was to be paid to Bradford. The Plaintiff was to afford certain facilities for effecting and continuing the policies then already effected on his life. The premiums under ordinary circumstances were to be paid by Bradford, but if any extra premiums became payable in consequence of Hawkins going out of the country, they were to be paid by him. There was to be no obligation on Bradford to keep up the policies, and then there was the clause for redemption which has been so frequently adverted to during the argument.

First, it must be admitted, that the Defendants, who represent Bradford, were under no obligation whatever to make any payment for keeping up the policies; next, it must be admitted, that Hawkins had a prospective interest in the policies, because if they were in existence at the time of the repurchase, he was entitled to have an assignment of them for his benefit.

The Plaintiff, being desirous of repurchasing, gave notice of his intention and of his election to take the policies. That notice did not alter the contract between the parties; it did not impose on the Defendants the obligation of making any further payments for keeping up the policies, but it did this; it expressed the Plaintiff's election to take the policies of insurance. The De-[571]-fendants, who, it is admitted, were not bound to make any further payments for keeping up the policies, say, that notwithstanding the prospective interest which the Plaintiff had, to have the policies assigned to him, they have a right to defeat that prospective interest, by surrendering the policies, and have also a right to receive a sum of £744, in addition to the £2500 which Bradford had agreed to accept as the consideration for the repurchase.

I am at a loss to see, upon what reasonable construction of the contract between the parties, this could be done. It does not appear to me that the Defendants had, at any time, a right to surrender the policies for a profit to themselves. They had a right to decline to keep them up, but that right is a very different thing from a right to defeat, altogether, the prospective right of the Plaintiff by an act done for their own profit.

The rights of the parties were not altered by the notice, except that the notice formed part of the transaction of repurchase, for there could not be a repurchase without notice. It was after the transaction of repurchase had commenced, that the Defendants claimed the right to surrender the policies, and put the value in their pocket. According to the Defendants' construction, the Plaintiff might have entered into arrangements for effecting the repurchase of the annuity, the instruments might have been all prepared, and at the very hour the parties had assembled to complete, they might have been told by the Defendants, "we have just surrendered the policies for our own benefit."

Admitting the Defendants to have been under no obligation to keep up the policies, I think they had not, before the notice, and I am clearly of opinion that they had not after the notice, any right by their own volun-[572]-tary act to surrender the policies for their own profit, and thus to defeat the interest of the Plaintiff, and make it impossible to carry the agreement into effect.

Thinking that there can be no reasonable doubt of the Plaintiff's right to the policies, there must be a declaration of the Plaintiff's right, and the Defendants must pay the costs of the suit.

[572] KERR v. GILLESPIE. June 12, August 3, 1844.

Letters written by a Defendant, after the institution of the suit, to an unprofessional agent abroad, "confidentially and in reference to the defence of the Defendant to this suit:" Held, not privileged.

This was a motion for the production of documents, admitted, by the Defendant's answer, to be in his possession. The Defendant, by his answer stated, that the letters appearing in the first part of the second schedule to be written by Samuel Street and Thomas C. Street, the agents of the Defendant, or either of them, to the Defendant, and to be written by the Defendant to Samuel Street and Thomas C. Street, or either of them; also the letters appearing to be written by the Defendant to his solicitors, and by the solicitors to the Defendant, were all of them so written, confidentially and in the way of business, and in reference to the defence of the Defendant to this suit. And the Defendant submitted that he was not bound to produce the same.

Messrs. Street were the agents in Canada of the Defendant, and were merchants, and not professional men. The correspondence was all subsequent to the filing of the bill.

Mr. Turner and Mr. Rogers, in support of the motion, insisted on the Plaintiff's right to have a production of [573] this correspondence, which, they argued, did not come within the rule of professional privilege, Messrs. Street being neither the professional advisers of the Defendant (see *Maden v. Vevers*, ante, 489), nor, as in *Bunbury v. Bunbury* (2 Beavan, 173), the medium of communication between the solicitor and his client.

Mr. Kindersley and Mr. Gordon, *contra*, argued that the Defendant was not bound to produce the correspondence, first, because it had taken place subsequent to the filing of the bill; and, secondly, because it had "reference to the defence of this suit," and that the Plaintiff had no right to see the Defendant's evidence. (See *Preston v. Carr*, 1 Y. & Jer. 175; *Curling v. Perring*, 2 My. & K. 380.)

THE MASTER OF THE ROLLS said he would reserve the point until he had decided the case of *Flight v. Robinson* (8 Beav. 22).

August 3. THE MASTER OF THE ROLLS [Lord Langdale] (*ex relations*) held that the correspondence was not privileged, as the answer did not state that it had passed between the solicitor and client, or any other grounds which could relieve the Defendant from the obligation of producing it. He therefore ordered the production.

[574] LAWRENCE v. KEMPSON. June 22, 1844.

A. B. and the other committee-men of a public company mortgaged the company's estate, and covenanted personally to pay the money. They afterwards entered into a personal obligation, by bond, for another debt. A. B. died, having certain shares vested in him as trustee to the company. By the decree, the shares were ordered to be sold, and the produce applied in payment of the debts of the company, for which the estate of A. B. was liable. Held, that the representatives of A. B. had a right to have the fund applied in payment of the bond debt, in priority of the mortgage debt.

In September 1822 Peter Kempson (since deceased) and eleven other persons, who then constituted the committee of the "Birmingham Coal Company," mortgaged certain property belonging to the company to Mr. Insole for £7000, which sum they personally covenanted to pay.

In October 1822 Peter Kempson and the other members of the committee became bound, by bond, to Mr. Mather for payment of £4000.

By the decree in this cause, it was declared, that certain gas shares, which stood in the name of Peter Kempson, deceased, had been purchased by him as a trustee for the above company, and that such shares ought to be sold, and the proceeds applied towards payment of the debts and obligations due from the said company, for which the estate of the said Peter Kempson was liable.

The Master was directed to ascertain, for what debts and obligations, due from the Birmingham Coal Company, and to whom and on what securities, the estate of the said testator Peter Kempson was liable.

The Master found that the estate of Peter Kempson was liable, in conjunction with the other parties, to the above debts.

The shares were sold for £4000 and upwards.

[575] The mortgaged estate of the company was said to be sufficient to provide for the mortgage on it, and the question was, to which of the incumbrances the produce of the gas shares ought to be applied.

Mr. Turner, for the Plaintiff. Mr. Kempson and the other parties interested in the company entered into two joint securities. There is no equity, giving to the representatives of Kempson the right of selecting to which of the particular debts the produce of the gas shares ought to be applied.

Mr. Lovat, *contra*. The decree declares that Kempson was a trustee of the gas shares, and that they ought to be sold and applied in discharge of the debts of the company for which Kempson was liable. The intention was to indemnify Kempson's estate; but if this fund be applied in payment of the mortgage, the company's estate will be relieved, and Kempson's estate still remain liable to the bond debt. That was not the intention of the Court. The estate will provide for payment of the mortgage, and the fund ought, therefore, to be applied in discharge of the bond debt.

Mr. Turner, in reply. The representatives of Kempson are not the only parties interested in this question, the other eleven, who are represented by the Plaintiff, have a right to a voice in the application of the money.

The covenant is joint, and the bond is joint and several, so that the executors are only liable on the bond.

[576] THE MASTER OF THE ROLLS [Lord Langdale]. I cannot think that the representatives of Kempson are in the same situation as they might have been in previous to the decree. By the decree he is declared to have been a trustee of the shares, which were directed to be sold, and the produce was to be applied in payment of the debts and obligations of the company for which the estate of Kempson was liable. A benefit was thereby intended for the representatives. The object of the Court was to indemnify the estate of Kempson, and that must be done effectually. The Plaintiff desires to apply this money in satisfaction of the debt in respect of which his estate is safe, and not in respect of that debt to which it is exposed to a greater hazard. One cannot well see that it is consistent with the decree.

It is said that Kempson was an original debtor, and that the decree directing the

fund to be applied in satisfaction of these debts does not specify any priority, and that it ought to be applied in payment of that debt which the majority of the obligors select; but it appears that Kempson stood in the situation of a trustee for the company, and a peculiar protection was given to his estate by the decree, which, whether right or wrong, cannot now be varied. I think that the fund ought to be applied, first, in payment of the bond debt, and then that the residue should go in satisfaction of the mortgage.

[577] WHEATLEY v. WHEATLEY.(1) Jan. 12, 23, 1846.

The replication mentioned in the 111th of the General Orders of May 1845 means a replication in the form directed in the 93d of such orders, and therefore, in a *transition case*, where a *subpoena* to rejoin has been served prior to these orders coming into operation: Held, that publication could not pass, under the 111th Order, "without rule or order," and that a special order was necessary.

Upon a motion to dismiss, under such circumstances, the Court will (unless good cause be shewn), order that publication do then pass.

Where, prior to the orders of 1845, a replication only, in the old form, has been filed, a replication in the new form mentioned in Order 93 may be regularly filed, for the purpose of putting the cause at issue, but *secus*, where a *subpoena* to rejoin has been served prior to these New Orders.

In this case replication had been filed on the 1st of November 1844, and a *subpoena* to rejoin had been served on the 28th of May 1845; so that the cause was at issue before the orders of May 1845 came into operation. (28th October 1845.)

No further step having been taken in the cause,

Mr. Kindersley and Mr. Steere, for the Defendant, moved to dismiss the bill for want of prosecution. They argued, that under the 111th Order of May 1845 (Ord. Can. 329), publication "passed without rule or order, at the expiration of two months, after the filing of the replication" (1st of Nov. 1844). That consequently the Defendant was entitled to dismiss, under the 114th Order, Article 4 (Ord. Can. 330), whereby such a motion may be made, if the Plaintiff "does not set down the cause to be heard, and obtain and serve a *subpoena* to hear judgment, within four weeks after publication has passed."

That as these orders had been promulgated so long back as May 1845, and did not come into operation until the 28th of October (3d Order, Ord. Can. 273), the Plaintiff could not therefore have been taken by surprise.

[578] Mr. James Anderson, *contra*. This motion is irregular on two grounds. *First*, Time could only run, under these orders of 1845, from the day on which they came into operation (28th Oct.), consequently, if publication could pass in this case by the operation of the 111th Order, it passed on the 23d of December 1845, and the Plaintiff, under the 114th Order, article 4, has four weeks to set down his cause. This period, excluding the Christmas Vacation, will not expire until February next. The Defendant, therefore, is premature in his motion.

Secondly. The new rules do not apply to this case. The replication referred to in the 111th Order means replication in the particular form mentioned in the 93d Order (Ord. Can. 319), by which a Plaintiff "joins issue with the Defendant;" and such seems to have been the opinion of the Vice-Chancellor of England in *Lowell v. Blew* (13 Simons, 492).

Mr. Kindersley, in reply.

THE MASTER OF THE ROLLS reserved his judgment.

Jan. 23. THE MASTER OF THE ROLLS [Lord Langdale]. Replication having been filed on the 1st of November 1844, and a *subpoena* to rejoin having been served on the 28th of May 1845, and no further step having been taken in the cause, the Defendant now moves to dismiss the bill for want of prosecution. I am of opinion that the motion cannot be now granted.

(1) For the convenience of the profession, this and the nine following practice cases are published out of their regular order.

[579] The replication mentioned in the 111th Order is a replication in the form directed in the 93d Order, and no such replication having been filed, publication does not pass without rule or order. Consequently, publication has not passed in this cause, and the 4th article of the 114th Order does not entitle the Defendant to move to dismiss.

Moreover, the office and effect of a replication in the new form is, to put the cause completely at issue; it is required and may regularly be filed for the purpose of putting the cause at issue, in cases where replications only have been filed in the old form, before the 28th of October 1845. (*Spencer v. Allen*, 4 Hare, 455.) In those cases, it is required for the purpose of doing that which is necessary for the purpose of putting the cause at issue, but which can no longer be done by service of a *subpoena* to rejoin, which, under the 93d Order (Ord. Can. 319), is not to be issued.

But where the *subpoena* to rejoin has issued and been served before the 28th of October 1845, replication in the new form has no office to perform, and is not to be filed.

In this case, the cause is completely at issue, and the next thing to do is to pass publication, which I think ought to be by order; and unless some reason can be given why publication should not now pass, or any reasonable objection is made, I think that upon this application, I may order that publication do now pass.

After the proper time, the Defendant, if it should be necessary, may renew his motion to dismiss.

[580] BIDDULPH v. LORD CAMOYS. Jan. 23, 1846.

Service abroad of a *subpoena* to appear and answer directed, under the 33d Order of May 1845, upon a Defendant of unsound mind not so found by inquisition.

Two of the Defendants, Edward Henry Darell and wife, were resident in Belgium. The husband was of unsound mind, though not so found by inquisition.

Mr. J. A. Cooke moved, under the 33d General Order of May 1845 (Ord. Can. 297), for liberty to serve these Defendants with a *subpoena* to appear and answer.

THE MASTER OF THE ROLLS said he would consider whether this could be done under the order referred to.

Jan. 23. THE MASTER OF THE ROLLS [Lord Langdale]. Two of the Defendants, husband and his wife, are resident in Belgium, and a motion is made, under the first article of the 33d Order of 8th May 1845, for leave to serve them with a *subpoena* to appear and answer. The evidence of residence abroad is sufficient to support the application.

But it appears, that the husband is of unsound mind, though not so found by inquisition, and the question is, whether a *subpoena* ought to be issued in such a case. As nothing can be done upon the service without the leave of the Court, I think that the motion ought to be granted. The order which is asked will only have the effect of placing the Defendant in the position, in which other Defendants, in the same circumstances, but resident within the jurisdiction, are placed without special order.

[581] Care should however be taken, that no application is made to enter an appearance, under the fourth article of Order 33, unless the Defendant should have recovered at the time when the *subpoena* is served. And I think, that in this case, that object may be sufficiently secured, by requiring the Plaintiff to undertake, that he will not apply for an order to enter an appearance for the Defendant, without producing the affidavits which have been read on this occasion.

[581] FIESKE v. BULLER. Nov. 3, 1845.

Upon an application to serve a *subpoena* abroad, under the 33d Order of May 1845, an affidavit merely shewing the place of residence abroad of the Defendant seven weeks previous is insufficient.

Mr. Glasse applied, under the 33d Order of May 1845 (Ord. Can. 297), for liberty to serve a *subpoena* abroad. The affidavit in support of the application shewed

merely, that the Defendant, on the 17th of September last, was resident at Calais in France, and that it was probable he was still there; but no further information was furnished as to his subsequent residence.

THE MASTER OF THE ROLLS [Lord Langdale] said there appeared to have been no communication with the Defendant during the last seven weeks, and he therefore thought, that the affidavit was not sufficient to shew the present residence of the Defendant. That the motion might however stand over to supply the defect.

[582] BROWN v. STANTON. Nov. 3, 1845.

Liberty being given under the 33d Order of May 1845 to serve a *subpoena* in Ireland, the periods limited under the 2d Article were ten days to appear, six weeks to plead, answer, or demur, not demurring alone, but no order was made as to the time for demurring alone.

Mr. Amphlett applied, under the 33d Order of May 1845 (Ord. Can. 297), for liberty to serve a *subpoena* upon the Defendant in Ireland.

The affidavit in support of the motion stated positively, upon the belief of the deponent, that the Defendant was now in or near Limerick.

He asked that the Court would limit, under Article 2, the time "after service of *subpoena* within which such Defendant was to plead, answer, or demur," and he also asked that a time might be limited for demurring alone.

THE MASTER OF THE ROLLS [Lord Langdale] said that the Defendant ought to have ten days after the service of the *subpoena* to appear, and six weeks after appearance to plead, answer, or demur, not demurring alone; but he said it was not necessary to fix any time for demurring alone, which would be twelve days (16th Order of May 1845, Art. 10; Ord. Can. 280), according to the usual practice.

NOTE.—In *Preston v. Dickinson*, Sir J. L. Knight Bruce, on the application of Mr. Headlam, gave liberty to serve the Defendant within the Grand Duchy of Baden, and limited the time for appearance, and for pleading, answering, and demurring, not demurring alone. In drawing up the order, a question arose, whether the following paragraph should be inserted, "But in case the said Defendant should be advised to demur alone, he is to do so within twelve days after such appearance," and also whether the form of *subpoena* mentioned in the orders of May 1845 ought to be varied in conformity, under the 24th Order of May 1845. (Ord. Can. 293.) The Lord Chancellor was applied to, and a communication was had with the Master [583] of the Rolls, who expressed himself as follows:—"The order as originally made by the Vice-Chancellor Knight Bruce is perfectly correct, and it is quite unnecessary to specify a limited time for demurring alone, or to make any alteration in the form of the *subpoena*, under the authority given by Order 24."

The order and *subpoena* were thereupon directed to be prepared in conformity with this opinion.

[583] MOORE v. PLATEL. Nov. 13, 1845.

On an application to appoint a solicitor guardian *ad litem*, to a Defendant of unsound mind, not so found by inquisition, the Court required to be first satisfied that no relative would undertake the defence.

Mr. Turner moved, under the 32d Order of May 1845 (Ord. Can. 296), for an order appointing one of the solicitors of the Court guardian *ad litem* of a Defendant of unsound mind, not so found by inquisition.

It was stated, that the Defendant had, for some time, been resident with a Mr. Snow, and that application had been made to the solicitors of the other Defendants to undertake his defence, but that they had refused.

THE MASTER OF THE ROLLS [Lord Langdale]. The object of the Court is to see how this Defendant may be best protected. You have only applied to the solicitor of

the other Defendants, who has refused; but it is not stated whether any application has been made to the relatives, or whether they will undertake the protection of this Defendant's interests. If they will not, I shall appoint Mr. Johnson, the solicitor of the Sutors' Fund, to be guardian; but I do not wish to do so until I am satisfied that no natural protector will undertake his defence.

The matter had better stand over for a further affidavit.

NOTE.—See *Needham v. Smith*, 6 Beavan, 130, note, and *Mackeverakin v. Cort*, 7 Beavan, 347.

[584] HUGHES v. THOMAS. Nov. 23, 1845.

Exceptions were shewn as cause on the day they were filed. Held, that they might be referred *instantly*, notwithstanding the 16th Order of May 1845, Art. 25.

This was an injunction case. The Plaintiff obtained the common injunction for want of answer, which, however, was afterwards filed.

On the 20th of November the Plaintiff excepted thereto for insufficiency, and on the same day, upon a motion before Vice-Chancellor Knight Bruce to dissolve the injunction, the exceptions were shewn as cause. It was then proposed to refer the exceptions *instantly*; but a question arose whether this could be done, since the 16th General Order of May 1845, Art. 25, which prohibits the Plaintiff referring exceptions for insufficiency until the expiration of eight days from the filing of such exceptions.(1)

The senior registrar, by the direction of His Honour the Vice-Chancellor Knight Bruce, applied to the Master of the Rolls. (2 Colly. 239.)

THE MASTER OF THE ROLLS [Lord Langdale] expressed the following opinion.

"The Plaintiff having filed exceptions for insufficiency is not without special leave to procure an order to refer them within eight days. Order 16, Art. 25.(1)

[585] "But in an injunction cause, if the Defendant obtain an order *nisi* to dissolve the injunction, the Plaintiff may shew his exceptions as cause against making the order *nisi* absolute.

"He does not ask for a reference, but insists on his exceptions as good cause; and, thereupon, the Court, under the general practice and to avoid giving unjust credit to the exceptions, makes the reference *mero motu*, or at the request of the Defendant, and, to avoid unnecessary delay, imposes upon the Plaintiff the condition of obtaining the report in four days. So much of this practice as relates to time is stated in Art. 28: the rest is founded on the old practice,(2) which is not altered even as to time, although in an attempt to collect together the dispersed regulations as to time, it was thought right to mention this particular regulation as to time here."

[586] HORRY v. CALDER. Dec. 4, 1845.

Bill filed in July, application on the 4th of December for leave to serve copy bill. Motion refused on account of the unexplained delay.

Mr. Allnutt moved, under the 28th Order of May 1845 (Ord. Can. 294, and see 23d Order of August 1841, Ord. Can. 171), for liberty to serve a copy of the bill on a Defendant, after the expiration of the twelve weeks. The amended bill had been filed in July, but no affidavit was produced in support of the application.

(1) 16th Order of May 1845, art. 25, and see articles 26 and 28. Ord. Can. 284, 285.

(2) See *Bishton v. Birch*, 2 Ves. & B. p. 42; Newland's Pr. 351; Hinde's Pr. 598; Wyatt's Pr. Reg. 235; 1 Turn. Pr. 973; 2 Har. Pr. 547; 1 Smith, Pr. (3d ed.), 781; 2 Dam. Pr. (1st ed.), 314.

THE MASTER OF THE ROLLS [Lord Langdale]. After this unexplained delay I must refuse the motion.

[586] DALTON v. HAYTER. Nov. 3, 1845.

The words "last of the answers" in the 114th Order of May 1845 means the last answer of any one of several Defendants, so that the right of one Defendant to move to dismiss for want of prosecution is not delayed by his Co-defendant's neglect to answer.

The expressions "the last answer," and "the last of several answers" in the 66th Order, and in the 16th Order, Art. 33, means the last of the several answers filed by several Defendants.

This was a motion to dismiss the bill for want of prosecution under the 114th of the General Orders of May 1845. (Ord. Can. 330.) The bill was filed in 1843 against several Defendants, and afterwards, by amendment, Mr. B. was made a party. Mr. B. filed his answer, which became sufficient on the 18th of April 1845, and some of the other Defendants filed their answer on the following day. The Plaintiff took no subsequent proceeding in the cause. Mrs. Moody, one of the Defendants, had not answered; it was stated that she had gone abroad since appearance, but it was not shewn that any attempt had been made to get in her answer. It was now moved on behalf of Mr. B. that the bill might be dismissed for want of prosecution, under the 114th Order of May 1845.

Mr. Beavan, in support of the motion. By the 114th General Order of May 1845 (Ord. Can. 330), any Defendant may move to dismiss, and the Court may order accordingly, if a Plaintiff does not file a replication within four weeks after the answer, or the last of the answers is found or deemed sufficient, and the question depends on the true construction of this order. The words "last of the answers" have reference to the antecedent expression "any Defendant," and mean the last answer of "any" such Defendant; as if a Defendant put in a further [587] answer, or an answer to an amended bill, then four weeks after such last answer he could move to dismiss.

Secondly; if this be not the true construction, then the last words "last of the answers" mean the last of the answers which have then been filed; otherwise the Plaintiff, by omitting due diligence to get in an answer, or by adding a friendly Defendant, might, for ever, prevent a dismissal for want of prosecution. Besides this, some of the Defendants may never answer at all, for the Plaintiff may file a "traversing note," or the bill may be taken *pro confesso* without an answer, in which case the General Order would never apply. According to this construction the last of the answers put in was filed on the 19th of April, and became sufficient on the 28th of May, and the four weeks expired on the 25th of June, after which this Defendant was at liberty to move to dismiss.

Thirdly; Mrs. Moody being out of the jurisdiction, is not a Defendant within this order? In the case of *The King of Spain v. Hullett* (1 Russ. & M. 7), a Defendant out of the jurisdiction was considered not to be a Defendant within the meaning of the 13th Order of 1830. (Ord. Can. 8.) So in *Cooke v. Betham* (1 C. P. Cooper, 403) and *Bradstock v. Whatley* (Rolls, 28th February 1844, unreported), a Defendant not served with a *subpoena* was held not to be a Defendant within the same 13th Order; requiring an order to amend to be obtained within six weeks after the last of the answers, if there be two or more Defendants, is to be deemed sufficient.

Mr. Greene, *contra*. This motion is premature. The 114th Order is, in its terms, permissive, and the De-[588]-fendant is entitled to move to dismiss after the lapse of four weeks after "the last of the answers" is sufficient. The expression "last of the answers" can only mean the last answer of all the Defendants who are required to answer, and here there is a Defendant whose answer is not yet put in. This construction might, I admit, give rise to abuse, but none is here suggested, and the Court can prevent abuse of the order when it is attempted; the clear meaning of the words of the order, there being nothing in the context to qualify

last answer of several Defendants answering. This is more consistent with the rest of the orders, and it must be observed especially that the Plaintiff is now required by the 93d (Ord. Can. 319) Order to file but one replication, and he must do this after the last answer of several Defendants comes in.

Again, the 118th (Ord. Can. 332) Order is in its terms negative, and "a Defendant is not to be at liberty to move to dismiss for want of prosecution, until after the expiration of the time within which a Plaintiff may obtain an order to amend such bill," and reverting to the 66th Order (Ord. Can. 308), we find that he is entitled to an order to amend within four weeks after "the last of several answers is to be deemed sufficient," and Articles 32, 33 (Ord. Can. 287), and 37 (Ord. Can. 286) of Order 16, contrasted, shew clearly, that this means the last answer of several Defendants, and afford the true explanation of "the last answer" throughout these orders; therefore, the time to amend has not elapsed. It is to be further observed, that the words "as to such Defendant" contained in the 26th Order of 1833 (Ord. Can. 52) are omitted in the 118th Order of May 1845. (Ord. Can. 332.) This [589] shews an intention that the last answer was not to have reference to the Defendant moving.

It is then said, that the words "last of the answers" in the 114th Order (Ord. Can. 330) means the last of the answers which may have been filed at the time of moving. [THE MASTER OF THE ROLLS. You need not trouble yourself on that point, for I am not of that opinion.]

As to the third point, the cases do not apply. Here Mrs. Moody was not out of the jurisdiction at the time the bill was filed, but process was prayed against her in ordinary course, and she has appeared. In *The King of Spain v. Hullett*, and in *Cooke v. Betham*, and *Bradstock v. Whalley*, the Defendant had not appeared or been served with a *subpoena*, as in the present case.

THE MASTER OF THE ROLLS [Lord Langdale], without hearing a reply, said: It has been contended that the right of a party to move to dismiss a bill for want of prosecution depends on the conduct of his Co-defendant, who is no way under his control. It would be singular if that were so, and upon a full consideration of these orders, I do not find that they admit of any such construction.

In the Order 114, Art. 1 (Ord. Can. 330), the expression "the answer or the last of the answers" is applicable to the case of any one Defendant, who has filed one or more answers to an original or amended bill; and it means the answer or last answer of any Defendant claiming a right to move to dismiss the bill.

But the time when the motion may be made is not independent of other orders. Thus, Order 118 (Ord. Can. 332) [590] directs, that a Defendant is not to move to dismiss until after the expiration of the time within which the Plaintiff may obtain an order to amend his bill; and the time within which the Plaintiff may obtain an order to amend depends upon Order 66 (Ord. Can. 308), as affected by Order 14. (Ord. Can. 276.)

You are not usually to impute to one Defendant a knowledge of that which has been done by his Co-defendants, and therefore, when the time for obtaining an order to amend has elapsed, as far as depends on the case of any Defendant, that Defendant may under Order 118 (Ord. Can. 332), move to dismiss.

But the expressions "the last answer," and "the last of several answers" in Orders 66 (Ord. Can. 308), and 16, Art. 33 (Ord. Can. 287), clearly mean the last of the several answers filed by several Defendants, or by more than one Defendant; and pending the time appointed by these orders, as affected by Order 14 (Ord. Can. 276), the Plaintiff is entitled to obtain an order to amend.

And the consequence is, that, although a particular Defendant may be entitled to move to dismiss under Order 114, Art. 1 (Ord. Can. 330), and Order 118 (Ord. Can. 332), the Court may not think it right to make an order according to the motion. The Plaintiff may not have been able to proceed effectually against some other Defendant, or the Court may think the case such as to justify or excuse some delay.

[591] In any such case the Court may, under Order 21 (Ord. Can. 292), give to the Plaintiff time, upon such conditions and on such terms as may be thought just and reasonable.

In this case, I am of opinion, that the Defendant's motion is made with perfect

regularity; but, considering the circumstances, (1) the motion must stand over until the appeal before the Lord Chancellor has been disposed of.

[591] TOTTY v. INGLEBY. Dec. 4, 1845.

Subpoena to appear to bill of revivor served on the 3d July, and an application made on the 4th of December to enter appearance for Defendant. Held, that the Plaintiff must either serve a new *subpoena* or give notice of motion.

Mr. Bayley moved under the 29th Order of May 1845 (Ord. Can. 294), after the expiration of the three weeks mentioned in that order, for liberty to enter an appearance for a Defendant to a bill of revivor. The *subpoena* had been served on the 3d of July. No explanation was given of the cause of the delay in making the application; but he argued that, as under the 62d Order (Ord. Can. 307), no order to revive could be made, without an application to the Court on notice, no prejudice could result to the Defendant.

[592] THE MASTER OF THE ROLLS [Lord Langdale], however, said that too long a period had elapsed since the service, and, therefore, the Plaintiff must either serve a new *subpoena*, or give notice of motion.

[592] BELL v. HASTINGS. Dec. 4, 10, 1845.

Liberty given, after great delay, to serve copy bill, the omission to apply earlier having been accidental, and not for delay.

Mr. Prior moved under the 28th Order of May 1845 (Ord. Can. 294), for liberty to serve a copy of the amended bill on a Defendant, after the expiration of the twelve weeks mentioned in that order. The amended bill had been filed on the 14th of April 1845.

THE MASTER OF THE ROLLS [Lord Langdale]. I cannot grant this application without being satisfied that there is no intention to delay the prosecution of this suit. This proceeding may possibly delay the proceedings as against all the other Defendants. You must shew your application is *bonâ fide*, and not for delay.

Dec. 10. Mr. Prior now stated, that he had an affidavit that the omission to apply had been accidental, and not for the purpose of delay: that the interrogatories had been settled by counsel; and that it was the Plaintiff's intention to prosecute the suit without delay.

THE MASTER OF THE ROLLS. Take the order.

[593] THE SKINNERS' COMPANY v. THE IRISH SOCIETY. (2) Feb. 9, 10, 12, 13, 14, 15, 16, 17, 19, 20, 21, 22, 23, Nov. 19, 1838.

[S. C. 12 CL. & F. 425; 8 E. R. 1474.]

The Irish Society held to be trustees for public purposes, and not accountable to the companies of London, notwithstanding the latter were, after providing for the public objects, entitled to the surplus revenues of the estates vested in the former.

After some negotiation, an agreement was entered into between King James I. and the City of London, for the grant by the former to the latter of a large tract of land in Ireland, to be colonized by English. It was stipulated that £20,000 should be advanced to be expended in the undertaking, that certain houses should be

(1) The Defendant had filed a demurrer to the bill which had been overruled. He applied for a stay of the proceedings pending the appeal, which having failed, the Plaintiff took immediate steps to compel the Defendant to proceed to put in his answer. The appeal on the demurrer had not been disposed of, but stood high in the paper.

(2) This case was affirmed by the House of Lords on the 8th of August 1845, and is now reported in consequence of its public importance.

built, &c. The city compulsorily levied the amount upon the city companies. In 1613 King James granted a charter creating a corporation (the Irish Society), the members of which were to be appointed by the city, for the management of the plantation, to whom the land was thereby granted, but no trusts were declared. The principal part of the lands were afterwards divided in severalty between the companies, but the town lands, fishings, &c., were retained by the Irish Society, who, after applying a considerable portion towards public purposes, such as building churches, schools, &c., divided the residue amongst the companies. The Irish Society having annually divided a considerable sum amongst its members and made large expenditures in tavern expences, and in other modes which were objected to, a bill was filed by one of the companies against the society, the City of London, and the Attorney-General, to correct the alleged abuses; but it was held, that the powers granted to the society and the trusts reposed in them were, in part, of a general and public nature, independent of the private benefit of the companies: that the companies, though interested in any surplus which might remain after the general purposes were answered, were not entitled to control the exercise of the powers given for general and public purposes, and that the Court had not jurisdiction, upon the application of the companies, to determine upon the propriety of the expenditure made, though the discretion might be controlled elsewhere and in another manner. The bill was dismissed with costs.

Allegations and admissions, used for the purpose of defence against attempted extortion, under the form of legal proceedings, or for the purpose of obtaining justice irregularly when regularly it could not be had, ought not to be used as evidence of the rights of the parties. Held, consequently, that allegations and admissions, made in the course of arbitrary proceedings against parties in the Star Chamber, and in a treaty for compromise which arose out of the sentence, and in the proceedings which took place before the House of Commons in an attempt to obtain relief from the oppression of that Court, could not in any way influence the judgment of this Court.

This case, which was formerly before the Court upon an interlocutory application (1 Myl. & Cr. 162), now came on for hearing.

[594] The bill was filed against the Irish Society (a corporate body), against forty of the trading companies of the City of London, and the Attorney-General, seeking a declaration, that the Plaintiffs and the other city companies were entitled to the Irish property in dispute: that the Irish Society were trustees for them and for an account, &c.

The outline of this case (a more complete statement of which will be found in the judgment of the Master of the Rolls (*post*, p. 602)) is as follows:—

In the year 1608, the principal part of the province of Ulster, in Ireland, had, by the attainder of the Roman Catholics involved in the recent rebellion, become forfeited and vested in the Crown. King James I., being desirous of colonizing it with his Protestant subjects, proposed to grant out the land to persons willing to undertake the work of colonization, upon terms contained in a printed "collection of orders and conditions" published by his authority. This document first stated the object the King had in view as follows:—That His Majesty "not respecting his own profit, but the public peace and welfare" of Ireland, by the civil plantation of those unreformed and waste countries, was pleased to distribute the escheated lands to such of his subjects as should seek the same, "with a mind not only to benefit themselves, but to do service to the Crown and Commonwealth." It then provided that the undertakers were to build fortresses, keep and furnish arms and men for the defence of the settlement, erect houses, form townships, take the oath of supremacy, plant a competent number of English and Scottish tenants; and it also provided for the foundation of market towns and corpor[595]-ations for the habitation and settling of tradesmen and artificers, and for free schools, parishes, churches, &c., &c.

Commissioners were appointed by the Crown, and on the 21st of July 1609 instructions given to them as to the mode in which the objects of the Crown were to be effected. The King, being desirous of engaging the citizens of London in this work, and to induce them to become undertakers of the colonization of a large tract

of the escheated lands, caused to be prepared a document, setting forth the "motives and reasons" to induce the city to engage therein. It specified the "fittest places for the City of London to plant," and which the King proposed to grant, the land, sea and river, "commodities" which it produced, and "the profits which London should receive by this plantation," by the advancement of trade, the employment of its superabundant population, &c., "to the great service of the King, the strength of his realm, and the advancement of several trades and benefit of particular persons."

This proposal seemed to have undergone much consideration on the part of the City of London. (1) A committee was appointed for investigating the matter, who by a report, dated the 15th of December 1609, recommended, first, that £15,000 should be expended, to be raised by way of companies of the city "by the poll according to the rate of corn set upon every company" (2); secondly, they specified the territory (about 23,000 acres in Coleraine), and privileges to be demanded, and the position in which [596] the cities of Derry and Coleraine were to be built; thirdly, the things to be performed by the undertakers; and, fourthly, with respect to the management, they recommended the constitution of a company in London by whose advice and direction all things concerning the plantation and undertaking were to be managed. This report, forming the basis of a proposal, being communicated to the Privy Council, was, with some variations, accepted. By articles of agreement, dated the 28th of January 1609-10, made between the Privy Council on behalf of the King on the one part, and "the committees appointed by Act of Common Council on behalf of the Mayor and Commonalty of the City of London on the other," "it was agreed by the city that the sum of £20,000 should be levied:" it provided for the building by the city of the Cities of Derry and Coleraine, and maintaining the Castle of Culmore, and specified the lands and privileges to be granted, and on what terms and conditions. This agreement was confirmed by the city by Act of Common Council of the 30th of January 1609, which enacted, "that for the better ordering, directing, and effecting of all things touching and concerning the said plantation, and the business thereunto belonging, there should be a company constituted" within the city, consisting of a governor, deputy, and twenty-four assistants, who were empowered to determine "what should be done or performed on behalf of this city touching or concerning the said plantation," &c., &c.

Possession of the lands was shortly after given, and the corporation, who then exercised a right of compulsorily taxing the companies, directed the £20,000 to be raised by the several companies, according to the assessment; other large sums were subsequently raised in like manner and for the same purpose. In 1610, it was proposed by the city that the companies should take a proportion of the lands in lieu of the [597] money disbursed by them, to be planted at their own costs, and they were informed that, whether they accepted the offer or not, they would be liable for the charges of the buildings, fortifications, and also "that, notwithstanding the acceptance of the lands, they should likewise be partakers of all benefits of fishings, with the profits of towns and other immunities. This was generally acceded to by the companies, and subsequently the commissioners appointed by the city made their report, dated 15th of October 1613, stating that they had divided the lands, but that a division of the towns and town lands, ferries, and fisheries could not be fitly made, but *that the rents and profits of them might be divided and go amongst the several companies.*" The report was approved and a division directed.

On the 29th of March 1613 King James I. granted his charter, whereby he incorporated the Irish Society, and he granted to it the lands undertaken, but no specific trust was thereby declared. The Irish Society were thereby empowered to determine all matters concerning the plantation, &c. (see *post*, p. 619), and the members were to be appointed and removable by the city.

In 1615 King James I. granted to the companies licences to hold in mortmain;

(1) Throughout this case the distinction between the Corporation of the City of London and the several corporate companies must be carefully borne in mind.

(2) That is, according to an assessment called the corn rate, by which the companies were respectively compellable to furnish a given quantity of corn for the city granaries.

and in 1617 the Irish Society, in pursuance of the prior agreement, conveyed to the several companies their allotment of the lands, to be held by them in severalty. The Irish Society reserved the town lands, ferries, fisheries, and timber, the rents of which formed the subject of this suit. After the death of James I., some questions arose respecting the validity of the charter; arbitrary proceedings were adopted by King Charles I. in the Star Chamber, against the City of London, the Irish Society, and the com-[598]-panies. That Court decreed a repeal of the charter, and imposed a fine of £70,000 on the city and the Irish Society. A complaint was made to the House of Commons, who resolved that the proceeding was illegal. A promise was made to restore the charter, but in consequence of the Civil War, this was not done till 1662, when Charles II. granted a new charter similar, with some variations, to the former. After the granting of the new charter, the Irish Society again executed conveyances of the respective allotments of the lands to the different companies. From that time, the different companies held their lands in severalty, and the Irish Society retained the town lands, ferries, and fisheries. They applied a considerable portion in public purposes, such as in building and repairing churches and chapels, in public schools, in paying schoolmasters, in building bridges and fortifications, and in a variety of other public objects, and they divided the surplus amongst the city companies.

The Skinners' Company having become dissatisfied with the modern expenditure, filed this bill, charging breaches of trust and mismanagement on the part of the Irish Society. It appeared that, on the average of the last eight years, the net rental was about £10,000 a year, of which there was divided amongst the companies no more than £2000 a year. The average amount expended by the company for their tavern expenses and entertainments, amounted to £474, and they divided amongst themselves for attendance money, about £425 a year. The other prominent items of expenditure objected to were as follows:—An annual contribution of £56, 17s. 6d. for the Derry Race Plate, a like sum for Colonel Ponsonby's monument, payments of £683, 2s. 2d., and £2224, 9s. 0d. in respect of the Coleraine election, and payment of large sums in tavern expenses, gratuities, and fees to the members of the Irish Society. The [599] following table will shew the rental and the application thereof for three years immediately before the filing of the bill:—

	1830.	1831.	1832.
	£ s. d.	£ s. d.	£ s. d.
Permanent payments and quit rents (Ireland)	703 14 7	704 1 9	662 8 10
Expenses of schools (Ireland)	439 19 9	438 12 4½	468 9 2
Salaries, &c. (Ireland)	629 18 0	591 10 8	693 10 8
Salaries and gratuities (England).	721 7 8	898 4 0	611 0 0
Charitable donations (Ireland)	195 4 7½	530 0 0	1556 1 8
Donations (England)	52 10 0	525 0 0	—
Abatements to tenants	109 2 9	109 2 9	109 2 9
Law expenses	1697 5 0	262 13 4	3460 0 2
Incidental expenses (Ireland)	521 0 7½	630 12 1	199 11 7
Incidental expenses (England)	100 7 6	556 15 11½	295 3 9
Expenses of deputation	650 0 0	793 16 0	—
Tavern expenses	357 18 4	601 13 2	452 14 3
Allowance to members	424 0 0	615 10 0	593 15 0
Irish Chamber expenses	75 18 8	183 15 4	—
Surveying expenses	—	7 10 0	—
Divided amongst the twelve companies	1200 0 0	3498 13 4	—
Total expenditure of each year	7878 7 6	10,937 10 9	9101 17 10

The net receipts for the corresponding years were :—

	1830.	1831.	1832.
Receipts	£ 10,575	£ 12,973	£ 9396

Several documents were produced in evidence, in which, in 1683, 1713, 1715, and 1789, the Irish Society had stated that they were "*trustees*" for the London companies, and like admissions had been made by the City of London. Thus in their defence to the proceedings in the Star Chamber, the city insisted, that they "had nothing to do with the said plantation, and that their names were used, merely for the transaction of affairs, [800] and for levying and raising of money for the said plantation, upon the companies of the city, which could not be done but by Act of Common Council." This defence was, however, overruled by the Court, the negotiation, agreement, &c., having been with the city. The city made a similar statement in the petition to the House of Commons, in 1641. In a petition to King Charles I. they stated, that the grant of the lands "was in trust for the several companies of London and the particular men who disbursed the monies towards the plantation;" and in a report of a Committee of Inquiry appointed by the Court of Aldermen, it was stated, that the lands, fishings, and customs, had been granted unto the Irish Society, for the use of the several companies of London who were at the charge of building, &c.

The cause now came on for hearing.

Sir W. W. Follett (Attorney-General), Mr. Wigram, and Mr. Lloyd, for the Plaintiffs, contended that the Irish Society were mere trustees for the city companies, who had furnished the means for making the plantation, and that they had repeatedly admitted themselves to be such. That the public purposes contemplated by the charters had now been fully performed, by the building of the houses, the settlement of the plantation, &c., and that the rents of the reserved lands, &c., belonged to the companies. That the society had been guilty of clear breaches of trust, by the application of the funds to the private purposes of the individual members, and in other improper modes, and that this Court, in the exercise of its ordinary jurisdiction, would, by its decree, adopt measures to prevent the future misapplication of the income of the property.

[801] Mr. Kindersley and Mr. Wood, for the Irish Society, insisted, that they were a political body invested by the Crown with important public trusts and large discretionary powers, like those given upon the formation of plantations in America, for the benefit of the plantation in connection with the City of London, and for the benefit of the citizens at large. That constant usage, the absolute dominion exercised by the society over the company as well as over the income of the property, and the absence of all interference by the companies shewed that the society did not stand in the relation of trustees to the company: that if they had conducted themselves improperly, they were answerable only to the Crown. That the Corporation of London had the power of affording redress, and of removing the members of the society; and that the Plaintiffs had no rights capable of being enforced by bill in equity.

Sir C. Wetherell, the Hon. C. E. Law (the Recorder), and Mr. Randell, for the City of London, joined in resisting the claim of the Plaintiffs, contending, that by the charter, a trust had been created for general public purposes; that the corporation had delegated to them a supreme visitatorial power and control, which this Court ought not to interfere with; and that, though the Crown, by information or other proceedings, might interfere with the management of the Irish Society, still the companies could not sustain a private suit for that purpose.

Sir R. M. Rolfe (Solicitor-General) and Mr. Wray, for the Crown, insisted that

the rents of the reserved portion were wholly or primarily devoted to, and ought to be applied in furtherance of, the general public objects of the plantation; that the Crown had delegated to the Irish Society a discretionary power, which this Court had no jurisdiction to control.

[602] Mr. Pemberton, Mr. Romilly, Mr. Walker, Mr. J. Russell, Mr. S. Sharpe, Mr. Clarke, Mr. Teed, Mr. Jeremy, Mr. Whitmarsh, Mr. Rogers, Mr. Hayter, Mr. Freeling, Mr. Baily, and Mr. Lovat, for other Defendants.

Sir W. W. Follett, in reply.

Attorney-General v. Middleton (2 Ves. sen. 326), *Penn v. Baltimore* (1 Ves. sen. 444), *Ex parte Berkhamstead Free School* (2 Ves. & B. 134), *Attorney-General v. Smythies* (2 Myl. & Cr. 135), *The Attorney-General v. The Duke of Marlborough* (3 Mad. 498), *Morice v. The Bishop of Durham* (9 Ves. 399, 10 Ves. p. 534), *Coke's Fourth Inst.* (247), *The Bishop of Derry v. The Irish Society*, were cited.

Nov. 19. THE MASTER OF THE ROLLS [Lord Langdale]. The Plaintiffs in this cause are the Company of the Skinners of the City of London; the Defendants are the Society of the Governor and Assistants, London, of the New Plantation in Ulster, within the realm of Ireland, who are usually called the Irish Society, the Company of Mercers, and about forty other companies of the City of London, John Thomas Thorpe, Henry Schultes, and Her Majesty's Attorney-General.

The Irish Society is a corporate body, possessed of and entitled to certain ferries, fisheries, and town lands in Ireland, and the bill prays, that it may be declared that the Plaintiffs and the other companies who contributed to the expenses of the new plantation in Ulster, are beneficially entitled to the rents and profits of the said ferries, fisheries, and town lands, subject only to certain payments and charges, and that the Irish [603] Society are trustees of the same rents and profits, so subject, for the Plaintiffs and the other companies. The bill further prays for an account of such rents and profits, and for a partition of the ferries, fisheries, and town lands, between the Plaintiffs and the other companies, or (if such partition ought not to be made) for the removal of the Irish Society from being such trustees, and that other trustees may be appointed; or that some other arrangement may be made, for securing to the Plaintiffs and the other companies the due payment of their respective shares of the said rents and profits: the bill also prays for a receiver and injunction, and for further relief.

There are four distinct parties whose interests or claims have been brought into question. First. The companies of the City of London, for whom the Plaintiffs insist that the Irish Society are mere trustees, bound to account to them, and without any right or discretionary power to apply any part of the income of the property vested in them, for any public, charitable, or other purpose.

Secondly. The Irish Society who admit that they have no beneficial interest in the property, and that they are trustees for the companies of any surplus which may remain after answering certain public purposes, but claim to have a discretionary power to apply so much of the income as they may think fit for those public purposes, without being liable to account for the same to the companies.

Thirdly. The City of London, who resist the claim of the Plaintiffs, and claim for themselves a species of visitatorial or superintending power, enabling them to control the conduct and proceedings of the Irish Society; and,

[604] Fourthly. The Attorney-General, who, on behalf of the Crown, suggests that the rents and profits are applicable to public purposes.

As nothing can be determined as between Co-defendants on the present occasion, the substantial question in the cause is, whether the Irish Society has, independently of the companies and without being subject to account to them, a discretionary power to apply any part of the rents and profits of the estates vested in them, for purposes which they deem beneficial to the public, with reference to the plantation in Ireland which is mentioned in the pleadings. The Irish Society may be answerable to the City of London, or to the companies as represented or protected by the City of London, or to the Crown; yet, if it is not answerable to the companies severally, in this Court, the Plaintiffs are not entitled to the relief which they ask by this bill. On the other hand, if the society had no such discretionary power as they claim, and are, as trustees, answerable to the companies, severally, for all their receipts and

payments, the Plaintiffs are entitled to relief; their right has been denied, and accounts have been refused to them.

The Irish Society now subsists under a charter of King Charles II., dated the 10th April 1662: that charter was principally, and as to most of its details, founded on a former charter granted by King James I. on the 29th March 1613, and from the mode in which the case was stated and argued on all sides, it appears to me necessary to consider the circumstances under which the first charter was granted, so far as those circumstances are proved by the evidence in the cause. From the evidence it appears, that in the year 1608, the greatest part of the six several counties of Armagh, Tyrone, Coleraine, Donegal, Fermanagh and Cavan, had, by escheat or forfeiture, come into the possession of the Crown, [605] and that King James I., being desirous to promote the public peace and welfare of Ireland by a civil plantation of what were called "those unreformed and waste countries," proposed to induce English and Scotch persons to emigrate thither, and undertake the plantation on certain terms; and for that purpose, he caused to be published a collection of such "orders and conditions" as were to be observed by the undertakers, upon the distribution and plantation of the lands.

It is plain from these "orders and conditions," that the King did not merely contemplate the benefit of the persons who should undertake the plantation, or "colony" as it is called in another document, but that he had a great public object in view, and to carry that into effect, desired to engage such of his subjects, as well of Great Britain as of Ireland, as, "being of merit and ability, should seek the lands, with a mind not only to benefit themselves, but to do service to the Crown and Commonwealth." It was intended to appoint commissioners for setting forth the several proportions of the lands, and for the ordering and settling the plantation, according to such instructions as should be given unto them by His Majesty in that behalf. Such commissioners were appointed, and instructions given to them on the 21st July 1609; but before that time, the King became desirous to engage the City of London in the undertaking, and caused to be prepared a paper, setting forth "motives and reasons to induce the City of London to undertake the plantation in the north of Ireland." These "motives and reasons" (after suggesting that the ruined City of Derry, and another place at or near the Castle of Coleraine, seemed to be the fittest places for the City of London to plant, and that the situation was such, that the same, especially the Derry, might be made by land almost impregnable), set forth, that His Majesty might be pleased to grant unto those towns, not only corporations with such liberties and privileges for their good [606] government, &c., as might be convenient, but also the whole territory and country between them, which was above twenty miles in length, bounded by the sea on the north, the river Bann on the east, and the river of Derry or Lough Foyle on the west; out of which, 1000 acres more might be allotted to each of the towns for their commons, rent free; the rest to be planted with such undertakers as the City of London should think good for their best profit, paying only for the same the easy rent of the undertakers. The "motives and reasons" further set forth, that His Majesty might be pleased to grant to those towns the benefit of all the customs of imports and exports for twenty-one years, paying only a yearly rent of 6s. 8d., and would be pleased to buy the salmon fishing in the rivers of Bann and Lough Foyle, and bestow the same on the towns for their better encouragement; and likewise to grant them licences to transport all prohibited wares growing on their own lands, and the admiralty on the coasts of Tyreconnell and Coleraine; and then were specified "the land commodities" which the north of Ireland produced, "the sea commodities," and "the profits which London should receive by the plantation;" and the profits which were described were of a public nature, affecting the general welfare of the city.

These "motives and reasons" were intended to be, and afterwards became, the subject of conference between certain persons authorized to act for the city, and certain members of the King's Council, and precepts were issued by the Lord Mayor to induce the companies of the City of London to appoint persons to act for them; and the first answer having been given and disliked, because given before any conference had with the King's Council for Ireland, persons were afterwards appointed committees for such conference by the city, and such committees "had (as is stated in

the precept dated the 24th of July 1609), re-[607]-ceived such satisfaction, as well of the honour of the action and the good that might come to the kingdom and city by the same, as the profit that was likely to redound to particular adventures as had given good encouragement to the committee and others to become adventurers therein, and liberty was also given for further satisfaction, that all things should be answerable to that which was reported, that certain men should be chosen and sent by the city to view the place, and make return to the city, so that, if it proved not answerable to that which was reported, and profitable for the undertakers, the city might be at liberty to leave the undertaking, anything then done notwithstanding." Under these circumstances, the Court of Aldermen ordered precepts to be sent to the several companies of the city, requiring them to call their companies together, to understand what every particular man would willingly adventure to the same, so that the committees might be fully instructed to give answer to the Council of Ireland on Friday then next, the 28th.

Precepts were accordingly issued. It does not appear, however, that this course was pursued; for an order of the Court of Common Council, dated the 1st of August following, was made, which, without taking notice of any willing adventurers, or any offers of contribution, recites, that the Privy Council had, theretofore, signified His Majesty's pleasure to divers aldermen and commoners concerning the intended plantation, and that divers aldermen and commoners, elected by that Court, had had conference with the Council for Ireland about the same, and then proceeded as follows:—"It is this day, therefore, upon the motion and commandment of the Lords of His Majesty's Privy Council, signified to divers aldermen and commoners of this city, upon Sunday last (the 30th July), at the council table, concluded and agreed, that four wise, grave, and discreet [608] citizens of this city, should be presently sent to view the place for the intended plantation in Ireland," and it was thereupon ordered, that four persons therein named, John Broad, Hugh Hammersley, Robert Treswell and John Rowley, "should forthwith, at the city's charges, undertake the voyage into Ireland, and survey and view the place and grounds intended for the new plantation there, and make report to the city, at their return from thence, of their opinion and doings touching the same." The persons appointed to be viewers received from the city £300 for their expenses, and then proceeded on their mission to Ireland.

It appears, therefore, that at this time, the King's Government was in treaty with the City of London, to undertake some portion of his plantation, and that the city, before entering into any engagement, proceeded, by commissioners or agents of their own and at their own expence, to ascertain the facts necessary for their consideration.

By an order of the Court of Aldermen, dated 28th November 1609, it appears that the commissioners had then returned and made their report, and an additional sum of £100 was ordered to be paid to them, and on 2d December 1609 the Court of Common Council, after noticing that the Lords of the Council expected presently to hear the resolution of the city touching the plantation, it was ordered, that Sir Stephen Soame and others, "calling unto them the four commissioners or viewers, should meet together, to advise and consider of all circumstances and matters fit to be remembered about the plantation," and they were to be ready to make report to the next Common Council, in writing, of their opinions touching the same, "Whereby the city's resolute answer concerning the said intended plantation might be made and delivered to the Lords of the Council" the 16th of December next.

[609] On the 15th of December the report of the committee was made, and it recommended, in substance, that the sum of money to be expended should only be £15,000, and that the same should be raised by way of companies, and in companies by the poll, according to the rate of corn set upon every company; but some of the inferior companies were thought fit to be spared; yet that such as were known able men in those companies should set proportionably with men of like ability in other companies; and for this levy it was proposed, that an Act should be passed in the Court of Common Council.

After this statement as to the sum and the mode of raising it, the committee claimed, that the Derry and the town of Coleraine should be the places where two

cities should be erected; that unto Derry 4000, and unto Coleraine 3000 acres of land should be laid, and that the rest of the territory and county of Coleraine, estimated at 16,000 acres of temporal lands, should be undertaken. Various privileges, varying from those mentioned in the first project, were proposed to be claimed, and it was suggested, that, seven years' time should be asked for, "to make such other reasonable demands, as time should shew to be needful but could not presently be foreseen." The report then stated what was proposed to be done, and finally suggested, that all things should be managed and ruled as follows: "It is thought best that a company be constituted here in London of persons to be selected for that purpose, and corporations to be carried on in the two cities of Derry and Coleraine, but all things concerning this plantation and undertaking to be managed and performed in Ireland by advice and direction from the company here in London." The report, containing this suggestion, which was the first germ of the Irish Society, was approved by the Common Council, and Mr. Recorder and others were [610] appointed to present the same, as the city's answer, to the Lords of the Council. This was done, and the Lords of the Council, having objected that £15,000 was too small a sum, did not accept the offer; in consequence of which, the Court of Common Council, on the 22d December, ordered that the sum of £5000 should be added to their former report, in respect of buying in of private interests and other charges, and the committees formerly appointed were required to deliver the former report, with that sum added, as their answer to the Lords of the Council. With this answer the Lords of the Council appeared to have been satisfied, and in contemplation of a final agreement, measures were very soon adopted by the city, for carrying the project into execution, on their part. On the 8th of January 1609-10, at a Common Council then held, it was enacted, granted, and agreed, that Sir Thomas Bennett and twenty-two other persons then named, and the four commissioners or viewers that were sent from the city into Ireland to view the intended place for plantation should, from time to time, meet and have conference, as well amongst themselves as with such commissioners as should be appointed by the Lords of the Council, touching the intended plantation in Ulster; and the said committees before named were to take advised care and consideration of all matters whatsoever, that to them, in their discretion, should be thought fit to be propounded, moved, or done on the behalf of the city, touching the same plantation, as the matter itself, being of that consequence and importance, did merit, and Sir Thomas Bennett was appointed to be the president of the said committees.

And it was further enacted, for the better expediting of the service, that a present taxation should be made of the said sum of £20,000, and a present levy made of one-fourth part thereof, and that the sum of £5000 [611] should be raised by way of companies of the city, and in companies by the poll, according to the rate of corn set upon every company; that some of the inferior companies were to be spared, yet such as were known able men in those companies were to be set proportionably with men of like ability in other companies, according, as in the report of the committees, confirmed by the Common Council, is mentioned; the same monies to be speedily raised, and to be paid on or before the feast of the purification next ensuing, unto Mr. Cornelius Fische, chamberlain of the city, who, by the said Court, was appointed treasurer, as well for the receipt and payment of the said £5000, as of the rest, being £15,000, when it should be required. On the following day (the 9th of January) precepts were issued for the purpose of carrying into effect the taxation and levy accordingly.

The Lords of the Council and the committees of the city soon afterwards came to an agreement. Articles were drawn up and settled; they bear date the 28th of January 1609-10, and they were approved and allowed by the Court of Common Council on the 30th of the same month; and from the course of proceeding which I have stated, it appears, that although it was at one time suggested that individuals should willingly undertake or voluntarily contribute to the undertaking, everything, at length, centered in the city, and in the Court of Common Council as representing the city: the city undertook and was to perform; the city was to provide the funds, and the city was to have the profit; the city was set in motion, by what has been called the pressure of the Crown or of the Government, and was, by its agents, the

contracting party with the Government. With the companies, otherwise than as they were involved in or formed part of the general body of the city, the Crown had no negotiation or dealing. The [612] Crown did not, as it seems concern itself, either with the means by which the city was to perform its undertaking, or with the inducements to be held out to individuals, further than as such inducements were secured by the general terms of the project, and the motives and reasons presented to the city. It may reasonably be supposed, that when the Court of Common Council, in performance of the contract, found it necessary to exercise a somewhat questionable power of taxation, suggestions of some benefit to result to those upon whom the charge was imposed, would, in some manner, be made, and that such was the case is extremely probable from the nature of the transaction itself, and is apparent from the subsequent proceedings; but in the formal acts at the time, the companies are treated as the instruments by which the sums assessed or the amounts taxed should be levied, and the levies were not made upon any property of the companies, but in companies by the poll. That the levies were compulsory and enforced against reluctant parties by the power of the city, is shewn by abundant evidence in this case.

At the same Common Council by which the agreement was approved and allowed, it was ordained and enacted, that "for the better ordering, directing, and effecting of all things touching and concerning the said plantation and the business thereunto belonging, there should be a company constituted and established within the City of London," which should consist of one governor, one deputy to the governor, and twenty-four assistants; that the governor and five of the assistants should be aldermen; that Mr. Recorder should be one of the assistants, and that the deputy and the rest of the assistants should be commoners of the city; and after providing for the continuance of the company by election in the Court of Common Council, and, appointing the present members of [613] the company, it was enacted and agreed, that the company should have authority to hold Courts, and in the same to treat and determine of all matters and causes concerning the business that to them, in their discretion, should be thought fit; and also to direct, appoint, and demand what should be done or performed, on behalf of the city, touching the plantation, and to give orders and directions in England into Ireland, for the ordering and disposing of all things concerning the intended plantation, or anything belonging to the citizens of London undertaking in that part of Ireland, as also for the receiving, ordering, disposing, and disbursing of all sums of money that were or should be collected or gathered for that purpose, and generally, for any other matter incident or belonging to the business and affairs in Ulster.

This enactment or order was the practical adoption, by the City of London, of the suggestion made by the Commissioners in the preceding month of December. This company as it is called, though it was only a committee of persons appointed by the Court of Common Council, was the Irish Society previously to its incorporation, and may be conveniently distinguished by that name. It proceeded to carry into effect the agreement entered into with the Crown, and the members of the society were so far recognised by the Crown, that applications were made to them in respect of matters relating to the plantation. Thus, by an order of the Common Council, dated 7th of June 1610, it appears, that the King's Commissioners for Ireland, desired that 2000 acres of land agreed by the articles to be passed to the city, should be spared and left out of the intended assurance, to the intent that the same might be otherwise disposed of, and that Alderman Cockaine, the governor, had signified that the company [society], of themselves, [614] had not power to comply with that desire, but that the same was to be done by Act of Common Council, and had promised the Commissioners to propound the same to the next Court of Common Council then to be holden; which being done, it was ordered, that the intended assurance from His Majesty should be made for the whole quantity, according to the intent of the article, without omitting the 2000 acres in question. Again in July 1610, the King's Irish Commissioners made to the company or society four proposals, which were reported to the Common Council, by whom two of the proposals were acceded to and the other two were rejected, "in regard, it was conceived, the granting and yielding to them would prove to be very prejudicial to the city;" upon a subsequent day, one of the rejected proposals was yielded.

On the 14th of January 1610-11 an order made by the Court of Common Council affords the first formal intimation, as to the mode in which the companies of the city were to be concerned or interested in the intended plantation. After authorising the society to let the fishings for seven years, for such fine or rent as they should think fit and convenient, for the most benefit and profit of the city, it was ordered, that precepts should forthwith be sent to every several company of the city, "to require them to assemble themselves together, and to advise amongst themselves, whether they would consent and agree to take and accept of lands, in lieu of the monies already by them disbursed or to be disbursed towards the said plantation, and so to build and plant the same, at their own cost and charges accordingly, as by the printed book of the plantation was required; or else, whether they would refer the letting of the lands there, and the managing of the whole business there, unto the said governor and assistants of the [615] society for the time being; and that every company be required, by the same precept, to deliver their answer in writing on Saturday then next in the forenoon, at the Guildhall, unto the said governor and assistants, whether of the two said offers they will embrace; to the intent that the said governor and assistants, upon the answer of the several companies of the city, may make a perfect relation to the next Court of Common Council there to be holden, which was appointed to be on Monday next, touching the resolution of the several companies of the said city, to the intent that such further course might then be taken therein as should be thought fit."

In the precept which was issued in pursuance of this order, and which bears date the last day of January 1610-11, it was recited, that the King had granted unto the City of London the City of Derry and town of Coleraine, with 7000 acres of common land thereunto adjoining, and fishings, and divers other immunities, privileges, and franchisea, paying four marks per annum, and that the city had undertaken to dispend in building of houses and fortifications, and for freeing of foreign titles the sum of £20,000, and that also His Majesty had further granted to the city, divers other lands in the county of Coleraine, and other undertaken lands to build thereupon, which building was to be performed in such manner as was expressed in the printed book then extant, yet with this addition, that they were to have and enjoy the same lands after the Irish measure, being far better than other ordinary undertakers had; and then the precept proceeds as follows:—"And forasmuch as the governors and committees for the plantation in Ireland are now instantly to take care for the letting and disposing of the lands in the county of Coleraine, and other lands so undertaken, to be used and managed for the benefit [616] of this city, which would otherwise prove a great hindrance and loss, especially for that the time of the year is now most convenient for the plantation to proceed, yet it is thought fit, that the offer of those lands be first made to the several companies of this city, who have and are to disburse the same, and bear the charges of buildings before mentioned: these are therefore to charge and command you, that yourselves, together with the assistants of such other of your company as you shall think fitting, do forthwith assemble together, and advise, whether you will accept of a proportion of the same lands, according to the quantity of your disbursements, to be by you undertaken and managed, according to the printed book for plantation, or that you will refer the letting and disposing thereof to the governor and committees. And that you certify to the governor and committees, in writing under your hands, at the Guildhall, on or before the 7th day of February next coming, what shall be your full determination therein, to the end the business may the sooner be effected, wherein you are to take advertisement, that your companies are to pay and bear their proportion of the charge of the building, fortifications, and freeing of the titles, whether they accept of the said offer of the lands or no; and also, that notwithstanding the acceptance of the lands, you shall likewise still be partakers of all benefits of fishing, with the profits of the towns and other immunities whatsoever."

In consequence of these proceedings, eight of the principal, and ten of the inferior companies signified their consents to accept of the lands, to plant upon the same according to the printed book of plantation, and the other companies signified their denial; whereupon it was, on the 28th of February 1610-11, ordered, that the companies who consented should have lands allotted [617] to them, and provision was

made for the event of the other companies within a fortnight, and upon further consideration, altering their minds, and consenting to accept of lands in lieu of the monies disbursed and to be disbursed by them towards the plantation in Ireland.

From these documents, it appears to have been understood, that the companies of the city had not previously undertaken the plantation, but that the plantation, being undertaken by the city, was, in default of other means, to be carried into execution by the society, or committee appointed by the city, but that it was thought desirable, that the undertaking should be, at least in part, performed by the incorporated companies; and that the city, having entered into the undertaking, having, by their power, levied the means of carrying it on, and being actually engaged in carrying it on, by their governor and committee or company, offered to each of the incorporated companies an option, either to undertake the plantation of a portion of the lands according to the printed book for plantation, or to refer the letting and disposing thereof to the governor and committees. It was an offer (which, by some of the companies, was at this time accepted) to give or allot lands, in lieu of the monies disbursed and to be disbursed towards the plantation, and the companies were informed, that whether they accepted the land or not, they were to pay and bear their proportions of the charges of buildings, fortifications and freeing titles, and that, notwithstanding their acceptance of the lands, they should be partakers of all benefits of findings, with the profits of the towns and other immunities whatsoever.

After these proceedings, the undertaking continued to be carried on by the company or society, under the control of the city: the money mentioned was levied, increased taxation, and additional levies became necessary, and were made. On the credit of them, the city advanced monies to the society, which were afterwards repaid, and the power, which the city exercised, of commitment, was frequently acted upon to compel payment of the assessments. It is to be observed, that by an order of Common Council, dated the 10th of July 1610-11, by which an additional taxation of £10,000, and a present levy of £5000 was ordered, the precept which was then ordered was to require every several company to assemble and advise among themselves, and, thereupon, certify to the governor and committee of the plantation, whether they would willingly yield to the supply of £10,000, or would be content to lose all the money they had already disbursed, and pass over their right therein to such as would undertake the payment for them, and to free and discharge them of all other payments thereafter touching the plantation.

It is apparent, that at this time, the companies were understood to have an interest in the sums they had been compelled to pay, and the Court of Common Council was probably understood to have power to declare a forfeiture.

During the time to which I have hitherto referred, no charter had been granted, but the city had proceeded, on the faith that an assurance of the land would be made to them. The lands are, in the precept of the last day of January 1610-11, mentioned as having been granted, though in fact they were not so, and on the 8th of January 1612-13 it was ordered, that Mr. William Cockayne, the first governor of the company, should be and continue governor, until the assurance from the [619] King unto the city concerning the plantation should be obtained and finished.

The charter of James was obtained soon after the date of this order. It is dated the 29th day of March 1613, and after reciting the King's intention, and that the mayor, commonalty, and citizens of London had laudably undertaken a considerable part of the plantation in Ulster, and were making progress therein, proceeds to consolidate the city and town of Derry, and all the territories and hereditaments thereby granted, into one county to be called the county of Londonderry; to declare that the City of Derry should be called Londonderry, to define the extent of the City of Londonderry and town of Coleraine, to incorporate the citizens of Londonderry and to declare, that they should have a mayor, aldermen, sheriffs and chamberlain. The mayor, commonalty, and citizens were empowered to make laws and ordinances, so that such laws and ordinances were certified by the City of Londonderry, under their common seal, to the society of the governor and assistants, London, of the new plantation in Ulster after mentioned, within four months after the making of such laws and ordinances, to the intent that the same society might ratify and confirm such

great sums of money, it was generally thought fit (as a matter much importuning the advancement of the said work, [625] as well for the general satisfaction of the several companies of the city who had undertaken the same, as also for accommodating such other affairs and circumstances, as from time to time thereafter should be offered to the further consideration of that Court), that some great and worthy magistrate of the city, accompanied by some commoner of special countenance and credit, should be sent into those parts, on the behalf of the city, to take exact notice, view, and account of the whole work of plantation, and of every circumstance and thing appertaining thereunto."

Mr. Alderman Smithies, and Mr. Matthias Springham were accordingly appointed to go into Ireland, and in the meantime to confer with the governor, deputy-governor, and assistants of the Irish Society for their better instruction, and to inform themselves of the things necessary to be remembered; and authority was given to them, by the Court of Common Council, "to take an exact notice, view, and account of the plantation, and of all works and other things whatsoever done, and to be done, and of all disbursements and accounts concerning the same, as also to judge, control, place, displace, disprove, redress, reform, correct, and direct (so far as to them should seem reasonable), all persons employed for the city's use, disbursements, and service in and about the plantation, and generally to do and execute every further act which to them might be thought meet, for the better ordering and governing the plantation, and the affairs concerning the same, to the intent, that upon their return and relation of their proceedings, the Court of Common Council might grow to such final resolution touching the plantation, as should be thought fit and most convenient," and that the charges of the negotiation should be defrayed by the Irish Society, out of the general stock of the plantation.

[626] This order is remarkable, as shewing the great power, which, after the charter, the City of London exercised, and contemplated the future exercise of, over the plantation and the affairs thereof, as well as the importance which was, at that time, attached to the satisfaction which should be given to the companies. No doubt seems to have been entertained, that the society, whatever its own powers might be, would act according to the suggestions and views of the city, and that the city, whatever other objects they had to promote, were bound, in duty or in policy, to satisfy the companies. As the necessary expense was not yet defrayed, as the power of the city over the companies afforded the only means of raising the money, and as public and general objects were to be attained, it does not appear difficult to account for the conduct of the several parties.

Very full instructions appear to have been given to the commissioners, and on the 8th of November 1613 Mr. Alderman Smithies delivered the report of himself and Mr. Springham, dated the 15th of October 1613, to the Court of Common Council; and the report, after stating several abuses and negligences which had occurred, and the proceedings of the commissioners in respect thereof, and stating their opinions, that if it should stand with the liking of the city, some convenient wall of brick or stone might thereafter be made about the castle of Culmore, proceeded as follows:—"Whereas it was generally desired, that a division should be made of all the lands by and amongst the several companies undertaking in this plantation, we have, with great travail, first viewed the lands, and carefully inquired after the true value of every balliboe, and thereupon, with great care and pains, and with the assistance and advice of the gentlemen of the country, the city's agents, and surveyors, proceeded to make an equal division of the [627] land into twelve parts, wherein we have used our best skill and diligence, and have done the same as equally as possibly we could devise, the form of which division we have here brought you, together with the plot of the same. But for the City of Londonderry and the 4000 acres there, and the town of Coleraine and the 3000 acres appointed to the same, the ferries, and the fishings, we are of opinion that a division cannot be fitly made of them, but the rents and profits of them may be divided, and go amongst the several companies; and we advise that upon the division, it be provided, that where a proportion of land shall want timber to build with, the company to whose share it may fall may have sufficient timber out of the woods next adjoining, and fitting for that use, to be assigned to them by the city's agents."

This report was approved and allowed by the Common Council. That part of it which related to the division of lands was almost immediately acted upon. That part which states the opinion of the commissioners, that the rents and profits of the town lands, ferries, and fishings, might be divided and go amongst the several companies, has naturally been much dwelt upon on behalf of the Plaintiffs: what notice may have been taken of it at the time does not now appear, but in connection with it, we must bear in mind, not only that it is in perfect accordance with the precept of the last day of January 1610-11, but also that very considerable and expensive public works were still in progress; that the city was then conceived to have power to levy, compulsorily, all such monies as should be required, and that some income, of not inconsiderable amount, was at that time derived, or about to be derived from the property not then to be divided. At a time when it was thought that money could be levied by [628] taxation, whenever it was wanted, the necessity or even the propriety or prudence of reserving some property producing income to answer the general purposes of the plantation, may not have been suggested, or, if suggested, may have yielded to the greater prudence of holding out prospects of income or profit to those, upon whom the burthen was imposed, by a power, which, even if thought lawful, must have been considered as arbitrary, and was, according to the evidence, in many instances not obeyed, without reluctance on one side, and the application of force on the other.

A division of the lands by lot was effected, under the direction and superintendence of the Court of Common Council on the 17th of December 1613, and each of the twelve chief companies had allotted to it so much land, as, in quantity and value, equalled one-twelfth part of the whole of the lands to be divided, under an arrangement by which every company of the city was to have an interest or share in the divided lands, proportioned to the amount of money levied upon it for the purposes of the plantation. And this being done, an order was immediately made for a further levy as follows:—After all which done (meaning the allotment) information was given by the governor and assistants of the Irish Society, “that all the monies formerly levied towards that charge is altogether issued, and that, notwithstanding the companies had their particular shares of land which was to be managed by themselves severally, the general work for the building of the rest of the towns and fortifications was to be done at the general charge, and therefore that a further supply must, of necessity, be made and provided to proceed on the business;” and therefore it was enacted, that a present taxation should be made of the further sum of £5000, which was accordingly ordered to be levied and raised of the several com-[629]-panies of the city; and it was also ordered, that conveyances should be made of the lands allotted to the several companies, by the advice of the recorder, in such manner as the committees of the plantation (i.e., the Irish Society) should think fit.

It appears, that the companies, without waiting for their conveyances, planted and placed divers numbers of British on their proportions of lands, and expended very large sums of money thereon; but independently of these undertakings, the works which were to be done at the general charge of the city continued to be expensive, and additional sums were levied on the companies. Complaints were, about the same time, made, on the part of the Crown, that the plantation had not proceeded according to the conditions, and an intimation was given that the grant might be resumed; further time, however, was given, until the last day of August 1616. The city, in the meantime, continued its active interference, by orders of the Court of Common Council, and employed its own agents; the Irish Society seeming to act, rather in its original character of a committee of the city, than as an independent corporation.

In the year 1615 licence to hold lands in mortmain was granted to the companies, and in the course of the next or two or three following years, manors were created, and conveyances thereof and of the allotted lands were made to the companies by the Irish Society. The conveyances were absolute, in some without, and in others with, the reservation of rent to the Irish Society. The licence for the companies to hold in mortmain was also a licence to the society to convey to them, and it contained a recital that the companies, in testimony of their true obedience to the Crown, &c., had disbursed, expended, and bestowed divers great [630] sums of money for and

towards the building, fortifying, planting, strengthening, and improving the City of Derry and the town of Coleraine, and some parts of other lands, and were willing and intended, so far as to them should seem convenient, to be at further charge for the planting, and improving of other lands; and for speedier proceeding therein, were desirous to have conveyances of the land they intended to build on; therefore, and to the end that the several companies might be the better encouraged and enabled to perfect and finish the intended plantation, "and in future times reap some gain and benefit of their great travails and expenses taken and bestowed therein," the licence was granted. The companies of London were thus recognized by the Crown as parties interested in the plantation, as undertakers, and after the conveyances were made, the companies may be considered as entitled to the lands allotted and conveyed to them (subject to the conditions of plantation as to particular lands), and as respectively entitled to all the profits to arise from those allotments, which (subject to the performance of those conditions), could lawfully be made. The lands not allotted, together with the ferries and fishings, remained vested in the Irish Society; and the City of London, or the Irish Society on its behalf, were bound to the performance of those general and public works, which were among the conditions of plantation; and for the purposes of those general and public works were, or were supposed to be, entitled to levy money on the companies, for whose satisfaction they, at least, professed themselves to be bound to provide.

About five or six years after the conveyances were made, further complaints were made by the Crown, that the conditions of plantation had not been performed. The complaints were laid before the Court of Common [631] Council on the 2d of June 1624; they principally regarded the general works of the plantation, but in part, the conduct of the plantation of the lands conveyed to the companies. As to the former, answer was made by the Court of Common Council; as to the latter, the subject was made known to the several companies, and, on their part, the Common Council complained, that the undertakers had been impeded by monopolies and patents of privilege contrary to the King's grant. The answer, though approved in the Court of Common Council, was, for alteration in matter of form and words of the like sense, referred to the Irish Society and others who had joined with them in drawing the answer.

Not long afterwards, and in the beginning of the reign of Charles I., the King having referred certain matters relating to the plantation to Lords Grandison, Carew, and Chichester, the Chancellor of the Exchequer did, upon their advice, require the City of London to do many things then specified, most of which were general works, but some of them affected the conduct of the companies; the Court of Common Council made answer to these requisitions, not only with respect to the general works, but also with respect to the plantation undertaken by the companies; and as to the first demand, which was that a fair new church should be built, they say, that although the work be very chargeable, and that the stocks of all the chief companies of London are already exhausted by means of the plantation, yet, in obedience to His Majesty's pleasure (the work also in itself being pious), they will forthwith give order to make preparation for erecting a fair new church, and will, so soon as conveniently they may, finish and beautify and adorn the same with seats fit and convenient.

[632] In the course of a few years afterwards, informations were filed in the Star Chamber against the City of London, the Irish Society, and certain individuals. The Defendants were charged with the deceitful and undue procuring of the charter of James, and with wilful breach of the articles agreed upon between the Lords of the Council and the committees appointed by the city on the 28th of January 1609-10, and with the wilful breach of trust which the King had reposed in them. It appears, that during the proceedings, it was insisted on by the city that they had nothing to do with the plantation, and that their name was used merely for the transaction of affairs, and for the levying of monies upon the companies for the plantation. This point was overruled, and the Court having adjudged that many offences, both of omission and commission, had been committed, inflicted upon the City of London and upon the Irish Society a fine of £70,000, and decreed, that the patent and their estates and interests should be surrendered and be brought into Court to be cancelled; and, after

reciting that the greatest part of the lands were, by the society, passed over to divers companies of the city, and by them demised to their farmers, who were not Defendants to the suit, and, therefore, not liable to the censure of the Court (although in the opinion of the Court they might justly have been censured if parties), it was directed, that if the companies and their farmers should not, in pursuance of the intention of the sentence, surrender their estates, the Attorney-General should exhibit an information and bring them also to the judgment of the Court.

This decree, if lawful, entitled the Crown to recover, not only a fine of £70,000, but the possession of all the lands and hereditaments which remained vested in the Irish Society, and it was accompanied by an intima-[633]-tion, that fines, and also all the lands conveyed to the companies or demised to their farmers, might be recovered if the Attorney-General thought fit to sue for them. Steps were early taken for the execution of the decree, and proceedings were commenced against the twelve companies. In these circumstances a negotiation for money took place between the Crown and the city. The city pressed by the impending fine and forfeiture and by other charges made against them, offered a composition of £100,000. The Crown endeavoured to obtain more, and the city, acting or professing to act only for the companies, and in concurrence with them, offered to give up all the fishings, and all the lands held by the society, or by the companies, and all arrears of rent; and at length, after a protracted negotiation, the fine was ultimately compromised, and the city agreed to surrender the lands, fishings, and customs in Ireland, and to pay a sum of £12,000. Proceedings to repeal the letters patent were thereupon made available by consent or default; but afterwards, in other political circumstances, the city endeavoured to obtain relief from this oppression, and to make available, before the House of Commons, those arguments which had failed before the Court of Star Chamber. The House of Commons then advancing to the ascendancy which it soon afterwards obtained, took upon itself to pass resolutions, declaring its opinion on the judgment of the Star Chamber, and declaring its opinion of the conduct of the city and of the companies respecting the plantation. The proceeding appears to have ended in the King's expressing himself to be willing to restore the plantation to its former footing, and it was proposed to confirm the rights of the companies by Act of Parliament, but civil war supervened, and it was under the power of Cromwell that the charter and the estates derived under it were first pretended to be renewed.

[634] I have thought it right to refer to these proceedings, which were dwelt upon in the argument, as affording evidence of facts or conclusions material to be now considered, and I have read all the documents referred to; but I am of opinion, that allegations and admissions used for the purpose of defence against attempted extortion under the form of legal proceedings, or for the purpose of obtaining justice irregularly, when regularly it could not be had, ought not to be used as evidence of the rights of the parties, if the same allegations are not otherwise proved; and, undoubtedly, some of the allegations now referred to are otherwise proved. Regard must be had to such proof, but independently of such other proof and of fair inference from the facts otherwise proved, I conceive that the allegations and admissions which were made in the Star Chamber, or in the treaty which arose out of the sentence there, or in the proceedings which took place before the House of Commons, ought not in any degree to influence my judgment.

Soon after the restoration, on the 10th of April, 1662, King Charles II. granted the charter, under which the Irish Society now exists, and from which the subsisting titles to the lands and estates thereby granted are derived. This charter recites the charter of James, the grants made by the society which was constituted under that charter, and that the society retained in its own hands "such part of the tenements and hereditaments as were not properly divisible for defraying the charge of the general operation of the plantation;" it further recites, the repeal of the charter, the promise made by King Charles I. to restore the same, and that it appeared that the society and other companies of the city had expended very great sums of money in building and planting of the county of Londonderry and Coleraine, [635] and then proceeds to express that the present grant was made, to the intent that the society or some other society by the present letters patent to be created, and the companies of the City of London and their respective assigns and under-tenants might, according to

their former several rights and interests therein, be restored to all the estates vested in them by force of the former letters patent; and to the intent that there might be a new society of the new plantation in Ulster, and a new incorporation of the City of Derry, and for the further and better settling and planting of the said county, towns, and places with trade and inhabitants.

This grant, therefore, is expressly made for the purpose of restoring the rights derived under the former charter; for restoring the rights and interests of the companies of London; and for further and better settling and planting the county, &c., with trade and inhabitants. The lapse of forty-nine years, and the change of circumstances, made it necessary that there should be some differences between the clauses in the charters of 1613 and 1662, and other differences may have been suggested by former experience, or by the present views and situations of the parties. They are sufficient to shew that the charter of Charles was framed with considerable care and attention, and was not a mere transcript of the charter of James.

In the charter of James, no mention was made of the companies; but the city and the society acting under the charter of James, had made conveyances to the companies, and had levied money for the general purposes of the plantation on the companies, and the intention of the charter of Charles was to restore the Irish Society, and also the companies of the City of London, to their former rights; and after making due allowance [636] for all the differences which occur, the charter of Charles appears to me to be substantially, as it was avowedly, a restoration of the charter of James. The two charters are alike in their general purview: in their general object: in the means adopted to carry that object into effect, and in the powers conferred for that purpose.

Under the new charter, new conveyances were made to the companies, and the Irish Society has ever since continued in the exclusive possession of the town lands, ferries, and fisheries, and has managed or let the same, and received and applied the rents thereof by its own authority. It has applied portions of the rents for purposes alleged to be public or charitable, and has, from time to time, stated a surplus, to be in its hands, and has paid certain sums, in respect of that surplus, to the twelve companies in equal shares. On one occasion, when money was wanting, the society applied, not to the City of London, as in the early period of its history, for further levies, but to the companies for voluntary contributions; and on another occasion, in which it became necessary to make a statement respecting the timber, it represented itself to be intrusted for the companies, and seized of a considerable salmon fishery, and other estates in the county of Londonderry, *in trust for the companies of the city*, over and besides the several proportions of lands which had been granted. The society have on other occasions stated themselves to be "trustees" for the companies; and there is an instance in which one is rather surprised to find them refusing to render any account to the city, and stating themselves to be accountable only to the twelve chief companies of London, to which all the surplus funds under their management not disposed of in the performance of the duties which the charter imposed upon them, were regularly transferred and paid.

[637] It does not, however, appear to me to be necessary to pursue further the history of the conduct and transactions of the society.

The society have vested in them, under a Royal charter, a very considerable property, in which they have not, collectively or individually as members of the society, any beneficial interest, and in respect of which they are invested with great powers, and have important duties to perform; in a sense, therefore, they are trustees. The property is part of that which was granted for the purposes of the plantation, and the powers possessed by the society, as well as the duties with which it is charged, have all of them reference to the plantation.

Now the objects of the plantation, and the intents and purposes thereof were of a nature partly public and political, and partly private, regarding only the interests of particular undertakers, whether corporate bodies or individuals. When the Crown treated only with individuals, and made grants to them, it imposed only conditions which were annexed to the enjoyment of the property bestowed, and the right of the Crown to enforce the conditions constituted the security which it held for the public and political objects which were contemplated.

But when it treated with the City of London, the case seems to have been varied, not by any change in the conditions imposed upon particular undertakers, but by the grant of powers and privileges which could not be bestowed on particular undertakers, and were intended to effect more important objects, to afford special means of enforcing the conditions which affected all, and special encouragements to undertakers, both in their [638] particular characters as such, and as members of the City of London, or persons enjoying the protection of the city, or partaking of the benefit of its general prosperity. The objects were such as affected the general welfare of Ireland, and the whole realm—those were the objects of the Crown: such as affected the general welfare of the City of London, those may be considered to have been the objects of the city: and such as affected the particular welfare and interests of the companies, or of individual undertakers.

The society emanated from the city, and even after its incorporation by the Crown, appears to have been little if anything more than the representative or instrument of the city for the purposes of the plantation. The city had contracted with the Crown to perform the duty, and it was at the suggestion of the city, and as the means, or as their instrument of performing the same duty, that the society was invested with the property, and with very extensive powers. The mistaken views which the society may have subsequently taken of its own situation and duties (and I think that such mistaken views have several times been taken), do not vary the conclusion to be deduced from the charter, and the circumstances contemporary with the grant of the first charter.

The duty to be performed regarded the Crown, and regarded the city, and through the city, the companies. At and long after the date of the first charter, the city had or at least was practically considered to have, and really exercised, great and extensive powers, not only over the society but over the companies; but the city in its corporate character had no beneficial interest; the money which it had advanced was early repaid, and the power which remained, or which was considered to remain, was, like that of the society, an entrusted power [639] for the benefit of the plantation and those interested in it.

Even after a large part of the territory comprised in the grant had been distributed and conveyed to the companies, much remained to be done for the general purposes of the plantation; and that which remained to be done, could not be accomplished without expence. At the time when the power of the city to raise money by taxation was not disputed, it may not have been thought necessary to retain any part of the property as a fund to support the expence, and it was reported by the commissioners on the 8th of November 1613, and probably generally understood, that the profits of the undivided hereditaments might be shared among the companies, but in 1662, when the charter of Charles was granted, and the power of the city to levy money on the companies was either no longer claimed, or was subject to very different considerations, it was recited in the charter, that the undivided property was retained to defray the expence of the general operation of the plantation. The expression was borrowed from a petition presented to the House of Commons by the City of London in January 1641, but it has its place in the charter of 1662, and must have weight accordingly.

It is said, and indeed admitted, that a dividend was made in the year 1623, and if I were at liberty to conjecture, I might perhaps suppose that the demands soon afterwards made on the city, and the difficulty of raising money, led to a conclusion that it was better to reserve the common property for the general purposes of the plantation, than to make division of its whole income, and resort to taxation and levies to defray the expences which might from time to time be required.

[640] It is clear that the general operation of the plantation was not completed at the time when the distribution of lands was made to the companies. It was indeed strongly urged in argument, that the general operation, although not then complete, was not long afterwards, or at all events was very long since, completed, and that thereupon, if not before, and in consequence thereof, the society became mere trustees for the companies: but I do not think that this Court has jurisdiction to determine the question whether the general operation of the plantation has been completed or

not, and if it had, it does not appear to me that there is any satisfactory evidence on the subject, or anything to shew that operations materially affecting many important objects of the plantation and requiring expence may not still have to be performed; and if such should be the case, it does not appear to me that this Court has, on the application of the Plaintiffs, jurisdiction to inquire or give directions about such operations.

And on the whole, the question is reduced to that which was made on the motion for the payment of money into Court, and for a receiver, whether, upon the settlement made in the north of Ireland, by virtue of the charter of King James the First, under which the towns of Londonderry and Coleraine were founded, and a large tract of country granted by the Crown to the Irish Society, the terms of the grant simply constituted the Irish Society ordinary trustees for the benefit of the companies of London, or whether the grant was coupled with certain public purposes and public trusts, independently of the private benefit of the companies.

After having considered the charter of King Charles II., and the charter of King James I., and the several circumstances in evidence in this cause, which preceded [641] and accompanied the grant of the charter of King James, and having read all the documents produced in this cause, to some only of which, though at the expence of so much time, I have but shortly adverted, and having also considered the conduct of the parties under the charter for so long a series of years, I am of opinion that the powers granted to the society, and the trusts reposed in them, were, in part, of a general and public nature, independent of the private benefit of the companies of London, and were intended by the Crown to benefit Ireland and the City of London, by connecting the City of Londonderry and the town of Coleraine, and a considerable Irish district with the City of London, and to promote the general purposes of the plantation; not only by securing the performance of the conditions imposed on ordinary undertakers, but also by the exercise of powers, and the performance of trusts, not within the scope of those conditions.

The charter of Charles II. expressly recites, that the property not actually divided was retained for the general operation of the plantation; and considering that the powers given to the Irish Society for the general operation of the plantation were of a general and public or political nature—that the property remaining vested in the society is applicable towards such general operation, and that the companies of London, though interested in any surplus which may remain after the general purposes are answered, are not entitled to control the exercise of the powers which are given for general and public purposes—I do not think that this Court has jurisdiction, upon the application of the companies, to determine upon the propriety of the expenditure which has been made. It must not be inferred that I approve of some of the items of expence which were commented upon in the argument. I express no opinion upon the subject, [642] thinking that the society have a discretion, which, though controllable elsewhere, and in another manner, is not to be controlled in this Court upon such a bill as this.

And upon the whole I think that the bill must be dismissed with costs as against the Irish Society, the City of London, and the Attorney-General: without costs as against the other companies, unless it shall appear that any of the companies have opposed the claim of the Plaintiffs.

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